Neutral Citation Number: [2026] EAT 89

Case No: EA-2024-000009-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 June 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

XX

Appellant

- and -

YY

Respondent

- -
- -

Benjamin Phelps (instructed by Nexa Law Limited) for the **Appellant**
John Ratledge (instructed by DWF LAW LLP) for the **Respondent**

Hearing date: 4 June 2026

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JUDGMENT

SUMMARY

Breach of contract

1. The claimant was an assistant head teacher who had been in a relationship that was coercive and controlling, during which she was persuaded to send a message of a sexual nature to someone she understood to be a boy under the age of 18, in circumstances in which it was accepted by the respondent that she feared that, if she failed to do so, she and her children would be at risk of serious harm. The claimant did not report the matter in the 18 months after she sent the message. It was then reported to the respondent by the person with whom the claimant had been having the relationship.

2. The claimant was summarily dismissed and brought a claim in the Employment Tribunal asserting complaints of discrimination because of something arising in consequence of disability, unfair dismissal, and wrongful dismissal. All complaints failed.

3. This appeal was limited to the complaint of wrongful dismissal. The Employment Tribunal erred in law in analysing the complaint on the basis that pressure or duress was irrelevant to whether there had been a breach by the claimant that entitled the respondent to terminate the contract. The matter was remitted to the same Employment Tribunal.

HIS HONOUR JUDGE JAMES TAYLER:

The issue

1. The issue in this appeal is whether the fact that an employee is subject to pressure or "duress" is relevant to the assessment of whether the employee has committed gross misconduct that entitles the employer to terminate their contract of employment summarily.

The judgment appealed

2. The appeal is against a judgment of Employment Judge Anstis sitting with lay members. The hearing took place on 3-6, 9, 10 and 12 October 2023 (in chambers). The Judgment was sent to the parties on 28 November 2023.

The outline facts

3. The claimant commenced employment with the respondent on 1 September 2014. Shortly before the events to which the claim related, she had been promoted to be assistant head teacher.

4. From about mid-2015 to August 2018, the claimant was in a coercive and controlling relationship.

5. In about mid-2016, the claimant sent a message to a person she understood to be a boy under the age of 18 asking, "are you a virgin". It was accepted by the respondent that the claimant did so under extreme pressure, which was described as "duress", fearing that if she did not send the message she and her children would be at risk of serious harm.

6. After having sent the message, the claimant did not report it or take any steps in accordance with the respondent's safeguarding policies and procedures. The matter only came to light when the person with whom the claimant had been having the relationship reported it to the respondent on 19 August 2018. Steps were immediately taken by the respondent to involve the Local Authority Designated Officer.

7. A multi-agency safeguarding hub was set up and the police were contacted. The claimant was suspended from work on 23 August 2018.

8. After full investigation, the claimant was invited to a disciplinary hearing which took place over three days, two in February and one in June 2020. The claimant was summarily dismissed on 9 June 2020. In the dismissal letter it was stated of the two core allegations:

> Allegation 1
>
> You sent at least one message of a sexual nature to a child. You told the Investigating Officer that the message enquired whether the child was a virgin.
>
> You admitted to having sent the above message sometime in early 2017. While it was suggested in the JEM meetings from October 2018 to June 2019 that you had sent multiple messages to children, you strongly refuted this and the panel felt that the evidence of any further messages, in addition to the one you admitted, was not clear enough to make a finding that further messages were sent.
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> On the basis of your admission, the panel found that you sent at least one message of a sexual nature to a child.
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> Allegation 2
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> You disclosed to the police in August 2018 that you had sent an inappropriate message to a child. This admission was made 18 months after the message was sent. The panel found that, prior to the disclosure to the police in August 2018, you had made no disclosure to your employer, despite having many opportunities to do so.
>
> The panel also found that you were aware of and up to date with safeguarding training and you were fully aware that the sending of the message was inappropriate and constituted a safeguarding risk. You were aware of your duty to report safeguarding risks to the school's Designated Safeguarding Lead and you failed to comply with that duty.

9. Under the heading "sanction" it was stated:

> We heard from you and your representative about the mitigating factors you wished us to consider. We therefore considered the following:
>
> You stated that you were under duress when you sent the messages and that your mental health had been compromised due to an abusive and controlling extra-marital relationship.
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> While the panel was willing to accept your description of the relationship with [PP] and acknowledged that you have been through a difficult time and your mental health has been significantly impacted, it did not feel that this amounted to adequate mitigation for your actions. As an educational professional with over twenty years' experience and in a senior position within your setting, you were fully aware of the need to safeguard all children from harm and that this includes those outside of your school, regardless of the outside pressures you were facing. Your duty to safeguard children is one which must take priority over all other concerns. You have followed all other safeguarding practices

> during this time and are clearly able to articulate your responsibilities as an educational professional in terms of safeguarding. You were therefore aware that your behaviour (and that of [PP]) was a safeguarding risk but for a period of 18 months you failed to report the conduct to anyone, despite there being various opportunities for you to do so. You, by your own admission, chose to protect your marriage (and were concerned about the stigma attached to this) over safeguarding all children including a child/children outside of your school setting. You did not give the panel any assurance that, should a situation of this nature arise again, you would be able to put the wellbeing of children ahead of your personal issues. …
>
> While you did accept that your behaviour was not appropriate, your representations to the panel focussed mostly on excusing the behaviour and did not give the panel any confidence that you would do anything differently in the future. We noted with some concern the situation involving [GG] with whom you had a relationship but also accused of serious sexual assault. You told the panel on days 1 & 2 of the hearing that you had been sexually assaulted by this colleague and that … you were glad to see [GG] moved out of your classroom. The panel was subsequently provided with email correspondence in which you were very supportive of this colleague and sought to prevent him being transferred out of your class. Whilst the panel respects your right not to pursue the alleged sexual assault with the police, there was potentially an ongoing danger to children which went unreported to [YY]. Furthermore, the email documentation provided to the panel on day 3 of the hearing calls into question the account you had previously given and gives the panel cause to question your credibility.
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> Taking into account the evidence and the issues you raised in mitigation, the panel considered whether there were any suitable alternative options in your case. However due to the seriousness of the conduct, the panel concluded that alternatives to dismissal were not appropriate. In particular, the panel felt that as an employee of a school you should be aware of the expectations of you. You were in a position of trust and failed to put the safety of children above your own issues. The panel did not believe you showed an understanding of the severity of your conduct and was not satisfied that you would put the safety of children first, regardless of your own personal circumstances. As such, the panel concluded that dismissal without notice or payment in lieu of notice was the appropriate sanction.

10. The claimant appealed against her dismissal. The appeal was dismissed on 5 August 2020.

The claim in the Employment Tribunal

11. The claimant brought complaints of discrimination because of something arising in consequence of disability, unfair dismissal, and wrongful dismissal. It was accepted that the claimant was a disabled person at the relevant times by reason of a recurrent depressive disorder as a result of which she was vulnerable to coercive control.

12. The complaint of disability discrimination failed, as did the complaints of unfair dismissal and wrongful dismissal.

13. The claimant appealed against the judgment of the Employment Tribunal. The only ground permitted to proceed relates to the wrongful dismissal complaint.

14. It is clear that the focus in the Employment Tribunal was on the complaints of discrimination because of something arising in consequence of disability and unfair dismissal. The complaint of wrongful dismissal was only the subject of very limited submissions by the parties. The appellant did not refer the Employment Tribunal to the authorities that are now relied upon in this appeal. The Employment Tribunal's direction as to the law on wrongful dismissal was, unsurprisingly in light of the very brief submissions on the point, very brief:

> 90. On the question of a wrongful dismissal, the onus is on the respondent to show on the balance of probability that the claimant committed a repudiatory breach of contract and that the respondent dismissed her without notice in response to that. That is typically spoken of as being "gross misconduct" but the underlying question is whether the actions amounted to a fundamental breach of contract, and that is to be assessed on an objective basis.

The conclusion of the Employment Tribunal

15. The Employment Tribunal dealt briefly with the determination of the complaint of wrongful dismissal, setting out its conclusions from paragraphs 142 to 146:

> 142. As we have made clear previously, we regard it as clear that **without the explanation of duress the claimant's actions in sending the message and failing to report it would be bound to be considered gross misconduct**: a repudiatory breach of her contract.
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> 143. **The question that follows is what difference the duress makes**. The respondent accepted (as do we) that the claimant sent the message under duress, in that she believed that either she or her children would come to harm if the message was not sent.
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> 144. **It was the claimant's case that this provided the context to the sending of the message, and that context took the message outside the realms of gross misconduct**.
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> 145. The significance of duress in assessing whether there has been a repudiatory breach of contract is a difficult one. Setting aside statutory overlays such as unfair dismissal, employment contracts are usually thought of as being subject to the same legal rules as any other contracts are, **but neither counsel were able to refer us to authority on the effect of duress on whether there has been a fundamental breach of contract.**
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> 146. **We start from the position that repudiatory breaches of employment contracts are to be determined on an objective basis, and that it is not necessary for someone to intend to commit a repudiatory breach of contract**. Approaching it from that

> perspective, we consider that **the sending of the message (and failure to report it) is, objectively speaking, a repudiatory breach of contract. The motives for that do not affect that.** The explanation of duress **may, in that context, be a reason why the respondent chooses not to exercise its right to terminate the contract but does not deprive the respondent of the right to terminate the contract. Even given that her breach of contract was committed under duress, the claimant was in repudiatory breach of contract.** The respondent then had the right to summarily terminate the contract, which it did. The respondent did not breach the claimant's contract in dismissing her without notice. The claimant was not wrongfully dismissed.

The appeal

16. The claimant asserts in the appeal that:

> The Tribunal erred in holding that the sending of the Message and the failure to report amounted to a repudiatory breach of contract. The motive or intent behind an alleged breach must be relevant to whether it is a repudiatory breach and form part of the objective assessment of the conduct. An employee who actively takes cash from the till is in a different situation to an employee who accidentally takes company money home. That the Appellant's actions were taken under duress prevented the sending of the Message and the failure to report from being a repudiatory breach of contract.

The law

17. A complaint of wrongful dismissal can be brought in the Employment Tribunal pursuant to the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, being a complaint of breach of contract that arises on the termination of employment.

18. In a claim of wrongful dismissal the employee seeks damages for breach of the contractual right to notice. The claim can be defeated if the employee was not entitled to notice as a result of their conduct.

19. The starting point is to consider the express terms of the contract, including those that deal with termination and any other express term that the claimant may have breached entitling the respondent to dismiss. In the absence of a breach of an express term there may be a breach of an implied term, usually the implied term of mutual trust and confidence.

20. The terms of the employment contract are not mentioned in the judgment, and I was not provided with a copy of the contract. Most contracts of employment have a term providing for notice, but also make specific provision that notice need not be given in certain circumstances, generally

including circumstances in which the employee is guilty of gross misconduct. The respondent in its skeleton argument stated that the claimant's contract of employment expressly provided for summary dismissal in the event of gross misconduct. That was not challenged by the claimant.

21. Some contracts of employment specifically provide that certain actions, or breaches of certain express terms of the contract, will amount to gross misconduct. That was not asserted to be the case by the respondent. The respondent did rely on its Code of Conduct, without stating whether it was incorporated into the claimant's contract of employment. The respondent relied on its policies that emphasised the obvious importance of safeguarding and permit only appropriate electronic communication.

22. Where a breach of an express term is relied upon, the question of whether the breach entitles the employer to terminate the contract of employment can be analysed in a number of overlapping ways, considered by the editors of **Chitty on Contracts** at paragraphs 28–009 through to 28–048 including:

22.1. the nature of the term breached - traditionally, terms were analysed as being conditions or warranties, breach of condition being a term of such significance that it entitles the other party to treat the contract as an end

22.2. the nature of the breach and whether it is what has traditionally been described as a fundamental breach of contract

22.3. renunciation, in which a party, by words or conduct, evinces an intention not to perform its obligations under the contract in some essential respect

23. Renunciation is not the only available analysis in considering whether there has been a breach of an express term of the contract, but it can be of assistance and has a clear relationship to the concept of mutual trust and confidence.

24. The appellant relied in the appeal on the commercial authority **Eminence Property Developments Ltd v Heaney** [2010] EWCA Civ 116. In that case a party to a contract to purchase

property as a result of an honest mistake gave short notice to complete. The issue was whether the breach was such as to entitle the other party to terminate the contract. Lord Justice Etherton, having review the relevant authorities, held:

> 61. I would make the following general observations on all those cases. First, in this area of the law, as in many others, there is a danger in attempts to clarify the application of a legal principle by a series of propositions derived from cases decided on their own particular facts. Instead of concentrating on the application of the principle to the facts of the case in hand, argument tends to revolve around the application of those propositions, which, if stated by the Court in an attempt to assist in future cases, often become regarded as prescriptive. **So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, "perspicuous". It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contact.**
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> 62. Secondly, **whether or not there has been a repudiatory breach is highly fact sensitive.** That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in The Nanfri.
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> 63. Thirdly, **all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker.** This means that **motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person.** So, Lord Wilberforce in *Woodar* (at p. 281D) expressed himself in qualified terms on motive, not by saying it will always be irrelevant, but that it is not, of itself, decisive.
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> 64. Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in *Woodar* itself. [emphasis added]

25. This demonstrates that, when adopting a renunciation analysis, while motive is irrelevant insofar as it is relied upon to show the subjective intention of the contract-breaker, it may be relevant if it reflects something that throws light on how the breach would be viewed by a reasonable person.

26. Where an express term is not relied upon, it may be asserted that there has been a breach of the implied term of mutual trust and confidence. The classic exposition of that term, in the context of a breach by an employer, was that of Browne-Wilkinson J in **Woods v WM Car Services**

(Peterborough) Ltd [1981] ICR 666;

> In our view it is clearly established that there is implied in a contract of employment a term that **the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee**: *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corpn Ltd v Austin* [1978] IRLR 332 and *Post Office v Roberts* [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v Roberts*. [emphasis added]

27. That expression of the implied term of mutual trust and confidence was approved by the House of Lords in **Malik v BCCI SA** [1997] ICR 606, in the speech of Lord Steyn at page 621, albeit that there was a transpositional error in that the judgment referred to conduct that is "calculated **and** likely" to destroy or seriously damage the relationship of confidence and trust, whereas the wording should be "calculated **or** likely": **Baldwin v Brighton and Hove City Council** [2007] ICR 680).

28. The passage quoted from **Eminence** was applied in the employment context when analysing the implied term of mutual trust and confidence in **Tullett Prebon plc v BGC Brokers LP** [2011] EWCA Civ 131:

29. The simplest approach, which can incorporate consideration of the nature of the contract, the term breached, the severity of the breach, whether the employee has shown that they were not prepared to be bound by the terms of the contract of employment, and take account of the reason why the employee acted as they did, insofar as it is relevant to an objective assessment of whether the breach is so serious as to entitle the employer to terminate, is to apply the classic description of gross misconduct in **Neary v Dean of Westminster** [1999] IRLR 288:

> **What degree of misconduct justifies summary dismissal?** I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry*. That case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, where Lord Evershed MR, at p.700, said: 'It follows that the question must be – if summary dismissal is claimed to be justified – **whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract** of service.' In *Sinclair v Neighbour*, Sellers LJ, at p.287F, said: 'The whole

> question is **whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged** as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his **conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them**'. In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as **whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment** ... and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that **conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment**.

30. In this case, the Employment Tribunal might best have directed itself by asking the question whether the conduct of the claimant, having regard to the pressure she was under at the time that the conduct occurred, and the importance of her safeguarding obligations, should objectively be treated as so undermining the trust and confidence which was inherent in her contract of employment that the respondent could no longer be required to keep her in their employment.

Analysis

31. Probably as a result of the brevity of the submissions, the reasoning of the Employment Tribunal was terse and it is hard to tell whether the Employment Tribunal considered that it could take account of the pressure, or "duress", on the claimant in determining whether her breach of contract was such as to permit the respondent to terminate. The sentence "Even given that her breach of contract was committed under duress, the claimant was in repudiatory breach of contract" suggests that it might have been taken into account.

32. However, on a reading of the passage as a whole I have concluded that the Employment Tribunal assumed that duress could not affect the answer to the question of whether the claimant had breached the contract in a manner that entitled the respondent to terminate.

33. The Employment Tribunal was required to consider, in determining whether the claimant was guilty of gross misconduct, the circumstances of the breach so far as they would affect an objective

assessment of whether the conduct should be treated as so undermining trust and confidence that the respondent could no longer be required to retain the claimant in its employment.

34. In conducting that assessment the Employment Tribunal should have considered the duress asserted by the claimant. The Employment Tribunal was also entitled to have regard to the fact that the claimant was employed in a senior position as an assistant head teacher at the time her conduct came to light. She was aware of her safeguarding obligations. While pressure, or what was described as duress, may be seen as significant in analysing her conduct in sending the message of a sexual nature, it was potentially of less significance in the consideration of her failure to report the matter in the 18 months after the message had been sent, before the matter came into the open because her former partner reported it to the respondent. As part of the circumstances, it may be relevant that the claimant did not appear fully to accept her responsibilities. These are matters that the Employment Tribunal will need to consider on remission.

35. Accordingly, the appeal is allowed. I have concluded that I cannot say that there is only one potential answer to the question of whether the claimant was guilty of gross misconduct. I have decided that the remission shall be to the same Employment Tribunal. Most of the findings of the Employment Tribunal were not overturned. The Employment Tribunal received only brief submissions in respect of the wrongful dismissal complaint and the parties did not refer the Employment Tribunal to the authorities relied on in the appeal. Remission to the same Employment Tribunal is likely to be the most efficient way forward.