Neutral Citation Number: [2023] EAT 155

Case No: EA-2022-000931-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 November 2023

Before :

HIS HONOUR JUDGE AUERBACH

MRS GEMMA TODD
MR STEVEN TORRANCE

- -

Between :

DR PAUL LEANEY

Appellant

- and -

LOUGHBOROUGH UNIVERSITY

Respondent

- -
- -

Mr David Flood (instructed by Fiona Bruce LLP) for the **Appellant**
Mr Jonathan Heard (instructed by Shakespeare Martineau LLP) for the **Respondent**

Hearing date: 23 November 2023

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JUDGMENT

SUMMARY

Unfair Dismissal; Constructive Dismissal

The claimant resigned and thereafter claimed constructive unfair dismissal, alleging a cumulative breach of the implied duty of trust and confidence. His claim was dismissed on the basis that, between the date of the last matter that could potentially be relied upon as a last straw, and the date of resignation, he had affirmed the contract. Having regard to the facts found, and the matters relied upon by the claimant as relevant to the question of whether there had been affirmation, the tribunal erred in its approach to affirmation. The matter was remitted to the same tribunal for fresh consideration of that question, in light of the facts found, and, as necessary, the further issues to which the complaint gave rise.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This is the claimant's appeal against the reserved decision of the employment tribunal, (Employment Judge Adkinson), arising from a full merits hearing at Leicester, dismissing his complaint of unfair dismissal. The claimant's employment with the respondent ended by resignation. His case was that he had been unfairly constructively dismissed, the respondent having conducted itself in a manner that amounted to a cumulative breach of the implied duty of trust and confidence. The tribunal determined what was the last incident that could be relied upon as a last straw for these purposes. That was on 29 June 2020. The tribunal did not determine whether the respondent was at that point in fundamental breach. The claimant resigned by giving notice on 28 September 2020. The tribunal concluded that by that point he had affirmed the contract. So he was not in any event constructively dismissed and his unfair dismissal claim therefore failed.

2. This appeal does not challenge the decision on the date of the last event that the claimant could rely upon as a last straw. The challenge is solely to the decision on affirmation and we are concerned solely with that question. Nothing we say should be taken to convey any view on whether or not there was a fundamental breach having regard to the facts which the tribunal found.

The Facts and the Tribunal's Decision

3. The tribunal's decision contains extensive and detailed findings of fact as to the chronology of events. However, for the purposes of this appeal much of the background and context which we take from those findings of fact can be summarised fairly broadly. We will set out the tribunal's findings and reasoning more fully when we come to the immediate lead-up to the resignation.

4. The claimant was first employed by the respondent in 1979 as a research assistant. He was a university lecturer from 1982. In 2019 he became a university teacher. He was a member of the

Respondent's Wolfson School of Engineering, of which the Dean was Professor Paul Conway. In addition to his teaching duties the claimant had roles at various times as sub-warden, and for many years warden, of halls of residence. At the relevant time Dr Manuel Alonzo had overall responsibility for halls of residence and was effectively, in respect of the claimant's warden role, his line manager.

5. In November 2018 there was an incident in which a student who lived in a flat within a hall of residence, of which the claimant was then the warden, referred to by the tribunal as student X, self-harmed. In the aftermath fellow students informed the claimant of the incident. He informed Dr Alonzo. He also arranged to meet student X and to meet with their fellow students. Subsequently a nurse from the university's health centre wrote to Dr Alonzo conveying a concern raised by student X about how, on student X's account, the claimant had handled the matter.

6. That led to a disciplinary investigation and report, which Dr Alonzo sent to the claimant in January 2019. He indicated that there was no formal case to answer, but that he had concerns about the claimant's judgment, which he wished to discuss with him informally. That led to the claimant raising an informal grievance about Dr Alonzo, which was investigated. The claimant then purported to appeal against the outcome, which was instead treated as a formal grievance. That was investigated and was partially, but not wholly, successful. The claimant appealed that decision in May 2019.

7. Mediation between the claimant and Dr Alonzo had been recommended; and there were exchanges in which the Vice-Chancellor directed the claimant to attend a mediation meeting. The tribunal found that, during this same period, and, despite the claimant in the exchanges maintaining his grievance appeal, and pressing for a panel date to be fixed in accordance with the applicable indicative timetable, no steps were taken to organise such a panel meeting.

8. In June 2019 the claimant resigned from the position of warden, referring to the failure to

convene an appeal panel. A letter was then sent in the name of the Director of Human Resources, Ms McKinley, also in June, accepting his resignation as warden, but referring at some length to the respondent having had various concerns for some time about his approach to the role.

9. After leaving the role of warden at the end of December, in January 2020 the claimant wrote to Ms McKinley reviewing the history of the matter, stressing the importance to him of his grievance appeal, taking issue with her June 2019 letter, and asking for evidence and particulars of the concerns referred to in it. She replied indicating that the time to discuss his role of warden had passed and suggesting they draw a line under the matter. That led to the claimant meeting the Vice-Chancellor, and then Ms McKinley writing in April, again encouraging him to draw a line under the matter. The claimant replied in May indicating that it was difficult to do so, in particular because student X had not done so, but concluding that he accepted that the time had come to end the dialogue. However, the tribunal accepted his evidence that this was one of his busiest times of the year, and he needed time to find some head space to consider how further to respond.

10. On 28 June 2020 the claimant contacted Professor Conway. On 29 June the claimant emailed him a note and they met over Teams. The claimant highlighted two areas of concern relating to his work detail and to the student X matter. Professor Conway indicated that the Wolfson School could make some mitigating arrangements in relation to his work detail, but that the student X matter was not within his remit, as it was a matter for the university. The tribunal accepted that the claimant decided at this point that there was no point in taking up the issue again with the university, as they were not going to help him.

11. The claimant contacted a solicitor on 1 July 2020. Thereafter there were negotiations between his solicitor and the university, but the tribunal had no evidence as to the substance. Nothing came from the negotiations. The claimant regarded the end of the negotiations as the last straw, and put the date as 7 September 2020. At [174] the tribunal accepted the following evidence

from him as to his state of mind at this point, as accurate.

> **"After all I had been though, I felt bereft of any support from my employer and after 40 years of successfully working with students, and fellow academic staff members, I had lost trust and confidence in my employer. With things gearing up with start of the new academic year I became more and more anxious about having to deal with students and contacted my (new) GP practice. My GP signed me off sick from 10th September 2020, with work stress and anxiety … This was my first day off sick ever, in over 40 years continuous employment" …**
>
> **"Having never been off sick at all in 40 years it just felt wrong to me, it did not feel that was the right thing to do, and it was solving nothing. The University never made any real effort to address the issues I was trying to raise and, in fact, blocked me at every stage possible causing the matter to be dragged out over a protracted period of time. The breakdown with my employer seemed complete and I had no alternative but to tender my resignation which I did by email on 28th September 2020 17:23.**

12. The tribunal went on to hold that, as it had no evidence as to what had happened in the negotiations, and in particular no basis to infer that there had been any misleading or underhand conduct by the respondent in them, there was no evidence on which it could accept the claimant's date for the last straw. It concluded that the last act that could be relied upon was on 29 June 2020. The tribunal also accepted that, had the claimant resigned before then, there would have been adverse impacts on his students, and it was reasonable for him to have put them first. But it continued:

> **"184. However, from 29 June or thereabouts those responsibilities had reduced, if not gone. There is of course a summer vacation when students are gone. I heard no evidence on this but believe it is not going too far to recognise he would still be working during the summer. However, I have no evidence to suggest that his responsibilities were such that he could not resign from 29 June 2020 without causing unfair and damaging disruption to others, e.g. to students."**

13. The tribunal stated that it did not follow from the claimant's having instructed solicitors that he was working under protest, and he did not specifically communicate to the respondent that he was.

14. After a self-direction as to the law, referring to some pertinent authorities and principles, the tribunal set out its conclusions in the following passage.

"***What was most recent act (or omission) that triggered or caused Dr Leaney to resign?***

202. Based on my findings of fact, the most recent event that triggered or caused Dr Leaney to resign was when Professor Conway told him he could not do anything about the things arising from the grievance or attempted appeal which arose out the incident with Student X.

203. Therefore the date of the last event is 29 June 2020.

204. It does not matter at this point if it is a breach of the implied term or not.

Has the employee affirmed the contract since that act?

205. Based on my findings of fact, I conclude that Dr Leaney affirmed his contract of employment after this event. My reasons are as follows:

206. Firstly as I set out in my findings of fact I do not accept that the conversations between him and the University through his lawyers from July through to the start of September are relevant. I have no evidence about what was discussed or about the nature of the communications. As I set out above, there is no evidence that the University misled Dr Leaney in some way to cause him to postpone his resignation or decision to resign.

207. In any case I do not accept that the fact that there may be negotiations ongoing alleviates Dr Leaney of what might be described as the obligation to make up his mind. On 29 June he knew he was out of options: The University clearly was not going to take the matter forward and Professor Conway could not help him. He had all the relevant information to enable him to be aware of the situation. He knew how head been treated. He had also received legal advice from 1 July or thereabouts. I am entitled to assume that the advice he received was competent and he was aware of the choices he had to make and the legal consequences and risks of making a choice. I make this assumption because I have heard no evidence to suggest otherwise.

208. I also reflect on the fact that delay itself must be seen in context , as pointed out in Buckland. However, unlike Buckland, the responsibilities that might have justified Dr Leaney choosing not to resign or to delay making his mind up do not apply by the 29 June 2020 since the factors he relied on no longer had such demands on him. In my view Dr Leaney's particular responsibilities and the dependence of innocent third parties (i.e. students) are not relevant after this time.

209. Therefore I conclude that Dr Leaney affirmed his contract of employment after 29 June 2020. In summary this is because:

> **209.1. of the delay between 29 June 2020 and his resignation on 28 September 2020 (nearly 3 months);**
>
> **209.2. no evidence about those negotiations and, in particular no evidence the University misled him;**
>
> **209.3. he did not work from 29 June 2020 under protest;**
>
> **209.4. being in receipt of competent legal advice; and**
>
> **209.5. the absence of any other particular circumstances that would justify**

> **such a delay in considering whether to resign or in tendering that resignation.**
>
> **210. I do not consider the fact there was a long notice period is relevant since the Employment Rights Act 1996 contemplates a resignation in response to a fundamental breach can be with or without notice and no argument has been advanced to suggest the fact the resignation was on notice is indicative of something that would undermine the claim.**
>
> ***Conclusions on last act and affirmation***
>
> **211. Applying *Kaur*, the claim must fail at this stage.**
>
> **Conclusion**
>
> **212. Because the claim fails at that stage, I do not need to go on to determine the other questions identified in *Kaur*.**
>
> **213. In the circumstances, the claim is dismissed."**

The Grounds of Appeal; the Law; the Arguments

15. The grounds of appeal are expressed as follows.

> **"1. Misapplication of the law. The Tribunal misapplied the law in finding that 3 months was not a reasonable period of delay before ii would amount to an affirmation.**
>
> **2. Failure to consider relevant matters. In deciding that the Claimant had affirmed his contract of employment before his resignation, the Tribunal failed to consider or weigh in the balance the relevant matter of his length of service, which was over 40 years, in deciding what period of delay was reasonable."**

The grounds were directed by Eady P to proceed to this full hearing.

16. At the hearing of the appeal today Mr Flood of counsel appears before us, as he did in the tribunal. Mr Heard of counsel succeeds Ms Hand of counsel who appeared in the tribunal for the respondent. At the start of the hearing an issue arose as to whether we could hear and consider Mr Flood's argument as to whether the tribunal had erred in its consideration, or lack of consideration, of a number of features which, on his case, were relevant to the question of affirmation. Mr Heard's position was that not all of these matters were in play and that permission to amend was required.

17. After hearing argument on this point, and for reasons we gave earlier, we concluded that

argument should be permitted across the range of points raised by Mr Flood, on the basis that, although the grounds of appeal might have been better set out, with more particulars and detail, ultimately these were all points that Mr Heard acknowledged he was in a position fairly to address today. We note that they were also all points which either were explicitly raised in the grounds, had been flagged up by Eady P when granting permission, or were otherwise points that had clearly been relied upon by the claimant in advancing his case, through Mr Flood, before the tribunal.

18. There was no dispute as to the guiding principles that emerge from the authorities in this area. In particular, starting with an observation of Lord Denning MR, in **Western Excavations (ECC) Ltd v Sharp** [1977] EWCA Civ 165; [1978] ICR 221, but then building on that in subsequent authorities, notably **Bashir v Brillo Manufacturing Co** [1979] IRLR 295, **W. E. Cox Toner (International) Ltd. v Crook** [1981] ICR 823, **Bournemouth University Higher Education Corporation v Buckland** [2010] EWCA Civ 121; [2010] ICR 908; and **Chindove v William Morrisons Supermarkets Plc**, UKEAT/0201/13. Some of these principles have also recently been reviewed by the EAT in **Brooks v Brooks Leisure Employment Services Ltd** [2023] EAT 137.

19. For our purposes the relevant general principles may be summarised as follows. The starting point is that, where one party is in fundamental breach of contract, the injured party may elect to accept the breach as bringing the contract to an end, or to treat the contract as continuing, requiring the party in breach to continue to perform it – that is affirmation. Where the injured party affirms, they will thereby have lost the right thereafter to treat the other party's conduct as having brought the contract to an end (unless or until there is thereafter further relevant conduct on the part of the offending party, a point discussed in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978; [2019] ICR 1).

20. The innocent party may indicate by some express communication that they have decided to

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

21. In particular, acts of the innocent party which are consistent only with the contract continuing are liable to be treated as evidence of implied affirmation. Where the injured party is the employee, the proactive carrying out of duties falling on him and/or the acceptance of significant performance by the employer by way of payment of wages, will place him at potential risk of being treated as having affirmed. However, if the injured party communicates that he is considering and, in some sense, reserving, his position, or makes attempts to seek to allow the other party some opportunity to put right the breach, before deciding what to do, then if, in the meantime, he continues to give some performance or to draw pay, he may not necessarily be taken to have thereby affirmed the breach.

22. In **Buckland** Jacob LJ recognised the difficult choice which the employee may often face in the following passage:

> **"54. Next, a word about affirmation in the context of employment contracts. 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."**

23. Although Mr Flood properly acknowledged that this observation may as such have been *obiter*, it was taken up and expounded upon by the EAT in **Chindove** in the following passage:

> **"26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test."**

24. Mr Flood's principal submissions on this appeal may be summarised as follows.

25. First, while the tribunal concluded that the claimant had affirmed the contract by the time of his resignation on 28 September 2020, it did not identify any particular conduct on his part, or date upon which affirmation occurred between 29 June 2020 and the resignation. It referred to things that were absent in this case, such as that the claimant had not specifically signalled that he was working under protest, nor was there any suggestion that he had been misled as to his position by bad advice. But nothing positive was identified by the tribunal. The tribunal, he submitted, had in reality relied principally simply on the length of the delay. This was clear, he submitted, particularly from [209].

26. Accordingly, submitted Mr Flood, the tribunal had made a principled error by focusing too much on the mere passage of time and failing to give sufficient or particular attention to particular circumstances and occurrences during the relevant period. These were as follows.

27. Firstly, there was the fact that there were communications going on between the claimant's solicitor and the university by way of negotiation. While the tribunal knew nothing about the

content, it knew that such negotiations were taking place for much of the period from around 1 July to 7 September 2020. Secondly, the tribunal knew that, after those negotiations ended, the claimant in short order went off sick on 10 September, never to return. Thirdly, the period in question coincided largely with the summer holidays, and the claimant's duties to his students would not resume until the start of the next term. These features were also said to be related, as the claimant's case was that, the negotiations having ended, this precipitated his going off sick and then resigning before the point was reached when he would have to engage with his students again.

28. Mr Flood further submitted that the tribunal had specifically erred, by failing to consider or give any weight to the claimant's length of service. He submitted that this was an error in itself, relying for that proposition upon **G. W. Stephens & Sons v Fish** [1989] ICR 324 (EAT). In the present case the claimant had worked for the respondent for some 40 years; and this very long period of service should, he argued, not merely have been weighed, but given great weight by the tribunal.

29. Mr Heard in reply reminded us of the well-established principles recently summarised by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016: that tribunal decisions should be read fairly and as a whole, without being hypercritical; that a tribunal does not need to refer to every feature of the evidence, nor every step of its reasoning more than is necessary to give a *Meek*-compliant decision; and that where the tribunal has given a correct self-direction as to the law, an appellate court should be slow to conclude that it has not gone on to apply the correct principles, unless that is clear from what it has said when setting out its conclusions.

30. In this case, submitted Mr Heard, the outcome on affirmation was not said to be, and could not be said to be, perverse. There is no predetermined period that any and every employee must be allowed in order to come to their decision, before being at risk of being held to have affirmed. The

tribunal had correctly directed itself as to the law, citing appropriately from **Western Excavating**, **Buckland**, and **Cox Toner**. On the face of it the tribunal had then applied those principles when reaching its conclusions at [205] to [210]. So there was no misapplication of the law.

31. The tribunal was plainly aware of the claimant's length of service. It referred in the course of its decision to his start date, his different roles over the years, including his own reference to 30 years' service as a warden. Further, in the reasons, an extract from the claimant's witness statement, in which he himself highlighted his 40 years' service, came just before the tribunal turned to consider the questions of the last act and the reason for delay. It could safely be inferred that the tribunal had this in mind when considering affirmation.

32. As to it being the holiday period, again it could be inferred that the judge took this into account, given that it was referred to in submissions and had been referred to by the tribunal in its decision earlier on, particularly when considering the last straw issue. Even if that was wrong, it would have made no difference to the outcome, given the judge's overall reasoning.

33. As to the sickness absence in the final period prior to the resignation, again the tribunal referred to this earlier in its fact-finding and was plainly aware of it. Whilst in **Chindove** it was said that the proposition that whether the employee has affirmed by continuing to honour his obligations under the contract has "nothing like the same force" in respect of a period where an employee is off sick, the authorities did not, submitted Mr Heard, go so far as to say that an employee who is off sick can never be taken to have affirmed. Further, in this case there was a period of more than two months before the claimant went off sick.

34. As to the fact that there were negotiations, the tribunal, he submitted, had properly found that this did not assist the claimant, because it was unable to make any finding about the substantive content; and it properly concluded that the mere fact of involving solicitors in the dispute was not necessarily to be equated with signalling that the claimant was working under protest.

Discussion and Conclusions

35. As to the general approach that the tribunal took, its self-direction as to the law did include references to authorities such as **Western Excavating**, **Cox Toner**, **Buckland** and relevant principles emerging from them. However, a number of general features of the decision give cause for concern as to whether the tribunal did take the correct approach in all respects to the question of affirmation.

36. First, we agree with the broad tenor of Mr Flood's submission that, while the tribunal in its conclusions made a number of points about things that did *not* happen in this case which, if they had, might have pointed away from affirmation, what the tribunal needed to focus on was the question of what conduct there had been during the relevant period that might or might not have amounted to an express or implied communication of affirmation.

37. In its self-direction as to the law the tribunal cited the *dictum* of Lord Denning MR in **Western Excavating** at [15]:

> **"Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."**

However, as later authorities such as **Bashir** and **Cox Toner** explain and clarify, it is not the passage of time, as such, prior to resignation that gives rise to affirmation, but conduct or other circumstances occurring in that period from which affirmation may be inferred.

38. The tribunal at [199] cited **Cox Toner** as authority for the proposition that "[m]ere delay by itself did not constitute an affirmation of the contract, but if the delay went on for too long it could be very persuasive evidence of an affirmation." The first part of that sentence is a fair summary, but the second part does not fully capture the point about the need to focus on conduct rather than the delay itself or its length. Whilst in its self-direction elsewhere the tribunal also noted, citing

Buckland, that, "the law looks very carefully at the facts before deciding whether there has really been an affirmation", we note that this observation came in the context of Jacob LJ's remarks that we have cited, including the immediately preceding observation that: "Ideally a wronged employee who stays on for a bit whilst he or she considers their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often."

39. Further, in its discussion at [207] the tribunal referred to "what might be described as the obligation to make up his mind" and at [209.5] to the absence of particular circumstances that would "justify the delay". These expressions are redolent of the unvarnished language used by Lord Denning MR, in **Sharp**. Indeed, in line with that approach the tribunal highlighted at [208] that, by contrast with what it took to be the facts in **Buckland**, the claimant did not after the end of June have ongoing obligations to students of the kind that would in the tribunal's view have "justified" his delaying making up his mind.

40. We interpose that Mr Flood observed that in **Buckland** this factual feature arose during the course of a long resignation period. But what this passage in any event conveys is that the present tribunal was clearly of the view that nothing by way of significant commitments to his students would have *prevented* the present claimant from resigning at any time after the end of June. That is once again to identify the *absence* of a factor in this case; but the fact that this would not have *prevented* the claimant from resigning does not by itself resolve the question of whether there was anything about his conduct or the circumstances during the relevant time window which should be treated as pointing to an express or implied affirmation, in circumstances where he had yet to resign.

41. We are conscious of the need not to take too hypercritical an approach to the tribunal's reasoning, including its summary of the law, or, it might be said, to the use of particular words or phrases, such as "justify". But this is an area where the doctrinal framing of the tribunal's approach

to the issue at hand can make a real difference to the outcome. In any event, even where a tribunal has correctly directed itself as to the law as far as that goes, it must still apply the law correctly in its dispositive reasoning. But we keep in mind that the starting point is that, where the self-direction as to the law is correct, it should be assumed that it has been applied correctly unless it is apparent that something has gone wrong. We turn, then, to the substantive reasoning and the substantive factual features said to be relevant, or potentially relevant, to the affirmation question in this case.

42. As to the approach to be taken to length of service, the claimant relied on **D. W. Stephens & Sons v Fish**. In that case the employee had worked for the employer since 1977. In January 1987 he was given a letter indicating that the employer could no longer continue to offer full time employment, offering him some part time work, but indicating that they were unable to offer any alternative full time work at the moment. The EAT considered that letter to be a repudiation, which the employee had accepted when he started his tribunal claim on 27 April 1987.

43. The Claimant relies on the following passage in the EAT's decision:

> **"Insofar as three months is more than one month, we take the view that somebody doing this sort of work who had been employed for the length of time that this employee had been employed is perfectly entitled to take time to consider his position."**

We note that the EAT went on to emphasise the reference in the January letter to the employer being unable to offer other full time work "at the moment" and observed that this held out the possibility that something might turn up – and waiting three months to see if it did was not then unreasonable.

44. Mr Flood acknowledged in his submissions that he was not suggesting that in some way there is a broad rule of thumb proportionate relationship between the length of service and the length of time that it is reasonable for an employee to take when deciding whether to accept a repudiatory breach, so that, the longer the service, the longer the employee can reasonably take to

decide. But he said, nevertheless, that this and other authorities indicate that it is a relevant factor to consider.

45. It seems to us that the authorities do make the point very broadly that an employee with long service might reasonably need longer to make up his mind. But the matter is fact sensitive. As discussed in **Chindove**, the tribunal needs to consider the nature of what is at stake for the particular employee in the particular case and the practical implications of the decision whether or not to resign for that particular employee. In a given case lengthy service might provide the context for other more specific factors, such as whether the employee would be abandoning a secure and stable job that would be difficult to replace, or whether resigning would entail the loss of valuable benefits that had been built up over time, and would be hard to replicate.

46. In the present case the submissions to the tribunal placed reliance on the fact that the claimant had over 40 years of service but did not point to any further particular circumstantial factors arising from that. We agree with Mr Heard that the tribunal had on board the fact that the claimant had worked for the respondent for some 40 years, as such. This was not a case where he was saying that it had taken him longer to make up his mind whether to resign, because of anything specifically linked to the fact that he would be giving up a job with that length of service under his belt. That said, we think it would have been better had the tribunal said something specific about whether it had taken into account that, for someone with the decades-long service that this claimant had, resigning might involve particular upheaval and distress; and that he might reasonably have needed to take some appreciable time to come to such a decision. Nevertheless, we might have hesitated as to whether to uphold this appeal were this the only point of challenge. However, we turn to other aspects.

47. First, we note that it might be said that it could reasonably be assumed that, given the period for which the claimant continued in employment prior to resigning, he had also continued to be

paid. But, if the tribunal did assume that, it did not say so, still less did it say that it regarded the claimant continuing to be paid as, by itself, sufficient in all the circumstances of this case to amount to affirmation. As to the possibility that the claimant had affirmed by continuing to do work and carry out duties for the respondent, again, the tribunal does not say that this was its conclusion. It plainly did give consideration to the implications of the period in question coinciding with the summer holidays in *one* respect which we have already mentioned, being the discussion of the fact that the claimant's ongoing term-time obligations to students did not continue after the end of June, and so would not have *inhibited* him from resigning thereafter. The observation at [184], that it could be inferred that he was still working during the summer, came within that context, the tribunal's point there being that any work he may have been doing then would not, in the absence of such ongoing student responsibilities at that time, be such as to reasonably inhibit him from resigning.

48. But what the tribunal did not indicate in its decision that it had considered or found, was that the claimant was, during the period in question, doing work of such a nature or significance that his continuing to do such work *itself* constituted affirmation. Indeed, as the tribunal noted at [184], it did not have any evidence about what, if any work, he specifically was doing, although it inferred that he must have been doing something.

49. As discussed in **Chindove**, whether the employee is in fact working, or doing so to any significant extent, is obviously, in our view, a potentially relevant consideration in this context. We would add that this is so particularly in the context of an academic university job where it is being said, at least, that what activities the employee engages in will be distinct and different during the summer vacation, compared with during term time. The tribunal does not appear to have considered the significance of the holiday period through that particular lens.

50. We turn then to the fact, as found, that the claimant was signed off sick for about the last

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

51. We also consider that the tribunal gave insufficient attention to the potential significance of the fact that there were negotiations taking place during much of the period prior to the claimant going off sick, and its own finding that he did so following the end of those negotiations. While there is no challenge before us to the conclusion that the negotiations could not be relied upon as a last straw, the question of the significance of this aspect for the issue of affirmation was a distinct matter. The fact that the tribunal did not know specifically what the negotiations were about was properly treated as decisive of the former issue, but we do not think it was correct to treat the fact that there *was* a period of negotiations as, therefore, irrelevant to the distinct issue of affirmation.

52. The tribunal properly noted that there was no evidence that the claimant had specifically indicated that he was reserving his position pending the outcome of the negotiations; and it made the point that involving solicitors in a dispute is not necessarily always to be equated with working under protest. Nevertheless, it was clear that his position was that the point of the negotiations was that they might provide some resolution to his concerns, whatever that might be; and that it was the negotiations coming to an end without any resolution which triggered his going off sick and then resigning.

53. In oral submissions Mr Flood said that the parties obviously were not talking about the weather. Those were his words, not ours, but in the view of the judge and industrial members of the

present panel, they capture a feature of the facts found in this case that the Tribunal failed to grapple with sufficiently when considering the question of affirmation. As discussed in **Brooks** at [30], where an employee postpones resigning in order to pursue a contractual grievance procedure which might lead to a resolution of their concern, that will generally not amount to an affirmation. Rather, the employee should be treated as continuing to work and draw pay for a limited time while giving the employer the opportunity to put matters right. So, in the present case, some consideration needed to be given to whether, although he did not say in terms that he was working under protest, the claimant could be said to have been working on while he allowed the respondent some opportunity to try to address his concerns in some way through these negotiations, before deciding whether to resign.

54. We come finally to Mr Heard's point by reference to **Greenberg**. The issue here is not about whether the tribunal needed to refer to evidence to which it did not refer. The issue is about whether it took the correct underlying approach to the consideration of whether there was affirmation, because it relied too heavily on the *pure* fact of delay, without sufficient or clear consideration of factors said to be relevant to the circumstances during the period in question, and whether the claimant, by express conduct, or impliedly, affirmed.

55. Further, the claimant clearly was, as can be seen from the written closing submission of Mr Flood to the tribunal below that was in our bundle, relying on all of the features that we have discussed: the fact that the period coincided with the summer holidays during which, it was submitted, he was not doing any significant work; the fact that there were negotiations for much of this period during which there was some sort of attempt at resolution; the fact that this was followed for the remainder of the relevant period by the claimant being off sick; and his very long length of service. These were the pillars of the claimant's case on affirmation. Whilst a decision does not need to address and deal with every last or detailed point of submission made to the tribunal, it does

need to address the essential elements of a party's case or features that are plainly, or at least arguably, potentially relevant to a correct application of the law to the issue that it is deciding.

56. For all of these reasons, we conclude that on this aspect this tribunal did err in law, and therefore this appeal is upheld.

Outcome

57. Having given our decision allowing this appeal, we have heard further submissions as to consequential steps. Mr Flood submitted that we have all the necessary facts found in the tribunal's existing decision to enable us to take a fresh decision as to whether there was affirmation in this case. He indicated that he would not go so far as to submit that, applying the law to those facts, there was only one correct answer to that question that could be given; but he said he would consent on behalf of his client to our re-taking the decision on the tribunal's behalf. Mr Heard indicated that he did not necessarily accept that all of the facts needed had been found. But, in any event, his client would not consent to our re-taking this decision. That being so, we are bound in any event, applying the guidance in **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920, to remit the matter to the tribunal.

58. Mr Flood invited us to remit the fresh decision on affirmation to a different judge. Depending on that decision next time around there might then be further things for the tribunal to decide, which he was content could, if that arose, then be decided by Judge Adkinson. Mr Heard's position was that we should remit all and any remaining issues to be decided by Judge Adkinson.

59. Our conclusions on this aspect are as follows. In principle there is much to be said for remission being to Judge Adkinson, if available, to deal with all or any points arising. The judge has made very full and detailed findings of fact about the matter, and, it can also be assumed, will be familiar with, or reminded of, the evidence which he heard over the course of a multi-day

hearing, and have that advantage over another judge.

60. Depending on which way the decision on affirmation goes, other matters such as whether there was or was not a fundamental breach are, as it were, unfinished business, which ordinarily would fall to the same judge, and, indeed, dare we say, might in the alternative have been dealt with by Judge Adkinson as part of his original decision. It would also be novel and unusual to remit one part of what remains to be decided by a different judge, but with any other further decisions then required, to be taken by the original judge who heard the matter. That is quite apart from the practical complications and delays to which such an arrangement would be liable to give rise.

61. We asked Mr Flood why whatever needs to be decided should not, therefore, simply go back to Judge Adkinson. Very straightforwardly, he replied that it was hard to say why not. We appreciate that what he did not say, is that there may be a concern, recognised in **Sinclair, Roche & Temperley v Heard** [2004] IRLR 763 as sometimes arising, as to whether the judge would be able entirely to put out of his mind the previous decision, and to come to the matter afresh. If so, we do not share that concern. While we express no view about any aspect of the remainder of the decision, that was not the subject of this appeal, we note that it was not suggested to us by either side that there is anything in the decision as a whole to indicate that the judge's approach was other than conscientious.

62. Further, the judge will, when it comes to re-visiting the question of affirmation, have the benefit of the guidance of the decision we have given this afternoon; and the parties will have the opportunity of course to make submissions, including, in light of our present decision, as to the approach that the judge should now take, and as to the conclusions that each of them will contend he should reach, on fresh consideration. He can be trusted to follow our guidance and to reach a conscientious, fresh decision on the matter, having heard the parties' rival submissions.

63. Both counsel were agreed that it would be neither necessary nor appropriate for the tribunal

to hear or receive any fresh evidence on this matter; and we leave to the tribunal and to the parties' submissions, whether it is invited to make any further findings of fact for the purposes of re-taking the affirmation decision, drawing on the existing evidence that was presented at the previous trial.