

Neutral Citation Number: [2025] EAT 146

Case No: EA-2022-000859-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 September 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

Between:

DR KATE BARRY

Appellant

- and -

(1) UPPER THAMES MEDICAL GROUP

(2) DR JULIAN TALLON

(3) DR TIMOTHY WAKEFORD

(4) DR JOSCELYN MYLES

(5) DR AMY HOWARTH

(6) DR CAROLINE MAXWELL

Respondents

Camille Ibbotson (instructed by Capital Law Limited) for the Appellant
Edmund McFarlane (solicitor appearing on behalf of Peninsula Business Services Ltd) for the
Respondents

Hearing date: 25 September 2025

JUDGMENT

SUMMARY

CONTRACT OF EMPLOYMENT

The Employment Tribunal erred in law in holding that the claimant had affirmed her contract of employment before resigning in response to the respondent's repudiatory breach.

HIS HONOUR JUDGE JAMES TAYLER:

1. The issue in this appeal is the extent to which it is legitimate to hold that an employee has affirmed a contract of employment where the employer is in repudiatory breach, by delaying for a period, with some limited contractual compliance, while seeking to persuade the employer to remedy the breach. In the context of employment disputes one might expect courts and tribunals to be slow to hold that employees should have acted precipitately to bring a contract to an end and brought a claim where there is some realistic prospect of the breach being remedied. Even in the more robustly commercial world of shipping, it was held in **Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia** [1996] 2 LR 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 recognise his obligations.

2. This is an appeal against a judgment of Employment Judge Oldroyd, sitting alone at Exeter. A video hearing took place on 16 and 17 May 2022. The judgment and reasons were sent to the parties on 16 June 2022. I take the relevant findings of fact for the purposes of this appeal from the decision of the Employment Tribunal.

3. The parties will be referred to as the "claimant" and "respondents", as they were before the Employment Tribunal.

4. The claimant is a general practitioner whose continuous service with the NHS began in April 2006. The claimant started employment with the respondents, a partnership of NHS general practitioners, on 16 April 2018.

5. In February 2019, the claimant had an episode of laryngitis, following which she began to suffer other symptoms, including profound fatigue. The claimant was diagnosed with an autoimmune disorder, myasthenia gravis. The claimant was absent for a number of periods during which disputes arose. The Employment Tribunal found that the respondents' treatment of the claimant during this time did not involve any breach of contract.

6. The claimant was invited to a second capability meeting, arising out of her periods of absence,

on 10 August 2020. In the immediate aftermath of that meeting, the claimant suffered a relapse of her condition and started a period of sickness absence on 24 August 2020, part of which was spent in hospital. She was unfit for any work until 26 December 2020.

7. The dispute about contractual sick pay was discussed at paras.56 to 60 of the judgment:

56. On 28 August 2020, the Respondents ceased paying such sick pay as they had been paying and announced that no further sick pay would be paid. To this end, the Claimant had received sick pay between 16 March 2019 and 28 August 2020, so over a period of around 17 months. The Respondents say that they paid the Claimant sick pay for a period that was longer than 12 months because she had, for much of that period, only been working 40% of her time.

57. The failure to pay sick pay for the period 28 August 2020 to 26 December 2020 is alleged by the Claimant to be a freestanding repudiatory breach of her contract but it is also the fifth complaint that the Claimant makes about the Respondents' conduct and which, it is said, cumulatively amounts to a breach of the Respondents' duty to maintain trust and confidence.

58. The sick pay issue soon led to a dispute between the Claimant and Respondent over her entitlement to sick pay. The dispute effectively began on 11 September 2020 when the Claimant's union representative e-mailed the Respondents to raise the issue of sick pay. The issue was raised more forcefully by way of letter dated 26 November 2020.

59. It is clear that the parties engaged in further correspondence relating to the issue of sick pay and these culminated in an e-mail being sent by Dr Tallon to the Claimant on 26 March 2020 that confirmed a final decision had been made to the effect that no sick pay would be paid. However, as that letter, I am told, was sent on without prejudice basis, I have not seen it.

60. Indeed, I have not seen other correspondence that I am told was generated relating to the sick pay dispute in that period and so it is not clear to me what each parties' position was at that time. Two things are clear to me, though:

60.1 The Respondents accepted that the Claimant's entitlement to sick pay was complicated and not clear; see Dr Tallon's letter of 9 November 2020.

60.2 At one stage and on 16 February 2021, the Respondents advised the Claimant that its payroll advisers had calculated her entitlement to sick pay to be £9,136.03 but this sum was never paid. The Respondents' case is that this gave the Claimant a false expectation of her entitlement to sick pay.

8. The claimant sought to return to work on 26 December 2020, but at the respondents' suggestion, the claimant took annual leave and was paid holiday pay.

9. The Employment Tribunal made limited findings of fact about the cessation of sick pay, and relevant correspondence in September 2020. On 7 September 2020, the respondents' payroll provider

informed the respondents that the claimant's entitlement to statutory sick pay had ended. By letter dated 11 September 2020 the claimant was informed of the cessation of sick pay said to be from 28 August 2020.

10. The claimant was helped by her trade union representative, who attempted to negotiate payment of full sick pay. As late as 16 February 2021, the practice manager informed the claimant's trade union adviser that the claimant was owed slightly over £9,000 in sick pay. It was only on 26 March 2021 that the senior partner of the respondents' practice wrote informing the claimant that she would not be paid sick pay. The claimant resigned on 6 April 2021.

11. The Employment Tribunal directed itself as to the relevant law, including the law concerning affirmation. There is no specific challenge to that self-direction.

12. The Employment Tribunal reached its conclusions from para. 92 onwards. Although not forming part of this appeal, one of the complaints that was dismissed was for unauthorised deduction from wages for the period from 15 February 2021 to 6 April 2021. The Employment Tribunal found that the claimant had been fit for work at that time but was not prepared to return to work until the issue about sick pay had been resolved:

99. The Claimant received no pay for the period 15 February 2021 - 6 April 2021. The Claimant argues that this was an unlawful deduction from wages and/or a breach of contract on the basis that she was ready and willing to work and yet the Respondents did not offer her sessions.

100. I have found that the Claimant was fit to work at this time. However, I have also found that the Respondents had made reasonable offers to the Claimant which she did not take up (owing to the ongoing sick pay dispute). I reject the suggestion therefore that the Claimant was ready and willing to work. I have found instead that the Claimant was not prepared to do so until the issue over sick pay had been resolved.

101. This aspect of the claim therefore fails. [emphasis added]

13. In the complaint of constructive unfair dismissal the claimant asserted numerous breaches of the implied term of mutual trust and confidence that failed. However, the claimant established a breach of an express term in respect of contractual sick pay. Despite finding that there was a breach of that term, the complaint of constructive unfair dismissal failed because the Employment Tribunal

held that the claimant had affirmed the contract of employment. But for that finding, the Employment Tribunal said it would have found that the dismissal of the claimant was unfair.

14. The Employment Tribunal considered the issue of affirmation at paras.106 to 110 of the judgment:

106. The third question is whether the Claimant had affirmed the contract before her resignation and so treated it as ongoing when viewed objectively such that she lost the 'right' to resign. The Respondents maintain that the Claimant affirmed the contract by delaying her resignation. To this end, and as I have noted, the Claimant was first advised that she would not be receiving sick pay on 11 September 20[2]1 and certainly by 26 November 20[2]1 she was in dispute with the Respondents (through the offices of her union representative). And yet, the Claimant did not resign until 8 April 2021.

107. The Claimant **points to these factors to suggest that there was not affirmation:**

107.1. The Claimant received **no pay (other than holiday pay) after 24 August 2020.**

107.2. The Claimant **did not perform any work after she was told that her sick pay was withheld.**

107.3. **The Claimant was in dispute over her sick pay and engaged in discussion with her representatives with the Respondents (much of it being without prejudice) such that the Claimant should be taken as reserving her position with regard to sick pay.** (In this regard, I would highlight again that I was not shown the without prejudice communications between the parties leading up to the Claimant's resignation).

108. In addition, I take note of the fact that:

108.1. **The Claimant was ill until 26 December 2020 and on holiday for a period of time thereafter.**

108.2. **As of 16 February 2021, the Respondents did (temporarily it would seem) indicate that the Claimant was owed at least some sick pay.**

109. **In spite of the points raised by the Claimant and the additional points that I have considered, in my judgment, I find that the Claimant affirmed her contract** in so far as her claim for unfair constructive dismissal arising out of the failure to pay sick pay is concerned. In reaching this conclusion, I have particular regard to:

109.1. **The long delay in resigning** between September 2020 when the Claimant first knew that she was not being paid more sick pay and April

2021. During this time, the Claimant was assisted by her union representative.

109.2. The Claimant's own evidence at paragraph 47 of her Statement in which she states that she was '*ready and wanted to return to work*' as from 26 December 2020. I infer that she made this position known to the Respondents as this would be consistent with her claim that the Respondents were '*blocking*' her return to work.

Taken together, this conduct amounts to behaviour that suggests clearly to me that the Claimant was not treating her contract with the Respondents as being at an end owing to the non-payment of sick pay.

110. In my judgment therefore, the claim for constructive dismissal arising out of breach of an express term must fail.

15. The claimant appeals on three grounds. The first asserts that the decision on affirmation is perverse in circumstances in which the Employment Tribunal had found in respect of the breach of contract complaint seeking unpaid wages that the claimant was not willing to return to work unless the dispute about sick pay was resolved, whereas when finding affirmation it found that the claimant was willing to return to work. The second ground challenges the relevance of the fact that the claimant was represented by a trade union representative to affirmation. The third ground contends that once the first two points are disposed of, the decision that the contract was affirmed was based on delay alone.

16. The concept of affirmation in the context of employment contracts has been considered by the Employment Appeal Tribunal in numerous appeals. It is worth stepping back for a moment and remembering that affirmation, like many contractual concepts, is about communication. That is also the case for concepts such as offer, acceptance and acceptance of repudiatory breach. Communication is not always by word, it can also be by deed.

17. Communication can be inferred from what a party has done, but the issue is always one of communication. It is of no significance that a party wants to continue with a contract if that decision is not communicated by word or deed. It is not what is in mind that matters but what is communicated by words, or actions from which affirmation can be inferred.

18. The starting point is the decision in **W. E. Cox Toner (International) Ltd. v Crook** [1981]

ICR 823. Browne-Wilkinson J stated:

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. Attridge* [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.

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.

19. The position was considered again by the EAT, Langstaff (P) in **Chindove v William Morrisons Supermarket Plc** UKEAT/0201/13/BA:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of *Western Excavating Ltd v Sharp* [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context [sic]. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it 'altogether abandons and refuses to perform the contract', using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:

Moreover, he [the employee] 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. He will be regarded as having elected to affirm the contract.

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon

the context. Part of that context is the employee's position. As Jacob LJ observed in the case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant was here off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this Tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. We simply cannot say whether this Tribunal had in mind these necessary factors. It did not set out the law. It did not set out the facts which caused it to apply the law. It did not honour rule 30(6). It did not deal with the detailed statement which the Claimant produced in respect of his constructive dismissal though this may be unduly critical of the Tribunal's judgment. The reference to time looks as though the Tribunal simply thought that the passage of time was sufficient in itself. This decision is, effectively, unreasoned. Mr Robinson said what he could, as best he could, but acknowledged the great difficulties that lay in his way. We have no doubt that the appeal on this ground, too, has to be upheld.

20. HHJ Auerbach considered the issue in **Leaney v Loughborough University** [2023] EAT 155:

20. The innocent party may indicate by some express communication that they have decided to affirm, but affirmation may also be implied (that is, inferred) from conduct. Mere delay in communicating a decision to accept the breach as bringing the contract to an end will not, in the absence of something amounting to express or implied affirmation, amount in itself to affirmation. But the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation, because of what occurred during that period.

21. In particular, acts of the innocent party which are consistent only with the contract continuing are liable to be treated as evidence of implied affirmation. Where the injured party is the employee, the proactive carrying out of duties falling on him and/or the acceptance of significant performance by the employer by way of payment of wages, will place him at potential risk of being treated as

having affirmed. However, if the injured party communicates that he is considering and, in some sense, reserving, his position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then if, in the meantime, he continues to give some performance or to draw pay, he may not necessarily be taken to have thereby affirmed the breach.

21. Judge Auerbach also considered the relevance of sickness absence to affirmation:

50. We turn then to the fact, as found, that the claimant was signed off sick for about the last three weeks of the period leading up to his resignation, a fact recorded by the tribunal but, again, not apparently considered in the context of affirmation. We do accept Mr Heard's submission that a tribunal is not bound to assume in every case that there *cannot* be any affirmation during a period of sickness absence; and we recognise that in this case consideration of this feature would not address the position in relation to the period prior to the start of the sickness absence. Nevertheless, it was something that, in our judgment, needed to be considered in the overall context of the issue of whether the claimant had, at some point in the relevant time window, affirmed.

22. I recently summarised the approach that the EAT adopts to appeals in **AB v Grafters Group Ltd (t/a CSI Catering Services International)** [2025] EAT 126:

15. An appeal to the Employment Appeal Tribunal lies only on a question of law: section 21 Employment Tribunals Act 1996.

16. In *British Telecommunications Plc v Sheridan* [1990] IRLR 27, the Master of the Rolls held:

34. ... Any court with the experience of the members of the Employment Appeal Tribunal, and in particular that of the industrial members, will in the nature of things from time to time find themselves disagreeing with or having grave doubts about the decisions of Industrial Tribunals. When that happens, they should proceed with great care. To start with, they do not have the benefit of seeing and hearing the witnesses, but, quite apart from that, Parliament has given the Employment Appeal Tribunal only a limited role. Its jurisdiction is limited to a consideration of questions of law.

35. On all questions of fact, the Industrial Tribunal is the final and only judge, and to that extent it is like an industrial jury. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the Tribunal has misdirected itself as to the applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. It can also interfere if the decision is perverse, in the sense explained by Lord Justice May in *Neale v Hereford & Worcester County Council* [1986] ICR 471 at 483.

17. The types of error of law that relate to factual findings were summarised by Lady Haldane in *Granger v Scottish Fire & Rescue Service* [2025] EAT 90:

29. As to the role of the EAT in appeals such as the present one, 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.’ [emphasis added]

18. The limited scope of challenges to decisions of an Employment Tribunal was emphasised by the Court of Appeal in *DPP Law Ltd v Greenberg* [2021] IRLR 1016:

57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:

(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:

The reading of an employment tribunal decision must not, however, be so fussy that it produces pernicky critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.

This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The “PACE”)* [2010] 1 Lloyd’s Reports 183 at paragraph [16], including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards “with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration”. This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.

(2) **A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact.** To impose such a requirement would put an intolerable burden on any fact finder. **Nor is it required to 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] IRLR 250). **Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged.** In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said

in *UCATT v Brain* [1981] I.C.R 542 at 551:

Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given.

(3) It follows from (2) that it is **not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind.** As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:

We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake Industrial Tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision, so it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd v Day* [1978] ICR 437 and in the recent decision in *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683.

58. **Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles,** and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.' [emphasis added]

19. I do not underestimate the importance of appreciating that a 'tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact',

that the Employment Tribunal is not 'required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant' and that I should not assume that 'a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision'. **While the Employment Tribunal is not required to refer to all evidence relevant to its findings of fact or conclusions this does not mean that there is no scope for challenging the reasoning of an Employment Tribunal if the reasons demonstrate that it has failed 'to take into account and/or resolve conflicts of fact or opinion on material matters' or has given 'weight to immaterial matters' as referred to in *Granger*. The analysis in *Granger* focuses on failures to consider material matters or taking account of immaterial matters. The EAT will adopt a generous approach to subsidiary factual matters but may analyse with greater care the factors that are material to the decisions on core issues.** [emphasis added]

23. Not every challenge to a factual determination of the Employment Tribunal is a pure assertion of perversity. In such appeals it may be asserted that the Employment Tribunal took account of irrelevant factors or failed to take relevant factors into account. That can provide a valid ground of appeal where the factors that have, or have not, been taken into account are of real importance to the proper determination of the dispute.

24. In considering the issue of affirmation, the Employment Tribunal at paras.107 and 108 paid regard to significant factors that pointed against the claimant having affirmed her contract. Those were the lack of pay other than holiday pay from 24 August 2020, no work being performed after the claimant was told that her right to sick pay was being challenged, and the resulting dispute in which the claimant asserted she was reserving her position. The Employment Tribunal also referred to the claimant's ill health until 26 December 2020 and that as late as 16 February 2021 the respondents appeared to accept that the claimant was entitled to at least some sick pay. All of those were factors that pointed significantly against a finding of affirmation.

25. The factors that the Employment Tribunal considered established affirmation were much more limited. The Employment Tribunal referred to the long delay in resigning between September 2020, when the claimant first knew that she was not going to be paid more sick pay, and April 2021 when she resigned. That analysis failed to take into account its earlier specific finding that during the period until 26 March 2021 there were ongoing discussions between the parties in which the claimant was

seeking to persuade the respondents to pay contractual sick pay and that, as late as 16 February 2021, the claimant had been informed by the respondents' practice manager that payroll had advised that she was owed over £9,000 in sick pay. That was a highly relevant factor that the Employment Tribunal conspicuously failed to take into account in finding affirmation.

26. The Employment Tribunal also held as part of its reasoning at para.109.1 that the claimant was assisted by her trade union representative. So far as that finding was material, that was a factor that went against affirmation rather than in its favour, because the claimant's trade union representative was seeking to assert the claimant's right to contractual sick pay.

27. The finding (at para. 109.2) that the claimant was ready and wanted to return to work as from 26 December 2020 went against its prior finding that she was not prepared to return to work (at para.100) unless she was paid the sick pay to which she was entitled. That important factor is not taken into account at para.109.2. While at para.109 the Employment Tribunal referred to factors to which particular regard was given, there is nothing in the judgment that identifies anything else that was taken into account. The only possible factor that the respondents refer to is the claimant accepting holiday pay at the suggestion of the respondents, but that was in the context of a situation in which she had been without any pay, and the payment was made during the course of negotiations seeking to resolve the dispute about her entitlement to contractual sick pay.

28. In all those circumstances, I find that all the grounds of appeal are made out. The Employment Tribunal erred in law in finding that the claimant had affirmed her contract of employment. I consider that this is one of those cases in which there was only one possible answer and, in accordance with **Jafri v Lincoln College** [2014] IRLR 544 I conclude the claimant had not affirmed her contract of employment prior to resigning, which necessarily had the consequence that she was unfairly dismissed on the alternative finding of the Employment Tribunal. That alternative reasoning was not challenged in the response to the appeal. The consequence is that a decision that the claimant was unfairly dismissed will be substituted for that of the Employment Tribunal.

29. The Employment Tribunal went significantly awry in its consideration of affirmation. That

said, that error has to be seen in the context of a significant number of other complaints and challenges brought by the claimant that were resolved against her and have not been the subject of appeal. Detailed findings of fact were made by the Employment Tribunal about the ongoing dispute between the parties in the period leading up to the claimant's resignation. I do not consider that the decision, in those circumstances, can be said to be totally flawed. I appreciate that there has been a significant passage of time. However, the Employment Tribunal made detailed and clear findings of fact and will have its note of evidence. Reliance can be placed on the professionalism of the Employment Tribunal to consider the issues that will arise in respect of remedy on remission. Accordingly, I substitute a decision that the claimant was unfairly dismissed and remit the matter to the same Employment Tribunal to determine remedy unless, in the view of the Regional Employment Judge, a hearing before the same Employment Tribunal is not practicable.