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Mutual Trust and Confidence – Where Are We Now?

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Introduction

1. Advising clients on whether a tribunal or court is likely to conclude that particular conduct amounted to a breach of the implied term of mutual trust and confidence is a challenge frequently encountered by employment practitioners. Although the legal formulation of the term and the consequences of breach are both well established, it can nevertheless be difficult to provide robust and confident advice to an employee who is considering resigning and claiming constructive dismissal, or to an employer which is seeking to defend claims of unfair dismissal and/or enforce post-termination restraints.

2. This paper is divided into the following sections:

A. Buckland v Bournemouth – Back to Basics?

3. In **Buckland v Bournemouth University Higher Education Corp [2010] ICR 908 CA,** the claimant, a university professor, failed 14 out of the 16 students enrolled on his course. His marks were endorsed by a second marker, but the university decided to conduct a further re-grading of the examination papers (without informing the claimant). Following a complaint by the claimant, an internal inquiry vindicated his marking and was critical of the university's conduct. The claimant was, however, dissatisfied with the process (he did not consider the chair of the inquiry to be sufficiently independent) and resigned, claiming constructive unfair dismissal.

4. The CA upheld the ET's decision that the claimant had been unfairly dismissed. It held that the range of reasonable responses test is not applicable when considering the 'first stage' question of whether the employment contract has been fundamentally breached; at this stage, the tribunal must apply an "unvarnished", objective test (applying **Malik v BCCI [1998] AC 240**). In the context of claims for unfair constructive dismissal, only once it has first been established that the claimant was in fact dismissed pursuant to section 95 (1) (c) ERA 1996 (as opposed to a 'mere resignation' by the employee) does the section 98 (4) question (i.e. the band of reasonable responses test) arise for determination.

5. In order to explain this distinction, Sedley LJ used the illustrative example of an employer who fails to pay an employee's wages on account of a major customer defaulting on an anticipated payment. In such circumstances, the failure to pay the employee's wages would be "arguably the most, indeed the only, reasonable response to the situation." Accordingly, an employer could, in principle, successfully defend a claim of *unfair* constructive dismissal by relying on the band of reasonable responses test in section 98 (4) ERA 1996. However, in Sedley LJ's view, "to hold that it [the employer's conduct in this illustrative example] is not a fundamental breach would

drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."[1]

6. Sedley LJ did accept it was arguable that reasonableness was one of the "tools" for deciding whether there had been a fundamental breach of an employment contract (and that there were likely to be cases in which such an assessment would be "useful"), but firmly rejected the proposition that it could be a legal requirement.

7. The CA's analysis of this issue perhaps failed fully to address the specific and distinct nature of the implied term of mutual trust and confidence. In constructive dismissal cases founded on an alleged breach of an express term of the contract (such as the requirement to pay wages), it is clear that the question of whether the employer had reasonable cause for acting in the manner it did will have no bearing on the contractual question of whether the breach of contract was sufficiently serious to be a fundamental (i.e. repudiatory) breach.

8. Constructive dismissal claims founded on an alleged breach of the implied term of mutual trust and confidence are, however, a different beast. In **Malik v BCCI**, the House of Lords held that a party to an employment contract must not, "without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (emphasis added). If there is reasonable cause for conduct which destroys or seriously damages trust and confidence, there will be no breach of the implied term and therefore no repudiation of the contract (**Hilton v Shiner Ltd Builders Merchants [2001] IRLR 727**). It follows that in seeking to ascertain whether there has been a breach of the implied term of mutual trust and confidence, the well-established formulation of the term specifically requires an assessment by the court or tribunal of the reasonableness of the defaulting party's conduct.

[1] Although see the comments of the HHJ Peter Clark in **Bedford v Pilgrims Group Limited [2010] (UKEAT/0106/10/SM)** on the issue of non-payment of wages and repudiatory breach.

9. The CA's analysis in **Buckland** of this particular issue was subsequently considered by the EAT in **Burton, McEvoy & Webb v Curry [2010] (UKEAT/0174/09/SM & UKEAT/0302/09/SM)**. Underhill P reiterated that in circumstances where a claimant alleges that he/she resigned in response to their employer's breach of the implied term of mutual trust and confidence, tribunals must "eschew any reference to the range of reasonable responses" in deciding whether there has been a constructive dismissal. Notwithstanding this clear statement of legal principle, Underhill P went on to acknowledge the significance of assessing "reasonableness" at this (first) stage of the process, stating as follows:

> "Although the **Malik** term is not equivalent to a term simply that the employer will behave reasonably, nevertheless in deciding whether it has been breached it will generally be relevant to consider whether the conduct complained of was reasonable: if it was, the employer will generally have 'reasonable and proper cause' for it, and, if it was not, that fact is likely to be at least material to the question of whether it was such as to destroy or seriously damage the relationship of trust and confidence between employer and employee..."

10. Underhill P further recognised the practical reality that:

> "...if the case is one where the employer has at the first stage been held to be in breach of the **Malik** term, which will normally have involved a consideration of reasonableness..., it is hard to see how it could be held at the second stage [i.e. the section 98 (4) question] to have been reasonable for him to have acted in the way complained of."

11. Thus, in claims of constructive unfair dismissal which rely on a breach of the implied term of mutual trust and confidence, it is now "settled" (following **Buckland**) that the applicable question for a court or tribunal to ask, at the 'first stage' of determining whether a constructive dismissal has taken place (i.e. the section 95 (1) (c) question), is not: "in the circumstances of the case, did the employer's treatment of the employee fall within the band of reasonable responses open to a reasonable employer?" However, it is not manifestly apparent how courts and tribunals will in practice decide (objectively) whether an employer had "reasonable and proper cause"

for its conduct (which, if proven, provides a complete defence to an alleged breach of the implied term of mutual trust and confidence), in complete isolation from this well established test.

12. The EAT decision in **Nagi v Sheffield Black Drugs Service [2010] (UKEAT/0233/09/LA)** is a good example of the overlap / coalescence of, on the one hand, the "band of reasonable responses" test; and on the other, an "unvarnished" application of the **Malik** test. Here, the EAT (Underhill P) refused to remit the case to the ET, notwithstanding the ET's erroneous application of the band of reasonable responses test in deciding whether the implied term of mutual trust and confidence had been breached by the respondent employer. On the facts, the ET had concluded that:

> "...the respondent's approach to the claimant's grievance amounted to a course of conduct which fell outside the range of reasonable responses which a reasonable employer would consider to be appropriate in the circumstances of the given case and that as such a fundamental breach occurred and that the claimant resigned in consequence with the result that he was constructively dismissed..."
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> (Emphasis added)

13. Having explained why it was impermissible for the ET to determine the question of whether there had been a fundamental breach of contract by reference to the 'reasonable responses' test (in light of the CA judgment in **Buckland**), the EAT nevertheless held that this was not a "fatal" misdirection. It stated as follows:

> "By finding that Ms Pabla's conduct was 'outside the range of reasonable responses' the majority were in our view necessarily finding that she did not have reasonable or proper cause for acting as she did..."
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> ...
>
> "...the requirement that the conduct complained of be such as to destroy or damage the relationship of trust and confidence remains an essential element in the test. We do not say that in every case a self-direction following **Claridge** must mean that the tribunal can be taken to have addressed the correct question, as now established by **Buckland**; but we believe that to be the case here."

14. It is clear, therefore, that a failure on the part of a tribunal to "eschew any reference to the range of reasonable responses" when determining the question of whether a constructive dismissal has in fact occurred (in claims founded on an alleged breach of the implied term of mutual trust and confidence) will not inevitably result in a successful appeal to the EAT. It seems likely, however, that the practical difficulties encountered by tribunals and courts, when faced with the unenviable task of unscrambling assessments of "reasonable and proper cause", "reasonableness" and the "range of reasonable responses", will result in further litigation and amplification by the appellate courts.

15. A separate contractual issue which arose for determination in **Buckland** was whether a fundamental breach of contract can subsequently be 'cured' by the defaulting party. The CA confirmed the 'orthodox' contractual view that it cannot. In the Court's view, to introduce an exception to the general law of contract, whereby an employer could unilaterally make amends for a fundamental breach of contract, would open a multitude of cases to an evaluation of whether the amends constituted an adequate cure of the breach, and was not justified.

16. The overruling of the EAT on the 'cure' issue inevitably means that the question of affirmation will remain central to many claims of constructive dismissal. In his judgment, Sedley LJ offered an olive branch to employers, stating that the CA's decision on this issue:

> "...does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends..."

17. For his part, Jacob LJ was more cautious on the question of affirmation, stating as follows:

> "When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

18. On the facts of the particular case, Jacob LJ stated that it was "entirely reasonable" for the claimant to wait for the findings of the internal inquiry before exercising his right to accept the university's repudiation. Furthermore, it was also "entirely proper for him to exercise that right by a long period of notice given the fact that his students would otherwise have been adversely affected mid−academic year."

19. In short, Jacob LJ considered that it takes "rather a lot" to find, in the context of an employment relationship, that one party to the employment contract has affirmed a fundamental breach of contract committed by the counterparty.

20. These differences in emphasis are likely to be relied upon by advocates in constructive dismissal claims as supporting their client's case, in circumstances where there has been a delay (which is more than *de minimis*) between the repudiatory conduct relied upon by the employee as justifying his/her resignation, and the date of resignation. In this context, it is worth noting that Carnwath LJ endorsed Sedley LJ's judgment in full, and the concluding remarks of Jacob LJ on the undesirability of remitting claims to the ET, in circumstances where the EAT is in a position to decide the matter itself. It may therefore be argued that Sedley LJ's endorsement of a "reasonably robust approach to affirmation" was the view preferred by the majority; albeit Carnwath LJ did not expressly disassociate himself from Jacob LJ's more cautious comments on the affirmation issue.

B. Distinguishing Malik – Tullett Prebon and the Question of Motive

21. One issue which arose for determination in this high profile 'poaching' litigation (**Tullett Prebon Plc v BGC Brokers LP**) was whether the defendant brokers (i.e. those brokers who had left Tullett to join BGC) had been constructively dismissed by their former employer. If they had been so dismissed, then their contractual post-termination restraints could not be enforced by Tullett against them. The defendant brokers argued that Tullett had (*inter alia*) engaged in "aggressive strong-arm tactics" in an effort to convince them to remain with the company and not to join BGC, with whom they had signed 'forward contracts'[2]. In the High Court (**[2010] IRLR 648**), Jack J stated:

> "It is in a sense circular to say that the employer's conduct must be serious enough to entitle the employee to leave. However, in considering what gravity of conduct by the employer is required, it is helpful to say that it must be such as so to damage the employee's trust in his employer, that he should not be expected to continue to work for the employer. Conduct which is mildly or moderately objectionable will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough."

22. The CA (**[2011] EWCA Civ 131**) focused principally on the contractual question of repudiation, stating that the legal test is:

[2] These contracts included a commitment on the part of the defecting brokers to join BGC at future dates when free to do so; indeed, the contract contained an express requirement to "take all such lawful action (including resigning from your current employment) as shall be necessary to comply with your obligations under this agreement and commence your duties with [BGC] at the earliest possible time."

BGC provided the brokers with indemnities in anticipation of litigation at the suit of Tullett and agreed to make substantial signing-on payments to the brokers, usually on the basis of half payable on signing with the balance to follow on the commencement of employment with BGC.

Although the lawfulness of the forward contracts was not an issue for determination on the appeal, it is worthy of note that Hooper LJ stated (*obiter*): "I would not wish it to be thought that I necessarily agree [with the conclusion of Jack J] that the terms of the forward contracts and associated agreements of the kind used in this case are compatible with the employee's duties to Tullett..."

> "...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 contract"
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> (expressly approving the dicta of Etherton LJ in **Eminence Property Develpoments Ltd v Heaney [2010] EWCA Civ 1168)**.

23. The CA went on to consider whether Jack J had been entitled, when assessing the alleged breach of mutual trust and confidence by Tullett, to take into account the motive / intention of the Tullett management, when they sought to persuade the defendant brokers to remain with the company. In **Malik v BCCI**, Lord Steyn had stated that:

> "...the motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for breach [of the implied term of trust and confidence]".

24. This dicta was, however, distinguished by the CA in **Tullett Prebon v BGC**. Once again, it endorsed the dicta of Etherton LJ in **Eminence Property v Heaney**, stating that although the court must apply an objective test in determining whether a party has committed a repudiatory breach of contract, motive:

> "...may be relevant if 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".

25. The facts of **Tullett Prebon v BGC** were "manifestly different" from those in **Malik v BCCI**, as it was concerned with the "specific dynamics between employer and employees", rather than the "indirect effect of corporate behaviour on employees". In the circumstances, the CA held that it was "necessary for [Jack J] to include an objective assessment of the true intention of the Tullett hierarchy..."; having done so, he reached a correct finding that the defendant brokers had not been constructively

dismissed by Tullett. Jack J had concluded that in seeking to induce the defendant brokers to remain in its employment, Tullett had not breached the implied term of trust and confidence; its conduct was "not intended to attack the relationship between Tullett and the brokers, but was intended to strengthen it."

26. Jack J was also alert to the tactical deployment by senior employees of arguments based on the implied term of mutual trust and confidence, with the principal objective of sidestepping undesirable post-termination restraints. He stated that:

> "The courts will...continue to scrutinise closely the arguments of employees (particularly highly paid individuals and teams moving to a competitor of their employer) who have already secured alternative employment prior to resigning, and who construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants. In such cases the argument will fail: (a) often at the first hurdle of whether there has been a repudiatory breach at all; or (b) sometimes, because any such breaches have been waived."

27. Another interesting aspect of this case was the debate over whether the implied term of mutual trust and confidence may arise and impose duties on contracting parties, prior to the commencement of an employment relationship. Tullett had successfully persuaded three brokers who had signed forward contracts with BGC to remain in its employment ("the Tullett Three"); and BGC brought a Part 20 claim on the basis that Tullett had unlawfully induced them to breach those contracts with BGC.

28. Although Jack J found that Tullett had induced the Tullett Three to breach their contracts with BGC, he concluded that Tullett was not liable in damages to BGC. This was on the basis that "Tullett induced them to do something which they were entitled to do". The conduct of Mr Verrier (BGC's Chief Operating Officer) "was such that the Tullett Three could have no trust and confidence in him BGC as their future employer". In other words, BGC's conduct amounted to a repudiatory breach of the forward contracts, which the Tullett Three were entitled to accept.

29. The CA held that Jack J was correct to find that obligations of trust and confidence can arise "as appropriate, taking account of [the circumstances]"; including a period before the commencement of employment. The Court's conclusion on this point was reinforced by two illustrative examples:

(i) A secretary signs a contract to begin employment with a new employer the following week but, the day before she is due to start work, is subjected to sexual harassment by her prospective boss and accused of being under qualified for the role. On BGC's analysis of the trust and confidence issue, the secretary must join the new employer and a failure to do so would amount to a breach of contract. This, in the CA's view, plainly could not be the state of the law.

(ii) An individual attends a job interview and accepts an offer of employment on being told confidential details of the new employer's business plan. He then returns to his current employer, intending to hand his notice in, but is persuaded not to move, whereupon he divulges the confidential details of the now rejected employer's business plan to his present and future employer, a competitor. In such circumstances, Kay LJ was of the view that the employee "would be in breach of an obligation of trust and confidence *vis-à-vis* the rejected employer".

30. In its analysis of the trust and confidence issue, the CA further stated that a 'forward contract' is "more akin to a contract of employment than to a purely commercial agreement..." On the facts of the case, it was:

> "...difficult to imagine circumstances affording greater justification for prospective employees at this level of the financial services sector seeing the conduct of their prospective employer as a repudiatory breach of the obligation of trust and confidence..."

31. BGC's "turpitude and obloquy" was of a "very different order" to Tullet's conduct; and therefore "justified a different conclusion in respect of repudiatory breach."

C. The 'Anterior Breach' Doctrine – A Conflict of Judicial Views

32. The facts in **Tullett Prebon v BGC** also gave rise to the question of whether the defendant brokers were, as a matter of law, entitled to rely on Tullett's alleged breach of the duty of mutual trust and confidence to found a claim of constructive unfair dismissal, in circumstances where they themselves were (at the time of the alleged breach) in repudiatory breach of contract, by virtue of their participation in the unlawful conspiracy to join BGC. Jack J doubted the decision in **RDF Media Group Plc v Clements** [2008] IRLR 207, in which it was held that an employee who was himself in repudiatory breach of contract could not accept a repudiatory breach by his employer. He stated:

> "The ordinary position is that, if there is a breach of a contract by one party which entitles the other to terminate the contract but he does not do so, then the contract both remains in being and may be terminated by the first party if the second party has himself committed a repudiatory breach of the contract".

33. However, as already discussed, Jack J was keen to emphasise that the Courts will scrutinise very closely the arguments of senior employee who "construct arguments of repudiatory breach as a means of avoiding notice periods and irksome covenants." In this context, Jack J stated that the question of whether the employer's conduct has sufficiently damaged the trust and confidence which the employee has in him (objectively judged), is to be "judged in all the circumstances"; which will include "the employee's own conduct to the extent that it is relevant to that question."

34. The anterior breach question was further considered by the High Court (Jack J) in **Brandeaux Advisers (UK) Ltd v Chadwick [2010] EWHC 3241 (QB)**. In this case, an employee had transferred vast amounts of confidential information relating to her employer's affairs to her personal computer, with a view to using it in the future should a regulatory dispute emerge. Once the employer discovered the transfer of confidential information, she was dismissed for gross misconduct. The claimant

company sought delivery up of the confidential information, and Ms Chadwick counterclaimed for damages for wrongful dismissal.

35. On the facts, the Court found that Ms Chadwick had not made out a case of repudiatory breach by her employer. In any event, however, Jack J rejected the contention that if the company had been in repudiatory breach of contract at the time of Ms Chadwick's act of gross misconduct, this would have barred it from summarily dismissing her. Jack J reiterated his observations in **Tullett Prebon v BGC** (i.e. rejecting the approach which had been "tentatively suggested" in **RDF v Clements**), emphasising that as a matter of contract law, "an unaccepted repudiation 'is a thing writ in water'".

36. The decision in **RDF v Clements** was, however, followed by the EAT (Scotland) in **Aberdeen City Council v McNeill [2010] IRLR 374**. Here, the local authority had commenced an investigation into M's conduct at work, following a number of serious allegations. The ET found that although M had been guilty of misconduct in several respects, his misconduct was not sufficiently serious to breach the implied term of trust and confidence. On the other hand, it found that the local authority's oppressive conduct of the investigation had been calculated to destroy the relationship of trust and confidence between the parties, and that M had resigned in response to that breach (i.e. he had been unfairly constructively dismissed).

37. The EAT (Scotland) allowed the employer's appeal. It found that the ET had minimised the seriousness of M's behaviour, and had failed to ask itself whether all of his acts of misconduct (taken together) amounted to a breach of the implied term of trust and confidence. On the evidence accepted by the tribunal, it was clear that M had been in material breach of the implied duty of trust and confidence.

38. Significantly, the EAT held that because M was, at the time of his resignation, in breach of the implied term of mutual trust and confidence, he was not entitled to terminate the contract on the basis that the local authority had itself breached that implied term. Lady Smith stated:

> "The contractual term on which the claimant sought to found [his claim for unfair constructive dismissal] was the respondents' implied duty of trust and confidence. But he himself was in breach of the duty incumbent on him that was the counterpart of that duty. That breach was plainly material. He was, accordingly, not entitled to terminate his contract of employment by reason of the respondent's conduct and the Tribunal were bound to conclude that he could not bring himself within the provisions of s95(1(c) of the 1996 Act."

39. The EAT further observed that the claimant's serious acts of misconduct had been uncovered by the employer only in the course of its internal investigation, so it was not a case where the employer had known of the breaches and affirmed the contract in knowledge of them, or where the employer had waived its right to rely on them.

40. It can therefore be seen that there is a conflict of judicial views on the question of whether a party who, at the time at which it purports to accept a repudiatory breach of (an employment) contract is itself in repudiatory breach of that contract will, as a matter of law, be barred from doing so – unless and until the 'anterior breach' has been affirmed or waived by the other party. As a matter of 'pure' contract law, the approach adopted by Jack J in **Tullett Prebon v BGC** and **Brandeaux v Chadwick** is, in my view, more coherent; although there are cogent arguments that the approach adopted by Lady Smith in **Aberdeen v McNeill** is more equitable. In light of the CA decision in **Buckland v Bournemouth**, however, it seems that there is a general reluctance on the part of the appellate courts to introduce employment law exceptions to the general law of contract.

41. The 'anterior breach' issue did not arise for determination in the CA hearing in **Tullett Prebon v BGC**, and so further litigation on this contractual issue seems probable.

D. Case Law Round-Up

42. In **Tullett Prebon v BGC**, the CA stressed that the question whether a repudiatory breach has occurred is a "question of fact for the tribunal of fact" and is a "highly context-specific question." In seeking to provide clear guidance to clients on cases concerning alleged breaches of the implied term of trust and confidence, the approach taken by courts and tribunals to factually similar cases is plainly of considerable assistance. This section of the paper considers a number of other recent EAT decisions which have involved issues of mutual trust and confidence.

43. In **Watson v University of Strathclyde [2011] (UKEATS/0021/10/BI),** the claimant had raised a grievance about the conduct of her line manager (T), which was rejected. The claimant appealed this decision through the university's internal appeal procedure and objected to the inclusion on the appeal panel of a particular individual (W), who had had significant dealings with T in the past; he had been involved in T's initial appointment, had refused to accept T's resignation when it was offered (following a criminal conviction for breach of the peace), and had issued a public statement to that effect. The university refused to modify the composition of the appeal panel, which went on to reject the claimant's appeal. Upon discovering that W had been a member of the appeal panel, the claimant resigned and claimed unfair constructive dismissal.

44. The ET rejected the claim, holding that the university's conclusion that W did not have a conflict of interest was reasonable. The EAT (Scotland) allowed the claimant's appeal, holding that the ET had erred in confining its considerations to the question of whether the university could reasonably have concluded that W was not in fact biased; that was not the only issue it had been required to address. Lady Smith stated that:

> "...any reasonable employer requires to have regard to the need to afford an employee a fair hearing of her grievance throughout, including at the appeal stage. In this case, any reasonable employer would then have had regard to the Claimant's perception, had regard to the facts relied on by her as justifying her in holding that perception and if they had done so, we consider that they, just like Lord Hope's fair minded and informed observer

> [applying the test laid down in **Porter v Magill** **[2001] UKHL 67**], could only have concluded that it would not be fair to her to include Dr West in the appeal panel..."
>
> (Emphasis added)
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> ....
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> "...Dr West would have been removed from the panel by any reasonable employer so as reassure the Claimant and enable her to attend the hearing with her concerns about its fairness thus allayed – the Respondent did not, however, respond to the Claimant's concerns at all."

45. In short, the EAT emphasised the requirement for employers not only to consider whether a member of a disciplinary / appeal panel is in fact biased, but also whether a fair minded and informed observer might think that there is a real possibility of bias. In the circumstances, the EAT reached the conclusion that the university's failures did amount to a breach of the implied term of mutual trust and confidence; and that the claimant's resignation constituted an unfair dismissal.

46. In **Nixon v Coates** **[2010] (UKEAT/0108/10/ZT)**, the respondent employer had required a pregnant employee to return to work in an office in which a rumour had been spread concerning the possible paternity of her expected child, without first dealing with her grievance against a member of the managerial staff alleged to have spread the rumour. The ET rejected the claimant's claims for harassment and discrimination on the basis of sex and pregnancy, but allowed her claim of constructive unfair dismissal (albeit reducing the compensatory award by 90% on account of her contributory fault).

47. The EAT upheld the finding on the constructive dismissal claim, stating that the respondent's failure to deal with the claimant's grievance, and insistence that she return to an atmosphere which she found unfavourable, constituted a breach of the implied term of trust and confidence. The EAT also found that the ET had erred in rejecting the harassment and sex discrimination claims, and in taking into account the claimant's conduct post-dismissal (this was not permissible under section 122 or 123 ERA 1996).

48. In **Bedford v Pilgrims Group Limited [2010] (UKEAT/0106/10/SM)**, the claimant's employment was transferred to the respondent pursuant to TUPE. Between the date of transfer and the claimant's resignation a number of issues arose. First, the claimant claimed that due to a disparity between the annual leave arrangements of his pre and post-transfer employers, he had been deprived of some holiday entitlement. The claimant had also been the subject of two disciplinary hearings by the respondent as a result of his conduct. The claimant tendered his resignation and issued claims for constructive dismissal and unauthorised deductions from his wages. The ET found that the respondent's failure to pay holiday pay was a breach of contract and upheld the claimant's claim in this regard. However the tribunal found that it was a minor breach that did not entitle the claimant to repudiate the contract. The ET further held that the breakdown of the employment relationship was due to the claimant's behaviour rather than the respondent's.

49. The EAT endorsed the ET's reasoning on the holiday pay issue, stating:

> "This is not, in our judgment, a situation akin to the employer unilaterally reducing contractual pay; see, for example, **Cantor Fitzgerald International v Callaghan and Ors** [1999] ICR 639, particularly per Judge LJ as he then was at page 649C... as that case makes clear, that there is no absolute principle that non-payment of wages amounts to a fundamental breach of contract. On the particular facts of this case where there was no entitlement to pay in lieu of holiday prior to termination, the Tribunal, in our judgment, was entitled to find that any breach in relation to holiday pay was minor and was not repudiatory."

50. Further, the ET had been entitled to find that although subjectively the Claimant had lost trust in the respondent from the outset of his employment, a fair-minded employee would not have considered that his employer had broken the necessary bond of trust and confidence.

51. **Bailey v Alexander House Agencies Ltd [2011] (UKEAT/0181/10/DM)** is a recent example of the obligation imposed on employers (by virtue of the implied term of mutual trust and confidence) to address in a proper fashion complaints raised by an

employee. In this case, the claimant had been threatened by a colleague (S) during an incident at work. She was badly affected by S's actions and informed her manager to that effect. The incident occurred on a Monday morning. On Thursday of that week, the claimant was informed by her area manager (by text message) that S would be remaining in the same office as the claimant. S worked in another office on Tuesday and Thursday of that week, but came into the office on Wednesday and Friday. The distress of the situation caused the claimant to be signed off sick (due to stress) and she submitted a formal grievance. When the respondent failed to contact her or deal with her grievance, the claimant resigned and brought a claim for constructive unfair dismissal.

52. The tribunal accepted that S's actions were completely inappropriate but was not satisfied that the actions themselves amounted to a fundamental breach of the implied duty of trust and confidence by the respondent, as it found that the respondent had taken prompt action and moved S to another office on a temporary basis. The tribunal also found that the respondent had not breached the implied term of mutual trust and confidence by failing to deal with the claimant's grievance.

53. The EAT overturned the ET's judgment, substituting a finding of constructive unfair dismissal. The ET's conclusion that the employer "took prompt action and moved Darren to the Rainford office on a temporary basis so that he was not working alongside the Claimant" was unsupported by the evidence (of the parties' working arrangements) and perverse.

54. As regards the inadequacy of the employer's investigation into the claimant's grievance, the EAT described as "insupportable" the ET's finding that it was "not unreasonable" for the employer not to contact the claimant while she was on sick leave. The EAT stated as follows:

> "It might (after consultation with an employee) be reasonable to investigate the grievance after the employee is fit to return to work, although (if for example the subject matter of the grievance is the cause of her failure to return to work) this is not necessarily the case. But it is wholly

unreasonable for an employer not even to acknowledge a grievance and inform the employee of the manner in which it proposes to deal with it."

55. Finally, **Sawar v SKF (UK) Ltd [2010] (UKEAT/0355/09/DM)** is a recent case involving the inappropriate admonishment of a senior employee, which was held not to constitute a breach of the implied term of mutual trust and confidence. The claimant was a senior manager of the respondent. His company car developed problems and, instead of dealing with the leasing agent through his employer as he ought to have done, he dealt with the agent directly. The claimant's manager informed him on two occasions of the correct company procedure. Subsequently, whilst the company car was out of use, the claimant refused more than one offer of a substitute vehicle, apparently for trivial reasons. The claimant's manager sent him an email which was critical of his conduct and cautioned that further failure to follow company instructions would result in withdrawal of the benefit of the vehicle. The manager's email was copied to another senior manager, a junior employee who managed the leasing scheme and two employees of the car manufacturer.

56. The claimant felt that his manager's comments should not have been made to others as, in effect, part of a public dressing down of a senior employee; and raised a formal grievance. The resulting investigation did not find any discrimination but the claimant's manager was requested to prepare a letter of apology. In this letter (which was sent by email to the claimant and copied to the four individuals who had received the original email), the claimant's manager referred to the employer's investigation of the claimant's grievance and its outcome. The claimant considered that this letter compounded the adverse effects of the original letter and resigned.

57. The ET found that although copying the email outside the organisation was not best industrial practice, the employer's failings did not amount to conduct that was likely to threaten the relationship of trust and confidence.

58. The EAT upheld the ET's decision, holding as follows:

> "We can well understand, and indeed would expect, that in most cases where an employer gives a dressing down to an employee in front of others who are not employees of the company, or who are junior employees of the company, that the employee who is subject to the telling off will be entitled to regard that as a repudiatory breach by the employer. But that is to view the action in isolation. There may be circumstances in which that is not the case. Every case must necessarily turn on its own facts and be decided in its own context. That is why, despite our view as to what we would normally expect a Tribunal to find, we cannot say that this Tribunal was not entitled to come to the conclusion it did, having particular regard to the context. That context, as the Tribunal itself pointed out, included the fact that the senior employee who had exposed the Appellant to the criticism he did in the email of 14 March, was himself taken to task for it and required, effectively, to write an apology..."

59. It is worth noting, however, that this case was decided before the CA's (somewhat reluctant) rejection in **Buckland** of the proposition that a repudiatory breach of contract may subsequently be remedied by the defaulting party's conduct. The dividing line between, on the one hand, conduct which forms part of the overall "context" of the alleged repudiation (and may therefore support a conclusion that no breach of the implied term of trust and confidence took place) and, on the other, conduct which is an attempt to 'cure' a repudiatory breach which has already occurred (and which will therefore not be relevant to the constructive dismissal question, save in relation to the question of affirmation / waiver) is likely to give rise to considerable debate in tribunal and court claims.

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