Neutral Citation Number: [2025] EAT 189

Case No: EA- 2024-SCO-000121-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 16 December 2025

Before :

THE HONOURABLE LADY POOLE

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Between :

MS JEN NELSON **Appellant**

- and –

RENFREWSHIRE COUNCIL **Respondent**

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Professor Douglas Brodie, as lay representative for the **Appellant**
Mr Neil Young, solicitor, for the **Respondent**

Hearing date: 11 December 2025

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JUDGMENT

SUMMARY

Contract of employment; unfair dismissal

In a claim for unfair dismissal, the employment tribunal found that the employee had not been constructively dismissed. After a successful appeal, the case was remitted to the tribunal to consider whether the employer's conduct amounted, individually or cumulatively, to a repudiatory breach of the implied term of trust and confidence. The tribunal again found that the employee had not been constructively dismissed. A further appeal was brought on the basis that the tribunal had erred in law in so finding.

Held: the appeal was refused. The tribunal had correctly applied an objective test when deciding whether the implied term of mutual trust and confidence had been breached. Its references to bad faith, deliberate manipulation and overt hostility were not, read in context, irrelevant considerations. Nor had the tribunal misdirected itself, when its decision was read as a whole. The tribunal had not failed to take into account relevant considerations. The question of whether an employer's conduct justifies an employee terminating a contract of employment without notice is primarily one of fact for the tribunal, which has the benefit of hearing directly from witnesses, and the tribunal's decision disclosed no error of law.

THE HONOURABLE LADY POOLE:

Introduction

1. The appellant brought a claim for unfair dismissal in the Employment Tribunal ("**ET**"). She had left her job as a support for learning teacher in a secondary school, and argued that she had been constructively dismissed. The ET found, in a decision of 20 May 2023, that there had been an occasion when the headteacher had behaved inappropriately towards the appellant, and there had been a flawed grievance procedure relating to that incident. However, the ET did not find that what happened met the threshold for a repudiatory breach of contract on the basis of a breach of the implied term of trust and confidence. As a result, the ET found that the appellant had not been constructively dismissed, and her claim for unfair dismissal failed ("**decision 1**").

2. The decision of the ET was appealed to the Employment Appeal Tribunal ("**EAT**"). In a decision dated 12 August 2024, the EAT partially upheld the appeal (**Nelson v Renfrewshire Council [2024] EAT 132**). Although the EAT rejected grounds based on perversity and inadequacy of reasons, it was found that the ET had failed properly to apply established legal principles to the facts. The case was remitted to the ET with directions.

3. The ET proceeded to re-determine the case. It did so, as directed, on the basis of the findings of fact made in decision 1, and after hearing submissions from parties. In a decision sent to parties on 22 November 2024 ("**decision 2**"), the ET again found that the implied term of trust and confidence was not breached. Consequently, there was no fundamental breach of contract, and the claimant's resignation did not constitute a dismissal. The claim of unfair dismissal was therefore dismissed.

4. The appellant appeals decision 2 to the EAT. Leave was granted on grounds of appeal of whether the ET took into account irrelevant considerations, misdirected itself in law, and failed to take into account relevant considerations. Parties submitted skeleton arguments. The EAT is grateful for the clear and helpful oral submissions on behalf of both parties. All of the written and oral submissions have been taken into account in reaching this decision.

Governing law

5. Provisions about unfair dismissal are contained in chapter X of the Employment Rights Act 1996 ("**ERA**"). Constructive dismissal is defined in section 95(1)(c) **ERA** as a situation in which:

> "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".

6. Given this wording, the nature of the employer's conduct will be a primary focus when considering whether an employee has been constructively dismissed. Not all negative conduct by an employer will result in an employee being constructively dismissed. The employer's conduct has to be sufficiently serious that it results in the employee being "entitled to terminate" the contract of employment. The employer's conduct must amount to a repudiatory breach. A repudiatory breach is a fundamental breach. It is something going to the root of the contract which shows the employer no longer intends to be bound by one or more of the essential terms of the contract. There is no rule of law specifying what circumstances are sufficient to count as a repudiatory breach; it is a question of fact and degree for the ET (**Woods v WM Car Services (Peterborough) Ltd [1982] ICR 693** at 698E-G, 703C-D and 705E, **The Leeds Dental Team Ltd v Rose [2014] ICR 94 para 40**).

7. In some constructive dismissal cases, the ET will consider first whether a term of a particular contract has been breached, and second whether the breach is fundamental. However, in cases where the employee relies on a breach of the implied term of trust and confidence, any established breach tends to be treated as fundamental (**Morrow v Safeway Stores 2002 IRLR 9**). The reason for the difference in approach stems from the definition of the implied term of trust and conduct. The implied term is that the employer will 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 (**Malik v BCCI [1997] ICR 606** p609, 621). Because the implied term is only breached if the conduct complained of is "likely to destroy or seriously damage" the relationship, if a breach is established it tends to be fundamental. Conduct which has an adverse effect on trust and mutual confidence will not breach the implied term unless it is likely to destroy or seriously damage the relationship of trust and confidence. Despite the difference in approach which has developed for constructive dismissal cases based on the implied term of mutual trust and confidence, in cases of unfair dismissal the ET is engaged in the same underlying exercise of applying section 95(1)(c). It is trying to assess if the employer's conduct was sufficiently serious for the employee to be entitled to terminate the contract of employment without notice.

8. In deciding whether there has been a breach of the implied term of mutual trust and confidence, it is well established that an objective test must be used. All of the circumstances found proved are examined, to see whether the employer's conduct is likely to destroy or seriously damage trust and confidence. The issue is not decided on the basis of the subjective intentions of an employer, or the actual effect on a particular employee. It is a question of whether a reasonable person in the position of the employee would regard the behaviour of the employer as likely to destroy or seriously damage the relationship of mutual trust and confidence (**Malik** p610-611, **Tullett Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131** at para 20, discussed further below).

9. Whether there has been a repudiatory breach is a highly context specific question involving questions of fact. The opinion of the ET carries weight, since it has heard and seen the witnesses. (**Woods** p698F-G, **Tullett** para 19, **Leeds Dental Team** para 40).

The decisions of the ET

10. The ET, in its first decision, found it established that there had been misconduct by the employer towards the employee in two main ways. The first concerned behaviour of the head teacher on 7 October 2021 towards the appellant, which was found to be insensitive, aggressive and intimidating. In the decision under appeal, the ET found that this behaviour was likely to undermine

the relationship of trust and confidence, without reasonable and proper cause. However, on objective assessment, it was likely to damage the relationship of trust and confidence only in a limited way. It was a one-off incident of brief duration, and there was no suggestion there had been similar behaviour to anyone either before or afterwards.

11. The second way in which the respondent behaved inadequately towards the appellant was in its conduct of its grievance procedure. The appellant invoked the grievance procedure after the incident with the headteacher, and the headteacher not accepting she had behaved in the ways described. Neither stage of the grievance procedure accepted that the head teacher was threatening, insensitive or aggressive. The ET found that the respondent's handling of the grievance procedure was problematic, both at stage 1 and stage 2. At stage 1, although there was an investigation and a decision by an education manager, there was a failure properly to gather and consider the relevant evidence, or explain why one version of events was preferred to another. Later comments by the investigator found proved by the ET revealed bias in favour of the head teacher, due to a predisposition to believe people higher up in the education hierarchy. At stage 2, although there was a further consideration of the grievance by the head of care and criminal justice, the ET found there was also a flawed and inadequate process. There was again a failure to obtain and hear all relevant evidence, and a failure adequately to explain why one version of events was preferred to another. There was no bias at stage 2, but the process at stage 2 was inadequate to cure the defects of stage 1. The ET found that the flawed grievance procedure was likely to cause damage to the relationship of trust and confidence. However, objectively assessed, the ET found the grievance procedure was inept, rather than showing outright hostility to the appellant or a manipulation of process to achieve a certain result.

12. Viewed cumulatively, the ET found that the behaviour of the respondent was unreasonable, but did not reach the level of "serious damage" or "destruction" of the relationship of trust and confidence. The individual impact of the incidents was also found not to reach that level. As a result, the ET found that there was no fundamental breach, and the claimant's resignation did not constitute

a dismissal.

Ground of appeal 1 – taking into account irrelevant considerations

13. The first ground of appeal focusses on wording used by the ET in three paragraphs of decision 2 (paras 15, 16 and 18). The appellant contends that the ET's use of the words "bad faith", "deliberate manipulation" or "overt hostility" reveal an error of law. It is argued that, since breach of the implied term of mutual trust and confidence is not contingent on the nature of the employer's motivation or intention, these were irrelevant considerations for the ET to take into account. The argument draws on **Malik**, and its finding that what is significant in assessing whether there is a breach is the impact of the employer's behaviour on the employee, rather than what the employer intended. The impact must be assessed objectively (**Malik** p622). The respondent, on the other hand, argues that the ET is entitled to take into account matters objectively assessed, including intentions of the employer inferred objectively. It also argues that, when the ET made these comments, it was responding to submissions made on behalf of the appellant criticising the grievance procedure.

14. The issue at the heart of this ground of appeal is whether the use of the words criticised by the appellant demonstrates that the ET failed to apply established legal principles. In assessing that matter, it is necessary to bear in mind that decisions of the ET must be read as a whole, without focussing on individual phrases or passages in isolation, and without being hypercritical. The decision of the ET must explain to the parties in broad terms why they lose or win, but the ET does not have to identify all the evidence relied on in reaching its conclusion, or express every step of its reasoning in any greater degree of detail than necessary to be Meek compliant (**Meek v Birmingham City Council [1987] IRLR 250**). Where the ET has correctly stated the legal principles to be applied, the EAT should 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 (**DPP Law v Greenberg [2021] EWCA Civ 672** para 57-58).

15. Examination of the ET's decisions show that it correctly stated the legal principles to be

applied. Decision 2, which is under appeal, incorporates part of decision 1, including the ET's factual findings and statement of applicable legal principles (paras 6 to 8). The ET correctly states "the test of whether there was a repudiatory breach of contract is objective, and it neither depends on the subjective intentions of the employer…nor on the subjective perception of the employee" (para 37 of decision 1). In decision 2, the ET again refers to the objective test it must apply (para 3 b.), and states expressly that it has sought to apply the **Malik** test in a way that focusses, objectively, on the calculated or likely effect rather than actual effect of the employer's conduct (para 9). In giving its reasoning for finding the implied term of mutual trust and confidence was not breached, the ET again refers to carrying out an objective assessment (paras 18-19).

16. The ET having correctly stated the applicable legal principles, for the EAT to intervene, it would have to be clear from the impugned wording that the ET had failed to apply those principles (**DPP Law** para 58). The EAT finds that the wording criticised does not demonstrate that the ET has taken into account irrelevant considerations where it refers to bad faith, deliberate manipulation or overt hostility.

17. While it is true, as a matter of law, that whether there has been a breach of the implied term is not decided on the basis of the employer's subjective intention, it does not follow that all evidence or factors which may have a bearing on intention are irrelevant considerations. What is required is an objective assessment of the evidence, and an analysis of the impact of conduct of the employer found proved on a reasonable employee. It is quite possible that an objective assessment of the evidence may give rise to reasonable inferences about the employer's intention (**Tullett** para 27, **Leeds Dental Team** paras 26 and 28, G-H, **Woods** 698 G-H).

18. There was a debate between the parties whether **Tullett** marked an unacceptable departure from a passage in the decision of Lord Steyn in **Malik**, where he adopted a quotation from an article by Professor Brodie:

"In assessing whether there had been a breach, it seems clear that what is significant is the

> impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively".

In **Tullett** (paras 27-28), Maurice Kay LJ quoted with apparent approval the ET judge saying that:

> "A party can still have an intention which may be relevant, but the intention is to be judged objectively".

There is no necessary conflict between that passage and the quotation in **Malik**, as found in **Leeds Dental Practice** (para 25). It is implicit in both quotations that contracts are broken not by the innermost mind, but by what people say and do. The objective test is part of the law in Scotland (**McBryde, The Law of Contract in Scotland, 3rd ed**, para 20-94), not only England. However, when evidence about a potential breach of contract is objectively assessed, it may naturally give rise to inferences. It is not irrelevant to take into account inferences which arise from an objective assessment.

19. An illustration may be found in the ET's finding in fact that the investigator of the grievance at stage 1 said certain things. The ET found as fact:

> "...during the stage 2 hearing Susan Bell [the investigator at stage 1 of the grievance procedure] said words to the effect of "I don't believe the Head Teacher would have said those things", and also words to the effect of "you can't get more credible witnesses than a head teacher and the education support manager". Those remarks were made in circumstances where it was wholly unclear precisely what either witness had said to Susan Bell before she reached her decision" (decision 1, para 26).

From the finding in fact of what Susan Bell said during the stage 2 hearing, the ET concluded that

she had a predisposition to believe the head teacher and education manager, because of their roles and status within the school hierarchy. Susan Bell had also elected not to take statements from two relevant witnesses prior to reaching her decision. From those proved matters, the ET inferred bias on Susan Bell's part in favour of management (decision 1, para 53 and 60). In other words, the ET found that the reasonable inference from the proved facts was bias in the stage 1 grievance procedure. But it did not find that Susan Bell's actions were motivated by bad faith or hostility to the claimant (decision 2 para 15). The findings of bias, and absence of bad faith or hostility, are reasonable inferences from established facts, and are reached on an objective assessment of the evidence.

20. It is clear that the focus is on the impact of the employer's behaviour on the reasonable employee, when deciding if the implied term of mutual trust and confidence is breached, not the employer's intention. But it is artificial to suggest that inferences of intention, which naturally and reasonably arise from evidence objectively assessed, must be left entirely out of account. They are part of the full circumstances the ET may take into account in deciding whether the impact of an employer's behaviour on a reasonable employee justified them in terminating the contract without notice.

21. It would be an error of law for the ET to investigate the employer's subjective intention, and to take it into account if it differed from what could reasonably be inferred from established facts. But when the decision is read as a whole, that is not what the ET in this case did. The ET was engaged in considering the employer's conduct, and deciding whether by reason of that conduct the appellant was entitled to terminate her contract of employment without notice. The ET investigated the behaviour for which the employer was responsible, and made findings in fact about that (decision 1, paras 17 to 30, incorporated in decision 2, para 7). It then considered the seriousness of the employer's conduct, as it was required to do in deciding whether it destroyed or seriously damaged the relationship of mutual trust and confidence and under section 95(1)(c) **ERA** (decision 2, paras 13 to 21). In assessing the seriousness of the employer's misconduct of the grievance procedure, the ET was bound to take into account what the employer's errors were. The ET made findings about those

errors, summarised above (paragraph 11). The respondent did carry out a grievance procedure at stage 1 and 2. However, stage 1 was of poor quality because it failed to gather all relevant evidence and explain why one account was preferred over another, and the investigator was subsequently found to be biased towards people in positions of authority. Stage 2 did not involve bias, but again was flawed and inadequate, because it did not properly re-investigate or explain findings. The judge went on to explain why he did not consider the respondent's errors to be sufficiently serious to destroy or seriously damage mutual trust and confidence. He sought to elucidate why, although there were flaws in the grievance process, they were not the most serious types of flaws. In doing so he contrasted the "inept and even biased handling" which existed in this case, with "outright hostility towards the claimant, or deliberate manipulation of a process to achieve a certain result", which did not. These were not irrelevant considerations in the context of the assessment of seriousness in which the ET was engaged. (In the light of that finding, it is not necessary to address the disputed suggestion of the respondent that the criticised wording was properly in decision 2 to address particular submissions made by the appellant about the grievance procedure being a whitewash).

22. When the decision is read as a whole, the references to the absence of bad faith, deliberate manipulation and overt hostility do not demonstrate a failure by the ET to apply an objective test. Nor, in context, do they demonstrate that the ET took into account irrelevant considerations when evaluating the seriousness of the impact of the employer's conduct on the relationship of mutual trust and confidence.

Ground of appeal 2 - misdirection in law

23. The second ground of appeal focusses on a passage in the ET's decision saying

> "The seriousness of the original incident has a bearing on the importance of the subsequent process" (para 18).

24. The arguments of the parties may be summarised as follows. The appellant argues that the ET was introducing a new principle of law to the effect that a breach of trust and confidence can be ameliorated by the relative innocuousness of prior conduct, for which there is no authority, and which is incorrect. In the present case there was a vulnerable employee, because she had brought a grievance, who was confronted by a procedure involving bias at stage 1, which was not corrected at stage 2. The ET was wrongly saying that, if conduct complained of was minor, not much was required by way of a grievance procedure. It is argued that this was contrary to principle, because parties should be encouraged to use grievance procedures to resolve disputes, the inference being that would not happen if employers could classify incidents as minor and do very little. The respondent agrees that if the ET judge had been trying to create a new rule of law along the lines described, that would have been wrong. However, the respondent submits that fairly read, that was not what the judge was doing. The comment was about the context of this specific case, a grievance about a relatively minor matter. The mishandling of it did not amount to the seriousness necessary for a repudiatory breach. An ET would not be criticised if it said that what was raised was a very serious matter and the grievance procedure had to be taken seriously, and a similar approach should apply to what the ET said in this case.

25. The circumstances that may give rise to grievance procedures being invoked are, to borrow words from **Woods** (p698F), "infinitely various". What will be necessary for a grievance to be adequately addressed will vary according to the particular circumstances, which may include the nature of the grievance and the content of any binding grievance procedures. A one-off occurrence may require less investigation than a grievance based on a number of different incidents over a period of time; or a one-off occurrence may be of sufficient complexity to warrant more investigation than a grievance based on multiple incidents. Similarly, the circumstances of a serious incident may be so obvious that grievance procedure relating to it may be relatively short, or alternatively there may be factors meaning a complaint about a relatively minor incident requires a significant amount by way of grievance procedure. Much will depend on fairness. Accordingly, it would be wrong to say, as a

generality, that a flawed grievance procedure is a less serious matter if the incident it relates to is minor. When assessing the seriousness of the impact of behaviour on mutual trust and confidence, the focus has to be on the circumstances of a particular case.

26. In this particular case, when the decision is read without being hypercritical, the comment made by the ET judge was not intended to introduce a rule of law that there can be no repudiatory breach where an incident complained of in a flawed grievance procedure is minor. Rather, it was a comment on the particular circumstances of this case as they arose on the facts. It is necessary to read the decision as a whole. The sentence criticised by the appellant appears in the context of an explanation of why the employer's conduct was not serious enough to amount to constructive dismissal. The ET explained that the original incident of inappropriate behaviour by the headteacher would damage the relationship of trust and confidence, but in a limited way (para 18). In other parts of the decision, it had been noted that it was a one-off incident of brief duration (para 13, decision 2). It involved the headteacher raising her voice to the appellant initially in her office and then in a nearby stairwell when she said, pointing at the appellant, "If you've got something to say, say it to my face" (decision 2 para 7 with decision 1 para 17-19). There had been a grievance procedure at stage 1, at which the appellant was represented, and presented witness statements from two others as well as her own evidence (decision 2 para 7 with decision 1 para 20). However, stage 1 was flawed, in that statements were not taken from two potential witnesses before the decision was reached, and the person in charge was biased by having a predisposition to believe the headteacher (decision 2 para 7 with decision 1 paras 22 and 26). At stage 2, although there was consideration of evidence, further evidence was not heard to resolve these defects, and there was no explanation why some evidence was weighted over others; but there was no bias (decision 2 paras 7 and 16 and decision 1, paras 24-25). The ET found these were flawed and inadequate processes (decision 2, paras 14 and 16). It also made careful findings about the nature of the flaws, and consequently the conduct of the employer which was being considered. The ET said "It is important to keep a realistic perspective on events, because microscopic examination brings a risk of over-enlargement" (para 18). Read in context, what

the ET was saying was tied to the particular circumstances of this case which it had found to exist.

27. There is no rule of law saying which circumstances are a repudiatory breach and which are not; it is essentially a matter of fact and degree for the ET (**Woods** at 698F and 703D). The sentence complained of, read in context, did not introduce a new rule of law, but was part of the ET's explanation why, in the particular circumstances of this case, the employer's conduct objectively assessed did not amount to constructive dismissal. The ET correctly directed itself on the governing law (para 15 above). It was a matter for the ET whether, on the facts, there had been conduct on the part of the respondent which was sufficiently serious to breach the implied term of mutual trust and confidence.

Grounds of appeal 3 and 4 – failure to have regard to relevant considerations

28. The final grounds of appeal argue that the ET failed to have regard to relevant considerations, and they may be addressed more briefly. In assessing these grounds of appeal, it is necessary to bear in mind the guidance in **DPP Law** (para 57) that it is not legitimate for an appellate tribunal to reason that a failure by an employment tribunal to refer to evidence 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.

29. Ground of appeal 3 is that the ET impermissibly failed to have regard to findings that the respondent had been found to have shown actual bias against the appellant in its handling of the Stage 1 grievance process, and that the inept handling of the Stage 2 process had failed to reveal that bias or correct it. However, in its decision the ET expressly mentioned bias in the first stage of the grievance procedure (decision 2 paras 14 and 18), and considered the second stage (decision 2 para 16), including that it was insufficient to restore fairness. The ET also incorporated its findings in fact in decision 1 (decision 2 para 7), which set out in detail the finding of bias and findings about stage 2. The ET judge had regard to those considerations; but it was for him to decide what weight to give those considerations and reach a judgment. The ET's decision is sufficient to explain to parties

why they won or lost. The EAT already rejected perversity grounds of challenge to the ET's decision in the first appeal. Ground of appeal 3 does not succeed.

30. Ground of appeal 4 is that the ET failed to take account of findings that the appellant was distressed by the respondent's mishandling of the grievance and was reasonable in that response. That ground also fails. Under the objective test in **Malik** already discussed, the ET was primarily considering the impact of the employer's conduct on a reasonable employee, rather than subjective distress. The ET was aware the appellant had been sufficiently upset about the grievance procedure not to appeal to stage 3, as she had no faith in the system and resigned (decision 1, para 28-29, incorporated by reference into decision 2, para 7). The ET also made an express finding that the appellant was entitled to be distressed by the failings in the grievance procedure (decision 1, para 60), which is accepted was akin to a finding that a reasonable employee would have been distressed by the employer's conduct. However, it is not accepted that the ET failed to take into account the relevant factor of the impact of the respondent's behaviour on a reasonable employee, due to not referring to the appellant's distress expressly in decision 2. There is an obvious link between decision 1 and decision 2, and it is not a legitimate inference that the absence of explicit mention in decision 2 meant that the impact on a reasonable employee was left out of account. Rather, the ET found that it was important to keep a realistic perspective on events (decision 2, para 18). It found that the respondent's conduct did not amount to a breach of the implied term of trust and confidence, falling short of serious damage or destruction (decision 2, para 19). There is no reasonable basis to infer the ET failed to take into account a relevant consideration.

Conclusion

31. The ET found that there had been conduct towards the appellant by the head teacher which was insensitive, aggressive and intimidating, and that the appellant had been subjected to a flawed grievance procedure in relation to the incident. Those findings remain. However, not all negative behaviour in the workplace on the part of an employer amounts to a breach of the implied term of

mutual trust and confidence. The question whether an employer's conduct justifies an employee terminating a contract of employment without notice is primarily one of fact for the ET (**Woods** at p698F). The EAT can only intervene if there has been an error of law. For reasons set out above, there has been no error of law by the ET, and the appeal is refused.