Appeal No. UKEAT/0439/12/GE

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 19 April 2013 & 8 July 2013
Judgment handed down on 4 February 2014

Before

HIS HONOUR JEFFREY BURKE QC

MR P GAMMON MBE

MRS L S TINSLEY

MS S GEBREMARIAM — APPELLANT

ETHIOPIAN AIRLINES ENTERPRISE T/A ETHIOPIAN AIRLINES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER ROBSON (of Counsel) Instructed by: Blue Circle Lawyers 59 Russell Square London WC1B 4HP
For the Respondent	MR JAMES WYNNE (of Counsel) Instructed by: Bates Wells & Braithwaite LLP 2-6 Cannon Street London EC2M 6YH

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

SEX DISCRIMINATION – Inferring discrimination

There were multiple points in this appeal in which the Claimant appealed against the rejection of her claims for constructive unfair dismissal, direct discrimination, indirect discrimination and detriment by protected disclosure, and the Respondent cross appealed.

Held

(1) On the cross appeal, the so-called "**Johnson** exclusion zone" did not apply to a case of constructive dismissal based on fundamental breach in the redundancy selection process when the Respondents had withdrawn their notice of dismissal as a result of the Claimant's appeal, but the Claimant then resigned.

(2) The Employment Tribunal had erred in law in finding that the withdrawal of the notice of dismissal cured their breach: see **Buckland** (2010 IRLR 45); but

(3) The ET had not considered or made a finding as to whether the Claimant had affirmed the contract before she resigned; remission necessary.

(4) Of the 5 protected disclosures relied upon, which the ET had not addressed in their reasons, the third to fifth either made only allegations (see **Geduld** 2010 ICR 325) or did not lead to any detriment; but the first and second could not be disposed of in that way; remission necessary.

(5) The ET had permissibly found that the Respondents did not apply the PCP on which the indirect discrimination claim was based.

(6) As to direct discrimination, the ET had adequately considered the issues and were entitled to go, where they had, directly to the "reasons why" question. Their reasoning should not be subjected to an "overly critical analysis"; see **Hewage** (2012 IRLR 70).

HIS HONOUR JEFFREY BURKE QC

The history of the appeal

1. The Claimant, Ms Gebremariam, brought before the Employment Tribunal, sitting at Watford and presided over by Employment Judge Henry, a number of claims against her employers, Ethiopian Airlines ("the Respondents"). By their judgment, sent to the parties on 23 May 2012, the Tribunal dismissed all of her claims. She now appeals against the Tribunal's conclusions that:

(1) she had not been constructively unfairly dismissed

(2) she had not been the victim of direct discrimination on the grounds of sex and/or maternity/pregnancy

(3) she had not been the victim of indirect discrimination on the grounds of her age

(4) she had not suffered detriment by reason of any protective disclosure falling within section 43B of the **Employment Rights Act 1996**.

2. The Respondents by way of cross-appeal put forward two arguments which, it is their case, set out an answer to her unfair dismissal claim, namely that:

(1) if the Tribunal did not find that the Claimant had affirmed any breach of the implied term of trust and confidence on which she relied, the Tribunal ought so to have found; and

(2) the breaches of contract on which the Claimant relied fell within what is currently known to employment lawyers as the "**Johnson** exclusion zone", which we will later explain.

3. We began to hear these appeals on 19 April 2013; we make no criticism that the submissions of Mr Robson, counsel for the Claimant, finished so far into the afternoon of that day that it was clear that there were no prospects of completing the argument without an

adjournment; we therefore agreed with Mr Wynne, counsel for the Respondents, that he could start his submissions when we resumed the hearing of the appeal, as we did on 16 July. After completion of the submission on that day, we reserved judgment – which we now give.

The facts

4. We take the facts, save as specifically stated, from the findings of the Tribunal. The history is a lengthy one; we have summarised it so far as practicable.

5. The Claimant was employed by the Respondents at their office in Chiswick, West London, as a customer service reservation and ticketing agent from June 2006. The office was relatively small; the headquarters of Ethiopian Airlines is, of course, in Addis Ababa, Ethiopia.

6. In September 2008 the Claimant commenced a period of maternity leave.

7. At about the same time another employee, Miss Zewdie, resigned; a Miss Raman was taken on in her place on a six-month fixed-term contract; her subsequent application for permanent employment was turned down by headquarters; at the time headquarters were considering establishing an offshore call centre to handle the enquiries of English-speaking customers and were reluctant to recruit (save, by inference, on a temporary basis); and in February 2009 Miss Raman left.

8. Meanwhile in December 2008 a Miss Abebe, who had worked for the airline in Addis Ababa but had moved to London, was taken on by the Respondents, again on a temporary basis. She was taken on because Miss Zewdie had left and the Claimant was on maternity leave. In July 2009 Miss Assefa, the area manager for UK and Ireland, asked

permission from Addis Ababa to take Miss Abebe on a permanent basis; but this application was turned down because the area was overstaffed; there had been a number of redundancies in the London office in 2008 and 2009. As a result, Miss Abebe left; the Claimant was still on maternity leave; the London office was short-handed.

9. A previous employee, Mr Bilgrami, who had in 2004 been dismissed because he had failed to provide sickness certificates to verify an absence, according to Miss Assefa's witness statement - the Tribunal made no finding about this – had been seeking re-employment. The Respondents had an urgent need and called on him. He was therefore employed on a short-term contract, from August to November 2009; that contract was extended to the end of January 2010.

10. On 22 September 2009 the Claimant returned to work after a year, less a few days, of maternity leave; but in December 2009 she informed the Respondents that she was again pregnant and that her second period of maternity leave was due to start in April 2010. For that reason Miss Assefa asked headquarters to make Mr Bilgrami's position as a reservation/ticketing agent permanent; and on this occasion headquarters approved. The Tribunal found that the history which we have, thus far, outlined, lay at the heart of the Claimant's discontent, she taking the view that female employees i.e. Miss Raman and Miss Abebe had not been granted permanent contracts but Mr Bilgrami had, and believing that there had been discriminatory treatment in ignorance of the fact that, in July 2009, Miss Assefa had specifically sought to obtain permission for Miss Abebe to be made permanent. It is material to point out that the Claimant was employed on a permanent contract. It is clear, though, that she believed that the Respondents were prejudiced against employees such as herself of child-bearing age.

11. Before the Claimant disclosed her second pregnancy, there were what the Tribunal found to be discussions between Miss Assefa and the Claimant about child-rearing and absent partners, both the Claimant and Miss Assefa having husbands who worked abroad. The Claimant's evidence was that this discussion was more pointed and involved questions from Miss Assefa as to the Claimant's intentions as to further children and further maternity leave, thus indicating an adverse attitude to employees of child-bearing age; but that account of those discussions was rejected by the Tribunal in favour of Miss Assefa's more neutral account.

12. The next episode arose from the Claimant's request in December 2009 for a risk assessment related to her pregnancy. The Tribunal went through the facts relating to this episode in some detail; they found that the Claimant's job was relaxed and not stressful and that she was not in her job exposed to physical danger; there was a rest room to which she had access. It is clear from the contemporary documents that the Claimant believed (or had been advised) that she had a right in law to such an assessment although Mr Robson on her behalf accepted during the course of his submissions that she did not. It is also clear that the Respondents had no experience of risk assessment procedures and did not know what to do in the face of the Claimant's request. They eventually obtained a form from an industry body called "Airline Personnel Discussion Group" in February 2010; and the Claimant was informed that her immediate line manager, Mr Summers, would be responsible for carrying out the assessment which she sought. Mr Summers discussed it with the Claimant, asking her to go through the form and sign it. Her response was that there was no value in her doing so because she was to commence maternity leave in nine days' time. After a passage of emails, set out in the Tribunal's judgment, it was decided that, if the Claimant did not want to continue with the risk assessment, it should be taken no further. On 24 March Mr Summers apologised for the delay in the process and explained that it arose from the Respondent's ignorance of the procedure. The Claimant responded in these terms:

"It is sad to see the legal requirement has been breached again in this day and age. Anyway thank you for looking into the matter. I really appreciate for all your effort."

The risk assessment thus fell by the wayside; the Claimant started her maternity leave on 6 April 2010. Because of maternity leave and illness she had only worked about 20 days since the beginning of December 2008.

13. At the end of July 2010 Miss Dias, the London office's senior secretary, gave notice of her retirement at the end of September. The Respondents decided to create a new post of administrative assistant to carry out PA, senior secretary and other administrative functions. The new post was not advertised internally; recruitment for it was carried out by an external agency; by this process a suitable candidate was identified but could not start immediately; and by this time headquarters had decided to go ahead with the call centre project and put a hold on new recruitment by the Respondents.

14. Having seen candidates for that post arrive for interview, Mr Bilgrami enquired about it and was offered the opportunity to act up in the new post for two months; no replacement was sought during that period; after two months he had done so well that he was offered the new post on a permanent basis; but his previous substantive post was found to be unnecessary to service needs and was deleted. In effect he moved from one substantive post to another without any addition to the staff as a whole.

15. The history moves forward to 8 April 2000 when the Claimant was due to return to work. She resigned on 23 May, six weeks later. The Tribunal made, in summary, the following findings as to what happened in that period:-

(1) The Claimant came to work on 8 April, three hours late. She asked Mr Summers for flexible working arrangements. She put in a written request to work from 9.00 to 4.30 (her contractual hours were 9.00 to 5.30) but with the ability to start at 10.00 and to take extended lunch breaks subject to making up for lost time on other days. It was her case that she had put in that written request on her own initiative; the Tribunal found that Mr Summers had advised her to do so.

(2) Mr Summers agreed to modified hours from 9am to 4.30pm, with no lunch break and occasional starts at 10am finishing at 5.30pm by prior agreement. In his letter in which he set out that agreement he said "I do hope this will assist in juggling family life."

(3) Meanwhile, Miss Assefa had been in Addis Ababa discussing how the London office should deal with the decision which had been taken by headquarters in February 2011 to activate the call centre, as a result of which calls to London ticketing agents had decreased by April 2011, as compared with 2010, from 5,925 to 2,533. It was decided to reduce the reservation/ticketing agents from two to one; and Miss Assefa considered the position of the two such agents, the Claimant and Miss Hailemariam. She decided that, of those two agents, Miss Hailemariam had 13 years' service with the Respondents, greater experience and a range of skills, but that the Claimant had limited experience. She therefore wrote to the Claimant informing her that she would be made redundant with effect from 30 June.

(4) The Claimant, with the assistance of a solicitor, put in an appeal; in her letter of appeal she put forward a number of arguments, which included lack of consultation, absence of a proper selection procedure, failure to consider alternatives, and that the Respondents were "favouring against young women in favour of male worker" and that she had been subjected to a maternity-related detriment by being made redundant.

(5) A few days later she added a further point to her appeal letter of 9 May by an email dated 16 May. She said that she had made a protected disclosure on 25 March 2010

(when she had sent to Mr Summers an email complaining that there had been a breach of a "legal requirement" that there should be a risk assessment) and that the company had acted in an age discriminatory manner and victimised her by using LIFO as a sole selection criterion. Mr Robson accepted that these letters did not form part of any formal step under a grievance procedure but were put forward in support of her appeal against the dismissal.

(6) On 18 May Miss Assefa replied to the letter of appeal, saying:

> **"We have now looked at the matter and I am pleased to inform you we uphold your grievance and thereby freeze the redundancy. The consultation process will start shortly and our managers – administration will be in charge of the consultation process."**

(7) The Tribunal found that the exchange of emails which followed set out the Claimant's rationale for her resignation on which her complaint of constructive dismissal was based. Summarising those emails will not provide their full flavour. The Employment Tribunal set them out at paragraphs 64 to 68; we will not repeat them but refer the reader to those paragraphs in the Tribunal's judgment.

The Tribunal's judgment

16. The Tribunal, in their conclusions, addressed, first, the Claimant's case that the Respondents were opposed to appointing females of child-rearing age to permanent positions; that case was the principal thrust of the Claimant's claim that there had been discrimination; the Tribunal found at paragraph 77 as fact that the claim was without substance; the Respondents had requested that Miss Abebe be appointed to a permanent post in July 2009, a fact of which the Claimant had been unaware until the Tribunal hearing.

17. At paragraph 78 the Tribunal addressed the Claimant's case that the appointment of Mr Bilgrami to the administrative assistant role constituted discrimination or was evidence in

support of the case to which we have referred in the previous paragraph. They concluded that that event did not constitute the appointment of a permanent post of a male in preference to a female because at that time Mr Bilgrami was already a member of the permanent staff.

18. The Tribunal then turned to the Claimant's complaints about the Respondent's reaction to her request for a risk assessment; at paragraph 79 they held as a matter of law, by reference to the decision of the EAT in **O'Neill v Buckinghamshire County Council** (2010 IRLR 384) (HHJ Ansell presiding) that the Respondents were not under any obligation to carry out such a risk assessment; at paragraph 80 they found that the Respondents did not know what to do when the Claimant asked for an assessment and that, when they found out what to do, there was little opportunity to carry out an assessment because the Claimant was sick or on leave and that they had not in that respect acted unreasonably or in breach of any contractual terms.

19. As to flexible working, the Tribunal said at paragraph 81:

> **"Turning to the claimant's claim as to the respondent's failure to grant flexible working, being an act of discrimination, the tribunal has some sympathy for the claimant's claim, but when one considers the factual matrix and the circumstances of Mr Summers asking the claimant to put her request in writing, which request was then acceded to, this tribunal does not find facts upon which we could conclude that the claimant had been treated less favourably because of her sex or age, so as to shift the burden to the respondent."**

20. As to the making of the Claimant redundant, the Tribunal at paragraphs 82 and 83 said:

> **"82. In giving consideration to the respondent making the claimant redundant, there is no question that a fair procedure was not followed for the purposes of s.98 of Employment Rights Act. However, that as may be, it is not challenged that the respondent's process of making redundancies without due process, was the modus operandi of the respondent on making staff redundant, as had operated on previous occasions in 2008/9. As such, this tribunal does not find support to the Claimant's contention that, the reason for the respondent's action in following the process they did, a process which was shown to the tribunal to be their norm, was on account of the claimant's sex or age.**
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> **83. Despite this finding, this does not in itself determine that considerations as to age and/or sex were nevertheless not at play, for which this tribunal has given consideration to the evidence of Miss Assefa, as to the process she followed in making a selection between Miss Hailemariam and the claimant, that this tribunal is satisfied that the respondent has, on the claimant adducing such evidence as regards the redundancy, from which an inference could be drawn of primary facts, as to the decision of Miss Assefa, being on grounds of sex**

> **and/or age, by reference to LIFO considerations, this tribunal is satisfied that Miss Assefa gave consideration not to questions of LIFO, but to the length of service as regards experience and ability, pertinent to the needs of the service, such that LIFO considerations, as a fact, was not considerations; but experience and ability, which factors were not on grounds of sex or race."**

21. The Tribunal turned to the constructive dismissal claim at paragraphs 85 to 90. At paragraph 85 they found that there had been no breach of contract on the Respondent's part prior to the redundancy notice. They then said this about the redundancy process:-

> **"86. Of the redundancy process, this tribunal finds that, there was a breach of the implied term of trust and confidence and of the claimant's entitlement to statutory protection under s.98 of Employment Rights Act. However, on the claimant presenting an appeal there against, which appeal was accepted, and the redundancy process to be aborted and commenced afresh, this tribunal can find nothing by the actions of the respondent that would then call into the question the genuineness of that action, despite the claimant's belief, which this tribunal finds to have been misconceived.**
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> **87. As regards the redundancy itself, the process providing for an appeal, which had been effective, this tribunal can find no basis on which the claimant's loss of trust and confidence in the respondent could thereafter [have] been maintained.**
>
> **88. Whilst the claimant has argued that, by the respondent acceding to her appeal without further, this was shocking, the claimant having stated '*I am stunned, shocked and angry at what you have written*' this tribunal does not find evidence to support such an opinion. The subject of the claimant's appeal was as regards the redundancy process, her selection and as to alternative employment not having been considered, such that the bullet points there raised, by that letter, must be read in the context of the subject of that letter, which on such a reading thereof, it is evident that the subsequent decision, upholding the claimant's appeal, can only relate to the claimant's redundancy; other acts to which the claimant has argued for, before this tribunal, cannot be read into her letter of appeal or the decision there from."**

22. They therefore concluded that there had been no fundamental breach of the contract of employment which entitled the Claimant to terminate that the contract and, therefore, there had been no constructive dismissal.

Constructive dismissal: ground 1

23. The Tribunal's conclusions on the constructive dismissal issue can be summarised as follows:-

(1) The events of which the Claimant complained prior to the redundancy process did not amount to a breach of contract on the Respondent's part.

(2) The redundancy process did amount to a breach of the implied term of trust and confidence and to a breach of the Claimant's entitlement under section 98 of the 1996 Act; but

(3) The effect of her appeal and the aborting of the redundancy process as a result was that there was no longer a fundamental breach of contract which entitled the Claimant to bring the employment to an end.

24. Mr Robson put forward two lines of attack upon these conclusions. The first was, in summary form, that the Tribunal had erred in law in concluding that the Respondents, by withdrawing the dismissal of the Claimant, had cured the breach of the implied term of trust and confidence which the nature and manner of the dismissal had created; and, secondly, the Tribunal failed to consider, in deciding that the effect of the appeal was to prevent the Claimant from relying on the Respondent's breach, the complaints made by the Claimant in her appeal letter on 9 May and the follow-up email of 15 May 2011; the Respondents had disregarded those complaints and thereby committed a further breach or an act which amounted to a last straw which entitled the Claimant to bring the contract of employment to an end.

25. Mr Wynne, on behalf of the Respondents, in response to those arguments, submitted that, as to (1), the Tribunal did not find that the withdrawal of the dismissal cured the preceding breach; the Tribunal should be taken to have decided that by presenting an appeal and thereby demonstrating an intent to continue the contract of employment, the Claimant had affirmed the contract; and as to (2) the Tribunal had found as fact that the Respondent's response to the appeal related to the redundancy dismissal notice only and did not constitute any act in relation to the Claimant's other complaints which could have entitled her to bring the contract of employment to an end.

26. The Respondent's cross-appeal relates to constructive dismissal. It has two limbs; they are:-

(1) If the Employment Tribunal did not conclude that the Claimant had affirmed the contract, they should have so concluded.

(2) In any event, the breaches of the implied term of trust and confidence found by the Tribunal occurred as part of the dismissal process; but the effect of the decision of the House of Lords in **Johnson v Unisys** [2001] IRLR 279 is that a breach of contract cannot be relied upon if it occurs in relation to the dismissal process; the Claimant's case fell within the area which in **Johnson** was held to be one in which claims based on breach of contract could not be made. That area has been described as the "**Johnson** exclusion zone"; for that reason the constructive dismissal claim should in any event have failed.

27. It is to be noted that the Claimant has not appealed against the Tribunal's conclusion that there was no breach of the implied term of trust and confidence prior to what has been described in this case as the dismissal process.

The Johnson exclusion zone

28. It may be thought logical to consider this aspect of the cross-appeal first. If a **Johnson** exclusion zone applies to this case, whether the Tribunal did or did not find that the breach arising from the dismissal process was cured or did or did not find or should have found that the Claimant had affirmed any such breach would be irrelevant. The Claimant would not be entitled to rely upon any such breach and would be left with her case that there had been further breaches arising from the Respondent's failure to respond to the other complaints raised in her appeal letter and email.

29. In **Johnson** the claimant sought damages for, *inter alia*, breach of the implied term of trust and confidence which consisted of his dismissal without a fair hearing and in breach of the employer's disciplinary procedure. His claim was struck out by the county court on the basis that a common law claim for damages could not be brought based on the manner of dismissal; any such claim had to be put forward as a statutory claim for unfair dismissal to the Employment Tribunal and fell to be considered under the provisions of section 98 of the 1996 Act and the following sections of the relevant part of that Act. The Court of Appeal upheld that decision, as did the House of Lords. In his speech, with which Lords Bingham and Millett expressly agreed, Lord Hoffmann said, at paragraphs 45 to 47:-

> **"45. In this case, Mr Johnson says likewise that his psychiatric injury is a consequence of a breach of the implied term of trust and confidence, which required Unisys to treat him fairly in the procedures for dismissal. He says that implied term now fills the gap which Lord Shaw of Dunfermline perceived and regretted in *Addis's* case (at pp 504-505) by creating a breach of contract additional to the dismissal itself.**
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> **46. It may be a matter of words, but I rather doubt whether the term of trust and confidence should be pressed so far. In the way it has always been formulated, it is concerned with preserving the continuing relationship which should subsist between employer and employee. So it does not seem altogether appropriate for use in connection with the way that relationship is terminated. If one is looking for an implied term, I think a more elegant solution is McLachlin J's implication of a separate term that the power of dismissal will be exercised fairly and in good faith. But the result would be the same as that for which Mr Johnson contends by invoking the implied term of trust and confidence. As I have said, I think it would be possible to reach such a conclusion without contradicting the express term that the employer is entitled to dismiss without cause.**
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> **47. I must however make it clear that, although in my opinion it would be jurisprudentially possible to imply a term which gave a remedy in this case, I do not think that even if the courts were free of legislative constraint (a point to which I shall return in a moment) it would necessarily be wise to do so. It is not simply an incremental step from the duty of trust and confidence implied in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20. The close association between the acts alleged to be in breach of the implied term and the irremovable and lawful fact of dismissal give rise to special problems. So, in *Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1, the majority rejected an implied duty to exercise the power of dismissal in good faith. Iacobucci J said, at p 28, that such a step was better left to the legislature. It would be 'overly intrusive and inconsistent with established principles of employment law'.**

30. Lord Hoffmann continued, at paragraphs 55-58, as follows:

> **"55. In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject-matter of a compensatory award....**

56. Part X of the Employment Rights Act 1996 therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit.

57. My Lords, I do not think that it is a proper exercise of the judicial function of the House to take such a step. Judge Ansell, to whose unreserved judgment I would pay respectful tribute, went in my opinion to the heart of the matter when he said:

> **'there is not one hint in the authorities that the...tens of thousands of people that appear before the tribunals can have, as it were, a possible second bite in common law and I ask myself, if this is the situation, why on earth do we have this special statutory framework? What is the point of it if it can be circumvented in this way? .... it would mean that effectively the statutory limit on compensation for unfair dismissal would disappear.'**

58. I can see no answer to these questions. For the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of Parliament that there should be such a remedy but that it should be limited in application and extent."

31. Subsequent decisions have established, however, the principle that the exclusion zone described by Lord Hoffmann must be confined within narrow boundaries. In **Eastwood v Magnox** [2005] 1 AC 503 the House of Lords considered claims by three employees; two alleged that they had been the victims of a deliberate course of harassment by other employees using the dismissal process and had, by the time of the disciplinary process, as a result of which each was dismissed, suffered psychiatric injury. They had been dismissed after a disciplinary process which they claimed had been improperly conducted after inadequate investigation. All three claimed common law damages in addition to their unfair dismissal claims; the first two claimants lost their claims at first instance and in the Court of Appeal on the basis that their claims fell within the **Johnson** exclusion zone; the third was found to fall outside that zone.

32. In the House of Lords Lords Hoffmann, Rodger, and Brown agreed with the speech of Lord Nicholls, who explained the *ratio* of **Johnson** in these terms at paragraph 10:-

> **"The judge's decision was upheld by the Court of Appeal and by a majority decision of your Lordships' House. Mr Johnson's claim was founded on the fact that he had been dismissed, and the trust and confidence implied term cannot be applied to dismissal itself. Further, the grounds on which it would be wrong to impose an implied contractual duty regarding exercise of the power of dismissal make it equally wrong to achieve the same result by imposing a duty**

of care. All the matters of which Mr Johnson complained in his court proceedings were within the statutory jurisdiction of an employment tribunal."

33. Lord Nicholls then said this, at paragraphs 15 and 16:-

"15. As was to be expected, the decision in *Johnson* has given rise to demarcation and other problems. These were bound to arise. Dismissal is normally the culmination of a process. Events leading up to a dismissal decision take place during the subsistence of an employment relationship. If an implied term to act fairly, or a term to that effect, applies to events leading up to dismissal but not to dismissal itself unsatisfactory results become inevitable.

16. The two cases now before the House are stark illustrations of these problems. In each case an employee or employees complained of unfair dismissal to an employment tribunal. In each case the employees subsequently brought court proceedings which were summarily dismissed at first instance on the basis that, having regard to the decision in *Johnson*, the proceedings were bound to fail. In neither case, therefore, has there been a trial. Appeals to the Court of Appeal and to your Lordships' House have proceeded on the footing that if trials take place the plaintiffs may be able to establish the truth of their allegations. The defendants are not to be taken to admit the truth of these allegations."

And continued, under the heading, "The boundary line" as follows, at paragraphs 27 to 33:-

"27. Identifying the boundary of the '*Johnson* exclusion area', as it has been called, is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.

28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area.

29. Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those now before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over.

30. If identifying the boundary between the common law rights and remedies and the statutory rights and remedies is comparatively straightforward, the same cannot be said of the practical consequences of this unusual boundary. Particularly in cases concerning financial loss flowing from psychiatric illnesses, some of the practical consequences are far from straightforward or desirable. The first and most obvious drawback is that in such cases the division of remedial jurisdiction between the court and an employment tribunal will lead to duplication of proceedings. In practice there will be cases where the employment tribunal and the court each traverse much of the same ground in deciding the factual issues before them, with attendant waste of resources and costs.

31. Second, the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by dismissal, may have to be chopped

artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. In some cases this legalistic distinction may give rise to difficult questions of causation in cases such as those now before the House, where financial loss is claimed as the consequence of psychiatric illness said to have been brought on by the employer's conduct before the employee was dismissed. Judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed.

32. Existence of this boundary line produces other strange results. An employer may be better off dismissing an employee than suspending him. A statutory claim for unfair dismissal would be subject to the statutory cap, a common law claim for unfair suspension would not. The decision of the Court of Appeal in *Gogay v Hertfordshire County Council* [2000] IRLR 703 is an example of the latter. Likewise, the decision in *Johnson's* case means that an employee who is psychologically vulnerable is owed no duty of care in respect of his dismissal although, depending on the circumstances, he may be owed a duty of care in respect of his suspension.

33. It goes without saying that an inter-relation between the common law and statute having these awkward and unfortunate consequences is not satisfactory. The difficulties arise principally because of the cap on the amount of compensatory awards for unfair dismissal. Although the cap was raised substantially in 1998, at times tribunals are still precluded from awarding full compensation for a dismissed employee's financial loss. So, understandably, employees and their legal advisers are seeking to side-step the statutory limit by identifying elements in the events preceding dismissal, but leading up to dismissal, which can be used as pegs on which to hang a common law claim for breach of an employer's implied contractual obligation to act fairly. This situation merits urgent attention by the government and the legislature."

34. The House of Lords held that all three claimants relied on events which constituted causes of action which accrued before the dismissals and did not fall within the **Johnson** exclusion zone.

35. The ambit of that zone came under scrutiny again, this time in the Supreme Court, in **Edwards v Chesterfield** (2012 IRLR 129). The claimants sought damages for dismissal, the manner of which involved a breach of an express provision of the contract of employment. The claims were struck out at first instance on the basis that the **Johnson** exclusion zone applied; the Court of Appeal allowed the claimants' appeal; but the Supreme Court, by a majority, restored the first-instance judgment. In his judgment at paragraph 24 Lord Dyson, under the heading "Did the present case fall outside the *Johnson* exclusion area?", said at paragraphs 55 to 57:-

> **"55. It is accepted by Miss O'Rourke that Mr Edwards' claim for unfair dismissal falls within the *Johnson* exclusion area. But she submits that his claim for damages for loss of reputation consequent on the findings of misconduct made by the disciplinary panel does not. She contends that these findings resulted from the fact that (in breach of the contractual disciplinary procedures) the disciplinary panel was not properly constituted and acted in a manner which was procedurally unfair. This breach, she submits, occurred independently of the dismissal.**
>
> **56. The undisputed facts are that Mr Edwards' disciplinary hearing was held on 9 February 2006. He was notified of his summary dismissal on the following day. The decision was confirmed in a long letter from the chairman of the disciplinary panel dated 16 February which set out in detail the allegations and the panel's findings. The complaint is that the panel's "erroneous" conclusions flowed from these findings. The findings and conclusions were first published in the letter which was sent six days after the decision to dismiss had been communicated to Mr Edwards and were contained in the letter which confirmed his dismissal. In my view, it is impossible to divorce the findings on which Mr Edwards seeks to found his claim for damages for loss of reputation from the dismissal when they were the very reasons for the dismissal itself.**
>
> **57. In these circumstances, Mr Edwards' claim for damages for loss of reputation is not one of those exceptional cases to which Lord Nicholls referred in *Eastwood* where an employer's failure to act fairly in the steps leading to a dismissal causes the employee financial loss. This claim does not arise from anything that was said or done before the dismissal. It is not independent of the dismissal. It arises from what was said by the Trust as part of the dismissal process. It follows that I cannot accept the distinction made by Lord Kerr and Lord Wilson between the findings or reasons for the dismissal and the dismissal itself. I agree with what Lord Mance says about that."**

36. On that approach the **Johnson** exclusion zone does not apply where the claim for damages is based on what was said or done before the dismissal and was not part of the steps taken by the employer leading to the dismissal, such as a failure to comply with an express term as to disciplinary procedure.

37. Lord Walker and Lord Mance agreed with Lord Dyson. Lord Phillips agreed with the result, holding at paragraph 88 that the principle established in **Johnson** and **Eastwood** could not be subverted as the claimant sought to do.

38. We have not been shown and are not aware of any authority which applies the principles in **Johnson** and **Eastwood** to constructive dismissal; however in our judgment when those principles are applied to this case it is clear that Mr Wynne's argument cannot succeed. At the time of the breaches of which the Claimant complains, i.e. the reaching of the decision to dismiss her without any consultation or selection exercise or other aspects of what is normally

regarded as a fair redundancy process, the Claimant had not been dismissed; the Respondents gave her notice of dismissal; but the dismissal would not have taken effect or terminated her contract pursuant to section 97(1)(a) of the 1996 Act until the notice expired on 30 June. The notice of dismissal was withdrawn before that date as a result of the appeal. The acts of the Respondents in relation to the redundancy process upon which the Claimant relied as entitling her to treat the contract of employment as an end all took place before any dismissal could have taken place (and of course before it did take place) pursuant to section 97(1)(c) of the Act when the Claimant resigned; they were not steps leading to the dismissal; they were steps upon which the Claimant was, on the findings of the Tribunal, entitled to rely as constituting fundamental breach of her contract of employment.

39. We doubt whether the **Johnson** exclusion zone can apply to acts of the employer which relate to a decision to dismiss which is not carried through and does not result in a dismissal but which the employee then chooses to treat as sufficient (in many cases together with earlier acts not connected with the dismissal) to entitle him or her to bring the contract of employment to an end. Such an employee must, if constructive dismissal is to be proved, establish that those acts of themselves or together with others amounted to a fundamental breach of the implied term of trust and confidence (or some other term of the contract of employment); the employee thus has to prove a breach of contract antecedent to the dismissal itself. We can see no basis in law or logic which would or should disable that employee from relying on the employer's treatment of him in relation to a dismissal which the employer then does not pursue as constituting or as being part of the breaches of contract upon which he or she relies to justify his or her resignation and subsequent claim for unfair dismissal. None of the authorities support the argument that such a case would fall within the **Johnson** exclusion zone.

40. Further the **Johnson** exclusion zone applies to common law claims for damages which conflict with the statutory jurisdiction as to unfair dismissal. That conflict is the basis of the existence of the zone. In this case the Claimant was not seeking to make any common law claim; she seeks to rely on the breaches of contract on the part of the Respondents in relation to the process by which they sent her a letter of dismissal to support her constructive dismissal claim.

41. For those reasons we reject the second limb of the cross-appeal. The **Johnson** exclusion zone does not provide an answer to the unfair dismissal claim in the circumstances of this case.

42. We should add that Mr Robson objected that the **Johnson** exclusion zone point, was not taken before the Tribunal by counsel then acting for the Respondents. We can understand why that was so; there was a great deal of evidence about the history of the Claimant's employment; and her allegations against the Respondents arising from that history had to be and were examined in detail; it may well not have been appreciated that the Tribunal would or might reach the conclusion that the only acts of the Respondent which could be treated as constituting a fundamental breach of the implied term of trust and confidence were those which arose from the dismissal process. The point is obviously one of law; it needs no further evidence or consideration of the facts to enable a decision to be made upon it. Having considered the familiar criteria set out in the authorities we have concluded that the Respondents were entitled to raise the point of law before us, or at least should be allowed to do so; but since the point has failed, we need say no more about it.

Cure of breach; and affirmation

43. There is no dispute between Mr Robson and Mr Wynne as to the principles of law which apply to these issues. In **Buckland v Bournemouth University** (2010 IRLR 445) the Court of

Appeal allowed the employee's appeal against the EAT decision that the employer's fundamental breach of the implied term of trust and confidence had been cured before the employee resigned in reliance upon that breach. The principle which the Court of Appeal set out is aptly summarised in the headnote to the IRLR report in these terms:

> **"A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends."**

44. **Buckland** was followed by the EAT in **Price v Surrey County Council** (EAT/0450/10) (Carnwath LJ presiding); see paragraph 20 of the judgment.

45. Mr Robson submitted that, although **Buckland** was put before the Tribunal, they failed at paragraphs 86 and 87 of their judgment to apply the principles there established and found - although they did not use the words "cure" or "cured" - that the effect of the Respondent's acceptance of the appeal and aborting the redundancy process was that there was no longer any breach of the implied term of trust and confidence on which the Claimant could rely.

46. Mr Wynne submitted that the Employment Tribunal, in those paragraphs, concluded that the Claimant, by appealing against the dismissal decision rather than resigning without putting forward an appeal, had affirmed the contract of employment. By the appeal, he argued, the Claimant was asking the Respondent not to dismiss her but to keep her in her employment; her letter was the equivalent of her saying "I want to remain employed." The first limb of the Respondent's cross-appeal comes into play at this point; for Mr Wynne contended that, if the Tribunal did not find that the Claimant had affirmed the contract, they should so have found; on the findings of primary fact, affirmation was unequivocally established.

47. There was at one stage of the arguments before us a suggestion that affirmation had not been raised before the Tribunal; Mr Wynne told us that he had checked with counsel who had appeared before the Tribunal for the Respondents and had confirmed that he had raised affirmation and, in the face of that assurance, Mr Robson did not persist with any objection.

48. We draw attention to the absence in the Tribunal judgment of either the word "cure" or the word "cured". There is also no reference to "affirmation", "waiver" or any word of similar meaning. We have to do our best to construe, from the words used by the Tribunal in paragraphs 86 and 87 and, if helpful, elsewhere, whether their conclusion was that the Respondents had cured their breach or that the Claimant had affirmed it. We have found that to be no easy task. The Tribunal, did not in this part of their judgment, express themselves with clarity. However in our view the language which the Tribunal did use is substantially more consistent with the concept of the Respondents having cured the breach, which involved some act by the Respondents, than that of the Claimant affirming the breach, which involved some act by her. Thus in paragraph 86 the Tribunal do not appear to have based themselves on the Claimant putting in an appeal but on what the Respondents did as a consequence of the appeal, by accepting it, aborting the redundancy process and starting it again; and in paragraph 87 the Tribunal spoke not of the appeal but of the fact that the appeal had been effective.

49. We have therefore concluded that the Tribunal found that there was no existing fundamental breach of contract at the time of the Claimant's resignation because, by accepting the Claimant's appeal, aborting the redundancy process and agreeing to start that process afresh the Respondents had cured the breach of contract which arose from the redundancy process; but it is not in dispute that that conclusion was not, in law, open to them. As **Buckland** makes clear, once fundamental breach of contract has been committed by the employer, the employee has an unfettered choice whether to treat the breach as repudiated and to accept the repudiation

and bring the contract of employment to an end or to affirm the contract; and the defaulting party, to use the words of Sedley LJ at paragraph 40 of his judgment in **Buckland** "cannot choose to retreat".

50. What the defaulting party, as Sedley LJ said in the following sentence, can do is to invite affirmation by making amends; and that takes us directly into the first basis of the cross-appeal, although not directly – for it is not suggested that the Claimant did anything by way of affirmation after the Respondents had, by acting as they did in the light of the appeal, made amends. The case of affirmation in this case is based on the putting forward of the appeal – which preceded the making of amends and, indeed, produced it.

51. In our judgment, a Tribunal is not required to find that where an employee puts forward an appeal against a determination by an employer, which determination has been arrived at in such a way that the Tribunal regards the employer has having been in fundamental breach of contract, by doing so the employee has automatically affirmed the contract and, in the absence of further breach, has lost the right to rely upon the breach which caused the employee to appeal. Every employee has or should have a contractual right to appeal against a dismissal decision, a disciplinary decision or the rejection of a grievance; the process leading to such a decision should, it is arguable, be viewed as a whole; it is, we would suggest, open to a Tribunal to find that by appealing such a decision an employee is not affirming the contract but seeking to see if he can persuade the employer to withdraw from the position which the employer has adopted or - again to use Sedley LJ's expression - to make amends. Whether that is so in the individual case must depend on the evidence. If our analysis of paragraphs 86 and 87 of the Tribunal's judgment is correct, the Tribunal did not consider the position of affirmation or at least made no finding as to whether, by appealing or otherwise, the Claimant was intending to and/or did affirm the contract. Without those findings we cannot substitute a conclusion that

the Claimant affirmed the contract for the Tribunal's conclusion that the Respondents cured its breach. We have concluded that the issue of constructive unfair dismissal must be the subject of a remission, in order that the question of affirmation be considered and decided upon. We will come at the end of this judgment to the nature of that remission.

Other breach of contract

52. Finally in considering unfair dismissal we must consider Mr Robson's second point, that the Tribunal ought to have found that, far from making amends, the Respondents had committed further breaches by not responding to the Claimant's complaints about her treatment, in the appeal letter and the following e-mails, other than in relation to the redundancy process. In our judgment this ground of appeal is not made out. We will assume, without holding, that Mr Robson is correct in his contention that the Respondents owed the Claimant a contractual duty to permit to her a reasonable and prompt opportunity to obtain redress of her grievances and that a breach of that obligation could amount to a fundamental breach of contract. Despite what the EAT said in **WA Goold (Pearmark) Ltd v McConnell** (1995 IRLR 516) we doubt whether such an obligation arises from a separate implied term from the implied term of trust and confidence and would prefer to see any such duty as part of that implied term – as in **Bracebridge Engineering v Darby (**1990 IRLR 3**)**; but Mr Wynne did not challenge the existence of a duty to act as Mr Robson contended, from whatever implied term its existence is derived.

53. However, in our judgment, the Tribunal can be seen clearly to have rejected the argument that there had been a breach of that obligation. As Mr Robson accepted, the Claimant had not put forward any formal grievance as to the matters of which she complained in the appeal letter and e-mail, beyond the redundancy process. It was not suggested that there was no grievance procedure available to her. The Tribunal were entitled to find, as they did at paragraph 88, that

the subject of the appeal was her being given notice of dismissal for redundancy without any fair redundancy process and that the Respondent's decision "upholding the Claimant's appeal" related to her complaints about the redundancy process. At paragraph 88 the Tribunal specifically addressed this point; what they set out in that paragraph, perhaps rather less elegantly than they would have preferred with hindsight, was that the Respondents were, in their response to the appeal, replying to the subject matter of the appeal i.e. the redundancy process and that they had not committed any further breach of contract. This was, in our judgment, a permissible view of the facts. The Respondents did not give any indication that they were not going to consider or investigate the other matters or treat them as a grievance to be considered; it was open to the Tribunal to regard the response as a response only on the redundancy process points. In her letter of 24 May in response to the Claimant's resignation letter, Miss Assefa said that her letter of 18 May, which withdrew the dismissal notice, was intended "to address your appeal only in respect of the consultation process in the redundancy matter."

Conclusion on constructive unfair dismissal

54. Our conclusions are, therefore, that the Tribunal erred in law in dismissing the Claimant's constructive unfair dismissal claim on the basis that the breaches of contract on which she relied had been cured; but the Tribunal did not, as they should have done, determine whether the Claimant had affirmed the breach or breaches on which she relied. On the latter issue there must be a remission; if affirmation is established, the constructive dismissal claim will fail; if it is not it will succeed.

Protected disclosures: ground 2

55. As Mr Robson's opening and closing written submissions to the Tribunal show, the Claimant's case was that she had been subjected to detriment by the Respondents on the ground

that she had made five protected disclosures; the disclosures were said to be found (a) in a conversation between the Claimant and Mr Summers about risk assessment on 23 March 2010; (b) in an email which she sent to Mr Summers on the same day; (c) in another email on that topic on 25 March 2010; (d) by the appeal letter of 9 May 2011; and (e) its follow-up email making additional points on 16 May 2011.

56. At paragraph 3 of the Tribunal's formal judgment, which was of course followed by the Tribunal's reasons for their judgment, the Tribunal adjudged that:

> **"The claimant has not made a qualifying disclosure for the purposes of section 43B of the Employment Rights Act 1996."**

In their reasons at paragraph 3.5 the Tribunal set out correctly the issues which arose under this head of claim – had there been a disclosure of information, was the subject matter of those disclosures such as to qualify them as being protected acts, were the disclosures made in good faith, what detriments if any did the disclosures result in, and had the Claimant suffered detriment on the grounds of protected disclosure?

57. Mr Wynne accepts that, thereafter, apart from making in paragraph 72, where the Tribunal begin the section of the judgment in which they set out the relevant law, a reference to section 43B, 43C and 47B of the **Employment Rights Act 1996** the Tribunal make no mention of the Claimant's protected disclosure claim; there is no express finding as to whether any of the disclosures for which the Claimant was contending consisted of or included the disclosure of information by the Claimant to the Respondent, whether any such disclosure was a qualified disclosure, if so whether any such disclosure was made in good faith (but it is accepted that good faith was not in issue) or whether the Claimant suffered any detriment on the grounds of such disclosure.

58. Mr Robson submits that these omissions from the Tribunal's reasons are fatal to paragraph 3 of their formal judgment. As to the first, oral disclosure, no facts were found as to what passed between the Claimant and Mr Summers on the relevant day; and there were no findings as to whether what were said to be disclosures in written form were qualified disclosures or whether any detriment was suffered thereby.

59. We can "clear the decks" to some extent; the Tribunal's conclusion, expressed in paragraph 3 of the judgment, was that there had been no qualifying disclosures; it was not that there has been no detriment; it is necessary therefore to eliminate from the discussion issues as to detriment (unless it were to be successfully argued that the Tribunal could not have found detriment). The question we have to decide is whether, in respect of all or any of the asserted disclosures, there must be a remission so that the relevant facts can be found and the relevant decisions made. Mr Wynne submits that we need not do so because it is clear from the Tribunal's findings of fact in other areas why the Tribunal expressed themselves in paragraph 3 of the judgment as they did; on the findings of fact, it is submitted, only one conclusion was open to them.

60. Mr Robson did not accept that argument; he rightly warned us against, as an appellate tribunal, making findings of fact of our own except in an area which was plainly beyond any doubt.

61. Before turning to Mr Wynne's argument on the facts, we need to refer to the decision of the EAT in **Cavendish Munro Professional Risks Managment v Geduld** (2010 ICR 325) (Slade J presiding), in which it was held (1) that a disclosure of information within section 43B requires the conveyance by the discloser of facts and not merely of allegations or statements of

the discloser's position and (2) that the communication to an employer by an employee or someone on his behalf of a statement of the employer's position, in which there is no communication of information, will not satisfy section 43B; see paragraphs 24, 25 and 29 of the EAT judgment, which we do not need to set out in full. Mr Wynne submits that the first to third asserted disclosures fell outside section 43B because they did not provide any factual information and did not contain any assertion of a failure on the part of the Respondents to comply with a legal obligation (sub-paragraph (b) of section 43B(1) being the only one sub-paragraph relied upon for rendering any disclosure a qualified disclosure).

62. So far as the third disclosure is concerned, the email of 25 March 2010 from the Claimant to Mr Summers says:-

> **"It is sad to see the legal requirement has been breached again in this day and age. Anyway thank you for looking into the matter. I really appreciate for all your effort."**

In our judgment, those words could not apply to the provision of facts by the Claimant to the Respondents; they amount unarguably to no more than an allegation.

63. However, we do not have the same view of the first and second asserted disclosures. The second such disclosure could be said to have conveyed to Mr Summers facts, namely that the risk assessment the Claimant had sought had not been carried out, that no risk assessment had been carried out during her previous pregnancy, that the first trimester of her pregnancy was an important time and that she was experiencing difficulties in the workplace. It was open to the Tribunal to consider that, at least by implication, the Claimant was asserting a legal obligation that the risk assessment be carried out and a breach of that obligation; the fact that there was, in truth, no such obligation would not take the disclosure outside section 43B(1)(b) as long as the Claimant reasonably believed the information tended to show that there had been

or was likely to be a failure to comply with the legal obligation. As to the first disclosure, we do not know what was said in evidence by the Claimant or Mr Summers on 23 March and cannot, on this part of the case, accept Mr Wynne's submission that the facts are all in his favour. Nor can we see how from the findings of fact it can be with certainty concluded that these disclosures could not have caused or had not caused any detriment to the Claimant.

64. As to the fourth and fifth asserted disclosures, Mr Wynne submitted that the appeal letter and the following email which were relied upon were "Geduld letters" i.e. conveyed no more than allegations and statements of position and that, in any event, the Claimant could not on the Tribunal's findings of fact be found to have been subjected to any detriment on the ground of those disclosures. In our view while the appeal letter contained allegations, the content could be seen as conveying facts e.g. "the company failed to seek volunteers before redundancy was considered" and "I was never given any warning..."; the following email could be said to have less factual content; we do not believe that a Tribunal would have been perverse if it had concluded that that email was to some extent conveying facts, for example "using agency staff for check-in at LHR".

65. What detriment could the Tribunal have found to have resulted from those disclosures, if disclosures they were? It was not the Claimant's case that these disclosures had caused her selection for redundancy; no dismissal or rejection of her appeal followed them. Four detriments were relied on – that the Claimant was not offered the post offered to Mr Bilgrami, was not given notice of redundancy, was not consulted about the redundancy and that her complaints made in the letter and email were not investigated. The first three alleged detriments all pre-dated these disclosures and could not have been caused by them. As to the fourth, there could not in reality have been any proper investigation of the "other matters" i.e. complaints other than those arising from the notice of dismissal for redundancy between 9 May

and the termination of the contract of employment by the Claimant on 23 May (a period during which the Claimant was not at work). We accept Mr Wynne's submission that there was nothing to show that the Respondents had done anything which could be regarded as subjecting the Claimant to a detriment by reason of the letter and the email said to constitute the fourth and fifth disclosures.

66. For these reasons the appeal on this ground succeeds in respect of the first and second asserted disclosures but fails in respect of the third to fifth asserted disclosures.

Discrimination: ground 4

Indirect discrimination

67. Mr Robson took ground 4 of the Notice of Appeal before ground 3; we will do the same.

68. Ground 4 attacks the Tribunal's conclusion as to the discrimination claims. Those claims were that the Claimant had been the victim of indirect discrimination by reason of the protected characteristic of age and had been the victim of direct discrimination on the grounds of the protected characteristics of her sex and of pregnancy/maternity. The less favourable treatment relied on was set out in Mr Robson's closing submissions; they were:-

> **"a. Failure to carry out a risk assessment as required by s.16(2) Management of Health and Safety at Work Regulations 1999 or at all.**
>
> **b. Failure to investigate C's complaints and grievances adequately or at all.**
>
> **c. Appointing a male, Mr Bilgrami, to the role of Administration Assistant without consulting C about the possible suitable alternative employment at the time.**
>
> **d. Appointing a male, Mr Bilgrami, to the role of Administration Assistant in favour of C**
>
> **e. Failing to carry out consultation about C's potential redundancy situation which might affect C.**
>
> **f. Selecting C for redundancy:**
>
> **i. On the grounds that she had become pregnant and/or taken maternity leave in the past;**
>
> **ii. Had recently become pregnant/taken maternity leave; and/or**

iii. Might become pregnant and take maternity leave in the future.

g. Failing to pay C her bonus in 2009

h. In all the circumstances exposing C to a culture and/or attitude which was directly discriminatory against women of a child-bearing age."

It is the Claimant's case that the Tribunal erred in law in its resolution of each of those claims.

69. It is convenient to consider the indirect discrimination case first. Mr Robson submitted that in respect of this claim, as in the case of the protected disclosure claim, although the Tribunal directed themselves at paragraph 3.3 to consider the issues which arose under such a claim, they did not resolve those issues by deciding whether the Respondent had applied a practice, criterion or policy (PCP) or whether, if there was a PCP which was applied, it would have put the Claimant at a particular disadvantage by reason of her age or any other protected characteristic relied upon or whether the Respondents had shown that such PCP as they applied was a proportionate means of achieving a legitimate aim. Mr Robson submits that the Tribunal did not answer these questions because, in effect, they omitted at the conclusion stage of their judgment to distinguish direct and indirect discrimination and treated the Claimant's claim in respect of sex, maternity/pregnancy and age as if they were all complaints of direct discrimination.

70. It is technically correct that the Tribunal did not set out an express conclusion on those questions in the conclusions section of their judgment; but the judgment must be seen in the context of the real, as opposed to the theoretical, issues before them. Mr Robson accepted that his indirect discrimination case was put on the basis that the PCP relied upon was LIFO; that that was so is clear from paragraph 25 of his closing submissions to the Tribunal. The Tribunal had to decide, before any question of disadvantage arising from the application of a PCP or as to proportionate aims of achieving a legitimate aim fell to be considered, whether the sole PCP relied upon had, on the facts, been applied to the Claimant.

71. We have set out paragraph 83 of the Tribunal's judgment earlier, at paragraph 20. Whether it would have been advisable for the Tribunal to separate out the direct discrimination and indirect discrimination claims at this stage of their judgment and to resolve individually the issues they had set out at the beginning of the judgment is in our view academic. What the Tribunal with clarity set out in that paragraph was a finding that the Respondents had not applied LIFO. They had had regard to length of service as affecting experience and ability. Faced with that point Mr Robson argued that selection based on LIFO – which is selection for redundancy on the basis of length of service alone, irrespective of other factors – and selection based on length of service as evidential of experience and ability – were both capable of being PCPs; that may be so; but the only PCP relied upon throughout by the Claimant was LIFO; and the Tribunal found as a fact that that PCP had not been applied. That length of service can be treated as a proportionate means of achieving a legitimate aim is clear from **Rolls Royce plc v Unite the Union** (2009 IRLR 576); but on the Tribunal's finding there was no need for the Tribunal to consider that issue or to consider indirect discrimination any further. They made a finding of fact which, unless successfully attacked as perverse (which it has not been) amounted to a terminal resolution of the indirect discrimination claim; in the face of that finding it could not succeed.

Direct discrimination

72. We therefore turn to direct discrimination. Mr Robson put forward his criticism of the Tribunal's conclusions on this part of the case by inviting us to look at the individual allegations of less favourable treatment and to consider the Tribunal's resolution of them; but first he put forward a more general criticism, that the Tribunal in what we have earlier called the formal judgment part of their decision appear to have omitted discrimination on the grounds of pregnancy/maternity from paragraph 1; but, as he accepted, appear at paragraph 2 to have

remedied that omission – if omission it was. When the two paragraphs are taken together they amount to a judgment rejecting all three heads of the direct discrimination claim.

73. As was set out in the extract from Mr Robson's closing submissions, which we have set out above, items (c) and (d) of less favourable treatment were alleged to have been the Respondent's appointment of Mr Bilgrami to the administrative assistant post which arose after Miss Dias left in preference to the Claimant and without consulting the Claimant. This is addressed in paragraph 19(a) of the Notice of Appeal. The Tribunal at paragraph 20 found that Mr Bilgrami had been given permanent employment from March 2010 because of the Claimant's impending maternity leave which was to start on 6 April and that lay at the heart of the Claimant's belief that the Respondents were happy to give permanent contracts to males such as Mr Bilgrami but not to females of childbearing age; but the Tribunal found that she held that belief in ignorance of the fact that the Respondents, as the findings of fact show, sought to have females of childrearing age appointed to permanent posts – particularly in the case of Miss Abebe.

74. We have set out earlier the contents of paragraph 78 of the Tribunal's judgment in which they concluded that the allegation of less favourable treatment in relation to the appointment of Mr Bilgrami to the administrative assistant's job did not amount to what was complained of, namely that Mr Bilgrami had been appointed to a permanent post when females would not be so appointed because Mr Bilgrami had already been appointed to a permanent post.

75. Mr Robson described that paragraph as short, unclear and demonstrably failing to consider (1) whether there had been differential treatment from which an inference of discrimination could be drawn and (2) if so, whether the Respondents had established, the

burden of proof being on them, an explanation which showed that the difference was not in truth discriminatory; in other words the Tribunal had failed to carry out the two-stage exercise laid down by the Court of Appeal in **Igen v Wong** (2005 IRLR 258).

76. In response to Mr Robson's attack on the Tribunal's conclusions on direct discrimination generally and this particular alleged disadvantage individually, Mr Wynne took us first to the decision of the Supreme Court in **Hewage v Grampian Health Board** (2012 IRLR 870) in which the Supreme Court was asked to give guidance as to how Tribunals should approach cases which concerned section 63A(2) of the **Sex Discrimination Act 1975** and section 54A(2) of the **Race Relations Act 1976** (which applied at the time of the acts of which Mrs Hewage complained). The **Equality Act 2010** by section 136(1), (2) and (4) achieves the same effect as those subsections by different words; it has not been suggested in this appeal that the provisions of the 2010 Act, which applied in this case to any acts after 1 October 2010, required any change in the approach which a Tribunal is to take in direct discrimination cases as compared with that which they should have taken when the previous statutory scheme applied.

77. In his judgment, with which the other members of the Supreme Court agreed, Lord Hope referred with approval to the well-known guidance given by the Court of Appeal in **Igen v Wong** and, subsequently, in **Madarassy v Nomura International (**2007 IRLR 246). At paragraph 32 he said:-

> **"The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance.**

78. Basing himself on that clear statement of the role of the burden of proof provisions and the **Igen v Wong** analysis, which it was Mr Robson's submission the Tribunal had failed to undertake, Mr Wynne submitted that this was a case in which the Tribunal had considered the facts in detail and had reached factual conclusions which rendered it unnecessary for the Tribunal to consider further the burden of proof or any more elaborate analysis. The Tribunal had committed, on his argument, no error of law in deciding not to go any further; it was not necessary to do so.

79. As to the appointment of Mr Bilgrami, Mr Wynne submitted that the Tribunal could be seen at paragraph 78 to have found that there had been no differential treatment and, at paragraph 21, that the claim that there had been such treatment was based on the Claimant's central misconception that the Respondents did not want to appoint females of childbearing age to permanent positions but would so appoint males.

80. Lord Hope's judgment in **Hewage** contains a further reminder, in addition to those to be found widely in earlier authorities, that:

> **"...one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."**

81. Employment Tribunals work under very real pressures of time; there is more than one aspect of the Employment Tribunal's judgment in this case, as we have already pointed out, in which it is not unfair to suggest that the Tribunal could have expressed themselves more clearly; but in our view the meaning and effect of paragraph 78 of the judgment, taken together with paragraphs 20 and 21 and the express findings of fact as to how Mr Bilgrami came to be appointed to the administrative assistant, are such that it is clear that the Tribunal found as fact that there was no differential treatment of the Claimant in the respects complained of

concerning Mr Bilgrami's appointment and that her belief that there had been was based on a misconception. We should add that, although Mr Robson referred in his skeleton argument to Regulation 10 of the **Maternity and Parental Leave Regulations 1999**, which obliges an employer to offer suitable alternative employment to an employee the continuation of whose employment is threatened by reason of redundancies during the course of maternity leave, and contended that the Tribunal failed to consider whether the Respondents were in breach of that obligation, that point does not appear to have been raised before; it was not, so far as our notes go, raised orally by Mr Robson. Mr Wynne said that no argument had been presented upon it; and Mr Robson did not return to it in his reply. We therefore say no more about it.

82. The Notice of Appeal, at paragraph 19(b), next addresses the Respondent's alleged failure to carry out a risk assessment. Mr Robson submitted that the Tribunal made the classic error in paragraph 80 of their judgment of concluding that there had been no discrimination on the basis that the Respondents were under no obligation to carry out a risk assessment and had acted reasonably.

83. It is now accepted law that the fact that an employer has acted reasonably does not of itself provide an answer to a direct discrimination claim nor does that the fact that an employer has acted unreasonably lead to the conclusion that he has been guilty of such discrimination. See **Glasgow City Council v Zafar** (1998 IRLR 36). The fact that there was no legal obligation to carry out a risk assessment does not necessarily lead to the conclusion that failure to carry out such an assessment could not amount to discrimination. However if paragraphs 79 and 80 of the judgment are read together, as they should be, it can be seen, perhaps using the generosity of interpretation expressly recommended by the Supreme Court in **Hewage**, that the Tribunal found that there was an adequate explanation for the treatment of the complainant upon which this complaint is based. It is not impermissible for a Tribunal to bypass the

Igen v Wong analysis and go directly to the "reason why question" - see **Shamoon v Chief Constable of the RUC** (2003 IRLR 285) - in particular where there is no actual comparator relied upon by the claimant, as was the case here. The Tribunal appear to us to have begun their conclusions on this issue at paragraph 79 appropriately by deciding that there was no obligation on the Respondents to carry out a risk assessment; the Claimant had argued that there was such an obligation; and at paragraph 80 the Tribunal set out what, despite the absence of any such obligation, the Respondents had done in the face of the Claimant's request. They clearly found as fact that the Respondents had not, in doing what they did, acted in a discriminatory manner. That was a conclusion of fact which was open to them; perversity formed no part of this ground of appeal. The third complaint of less favourable treatment, addressed by the Notice of Appeal at paragraph 19(c), is that of failure to grant flexible working. The contention is that the Tribunal failed to consider the facts relied upon by the Claimant as "shifting the burden of proof" i.e. as establishing treatment from which an inference of discrimination could be drawn so that the burden of providing an explanation inconsistent with discrimination fell on the Respondents. Mr Robson also criticised the Tribunal for failing, when they dealt with this issue at paragraph 81 of their judgment, to appreciate that the protected characteristics relied upon were sex and pregnancy/maternity and did not include age.

84. In our judgment, it is clear that the Tribunal were fully seized of the **Igen v Wong** analysis, to which they had expressly directed themselves at paragraph 76, and concluded as fact that the Claimant had not been subjected to less favourable treatment so as to "shift the burden to the Respondent". It is correct that they do not, in that paragraph, set out the history which led them to that conclusion; but the Tribunal's judgment must be read as a whole; and at paragraphs 49 to 54 the Tribunal set out a full narrative of what had taken place between the parties in respect of flexible working. Subject to points to which Mr Robson turned later in his

submissions under ground 4 and to which we will come, the Tribunal appear to have covered the factual ground relied upon in detail and to have reached in paragraph 81 a factual conclusion which is not said to have been perverse.

85. The Tribunal do appear to have been in error in their reference to "sex or age" rather than "sex or pregnancy/maternity" in that paragraph; but it is not asserted that that error affects the factual conclusion which they reached.

86. The fourth item of differential treatment relied upon in the Notice of Appeal at paragraph 19(d) is the selection of the Claimant for redundancy. The Tribunal addressed that, as a complaint of direct discrimination, at paragraph 82 and, in part – although it appears to be directed principally at indirect discrimination, although not expressly so – at paragraph 83. We have already dealt with the issues as to indirect discrimination.

87. Mr Robson's criticism of paragraph 82 was that it dealt with the process by which the Respondents came to give the Claimant notice of dismissal on the ground of redundancy but not with the fact that she was chosen for dismissal and that, in paragraph 83, the Tribunal had adopted a reason why approach but had compared the Claimant with Miss Hailemariam, another woman, rather than with an actual or hypothetical male. In his skeleton argument on this part of the case Mr Robson also developed points as to the PCP and indirect discrimination which we have already addressed.

88. If the Respondents had applied LIFO as a criterion, that might have led to a finding of indirect discrimination but would not on its own have supported a finding of direct discrimination; the selection would not have been on the grounds of sex or pregnancy/maternity. The same applies to length of service. That is why the Claimant put this

part of her case forward as indirect discrimination. Mr Robson expressed concern about the use in paragraph 83 of direct discrimination language – such as "on the grounds of" or "less favourable treatment" – but that concern does not support his argument that the Tribunal erred in law in their consideration of this part of the Claimant's direct discrimination claim. Similarly although in paragraph 83 the Tribunal refer to "grounds of sex or race" and in paragraph 82 to "sex or age" as protected characteristics, such errors do not of themselves amount to an error of law.

89. The basis for the Tribunal's rejection of this aspect of the Claimant's direct discrimination claim can be seen in paragraph 82. The Tribunal found that the reason for the Respondents giving notice of dismissal for redundancy to the Claimant without any fair procedure was not discrimination but that that was how they had always handled redundancies. There was, we believe, no challenge to the existence of a redundancy situation; if there was, the Tribunal's findings at paragraphs 55 to 58 that the work of reservation and ticketing agents had significantly reduced as a result of the introduction of the call centre and that Miss Assefa decided as a result to reduce the number of such agents to one demonstrated a redundancy situation; and it is clear that the Tribunal, as they were entitled to do, approached the issue of discrimination in relation to the notice of dismissal on the basis that there was a redundancy situation.

90. The basis on which the Claimant was selected and the only other similar employee was not is set out in paragraph 58. At paragraph 82 the Tribunal found as fact that the process by which the Claimant was chosen – which process must be taken to include the selection process described in paragraph 58 – was applied by the Respondents on previous occasions in 2008/9. That process "was shown to the Tribunal to be [the Respondents'] norm." The Tribunal did not state whether their factual conclusion was that there had been no differential treatment or that

the Respondents had established an explanation of the selection of the Claimant which was inconsistent with discrimination; the former appears to be more appropriate; but what is clear is that the Tribunal, applying the correct tests, rejected this part of the Claimant's claim on the facts; and their conclusion is not said to have been perverse.

91. The next alleged act of differential treatment relied upon by the Claimant, covered by paragraph 19(e) of the Notice of Appeal, was the Respondents' alleged failure to pay the Claimant a bonus in 2009. The Tribunal found at paragraphs 70 and 71 that the Claimant has raised this allegation in late 2009, received an email explaining that a productivity bonus was related to presence at work and, after receiving a breakdown of the payment which had been made to her, did not raise the matter again. At paragraph 84 the Tribunal found that this claim had been brought out of time and that no explanation for the delay had been offered by the Claimant; they therefore had no jurisdiction to consider it. Mr Robson conceded that the Claimant offered no explanation in her evidence for the delay. The Notice of Appeal asserts that the Tribunal erred in failing to consider whether this alleged failure on the Respondent's part should be treated as background evidence supportive of the Claimant's case and in failing to consider whether it would have been just and equitable to extend time; but Mr Robson, with admirable candour, said on this issue that he did not "put it very high" but wanted to "keep this ball in the air". We will in those circumstances address Mr Robson's point shortly. As to the first point, the Tribunal made findings of fact as to what happened; there is nothing to show that they did not have all their findings of fact in mind when they set out their conclusions on this and the other allegations of discrimination. As to the second point, there is a simple answer. The Tribunal did consider whether to extend time on the basis that it was just and equitable to do so; there can be no other purpose for their saying in paragraph 84 that no explanation for the late claim had been offered. The Tribunal were fully entitled succinctly to reject this aspect of

the Claimant's claim on the basis that it was out of time and that no explanation for the delay had been offered.

92. Lastly in this area we come to paragraph 19(f) of the Notice of Appeal which asserts that the Tribunal failed or failed properly to consider the question whether the Respondent's failure to investigate the Claimant's complaints and grievances was a discriminatory act. This point was not developed in Mr Robson's skeleton argument or, to any substantial extent, in oral argument; and we are not persuaded that the Tribunal erred in law in their approach to it. It is correct that the Tribunal did not expressly address it as a freestanding direct discrimination claim; but if the judgment is read as a whole it is sufficiently clear, in our view, that the Tribunal concluded that the Respondents had not yet responded to the Claimant's complaints set out in her appeal letter and the following email, insofar as they did not relate to redundancy; thus far, they had done no more than withdraw the notice of dismissal. Thus the Tribunal said, at paragraph 88:

> **"...the subsequent decision, upholding the Claimant's appeal, can only relate to the Claimant's redundancy; other acts to which the Claimant has argued for, before this tribunal, cannot be read into her letter of appeal or the decision there from."**

In other words, the Tribunal found that the Respondents had not said or done anything at that stage in relation to the other matters; there was therefore no treatment in relation to those matters of which the Claimant could complain.

93. We now turn, as we said we would, to Mr Robson's argument that there were items of factual material which supported the Claimant's discrimination case but which find no place in the Tribunal's judgment. There were two principal areas of such material on which Mr Robson relied, (a) the contents of the Respondent's replies to the discrimination questionnaire

administered on behalf of the Claimant and (b) four pieces of evidence from what the Respondents had said or written at various stages.

94. As to the questionnaire we accept the principle set out in **Carrington v Helix Lighting** (1990 IRLR 6), albeit as *obiter dicta*, that a Tribunal may take a serious view of any failure to answer satisfactorily the questions put in such a questionnaire; that principle applies whether discrimination is being considered under the previous or the present statutory regime.

95. We do not intend a disservice to Mr Robson if we do not go through the details of each of the points he made derived from the answers to the questionnaire administered in this case; they are fully set out in his skeleton argument which we have considered in detail. We should refer to a point based on the answer to question 19; Mr Robson accepted if that point had not been put forward in his closing submissions; and he could hardly complain if the Tribunal did not pick it up themselves. We accept the submission that the points which Mr Robson made could have been regarded as supportive of the Claimant's claim; but it does not follow that the Tribunal were obliged expressly to set out the points which Mr Robson made from the content of the questionnaire and to address them. It is trite law that it is not necessary for a Tribunal to give express attention in their judgment to each evidential point made by a party or to explain why, in the case of each such point, the Tribunal have or have not concluded it to be relevant or persuasive. The Tribunal's duty is to record factual conclusions on the issues as defined and to give sufficient reasons for their factual conclusions to satisfy what was at the material time the applicable rule, rule 30(6) of Schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** and the broad requirement established by the Court of Appeal in **Meek v Birmingham City Council** [1987] IRLR 250. The Tribunal in this case had set out, in the manner we have described, not only their conclusions on the direct discrimination issues but how they reached those conclusions. Their judgment is not lacking in compliance

with rule 30(6) or with the **Meek** requirements. The omission of reference to the points made by Mr Robson on the questionnaire does not justify a conclusion that the Tribunal was in error of law.

96. We take the same view about the second category of omission on which the Claimant relies. What we have just said about the first category of omission applies equally to the second category; we do not intend to repeat what we have just said.

97. Mr Robson further raised inconsistencies between what was set out in the Respondent's ET3 and the Respondent's witness statements. He agreed that these points had not been raised by his skeleton argument or his Notice of Appeal; we are not inclined to allow him to pursue these points in the face of Mr Wynne's objections. It appears to us that, in any event, they do not undermine the Tribunal's conclusions, for the reasons we have set out; the argument based on these inconsistencies would have been likely to have made little headway if perversity had been argued; but it was not; and the argument amounts to no more, in our judgment, than the result of an industrious search to find points in the Claimant's favour to which the Tribunal did not expressly refer. We do not in any sense criticise Mr Robson for his industry on behalf of the Claimant; but for the reasons we have set out this argument, based on the results of that industry, it is not persuasive.

98. Accordingly for the reasons we have set out, at we regret considerable length – for there were many points to be considered – we have concluded that the appeal against the rejection of the Claimant's discrimination claims fails.

The conversation with Miss Assefa: Ground 3

99. It was the Claimant's case that, in connection with her request for a risk assessment, Miss Assefa asked her questions about her pregnancy and her future intentions as to having children and having further maternity leave. It was Miss Assefa's evidence that there had been a discussion with the Claimant about childrearing and absent partners – the Claimant's and Miss Assefa's husbands both worked abroad. These rival versions of the discussion are set out at paragraphs 23-24 of the Tribunal's judgment.

100. At paragraph 25 the Tribunal found in favour of Miss Assefa's account; they said:

> **"In giving consideration to these facts, the tribunal is conscious that the claimant is unable to give any particulars as to the time of this conversation, otherwise than that the conversation took place. In contrast, Ms Assefa acknowledging the conversation, is able to put this in context as to when this discussion was had, such that this tribunal, on a balance of probabilities, prefers the evidence of Ms Assefa in her account, as to the discussion and the context, in which that discussion was had."**

That conclusion of the Tribunal is attacked on the sole basis that the Claimant had put forward a specific date for that conversation, namely 23 March 2010. Her evidence, Mr Robson submitted, was rejected on the false basis that she was unable to give any particulars as to the time of the conversation.

101. The difficulty which faces this submission is that there is no record before us of what the Claimant said on this issue when giving evidence. No doubt her evidence in chief consisted of her witness statement (see judgment, paragraph 5); but she was, of course, cross-examined and was, probably, asked questions by the Tribunal. No one appears to have sought any notes of the evidence which related to the issue whether the Tribunal were or were not correct in their description of the Claimant's evidence, what she said when she had been questioned on this issue we simply do not know; and it must follow that this ground of appeal has not been made

out. It is not necessary for us to go into Mr Wynne's alternative submission that, if the Tribunal had made the error complained of under this ground, their overall conclusion as to discrimination cannot be said to have been undone by such error.

The late disclosed letter: ground 5

102. The Tribunal were clearly influenced in their decision-making by the letter of 15 July 2009 in which Miss Assefa requested permission from Addis Ababa to engage Miss Abebe on a permanent contract; see paragraphs 15, 21 and 77. Mr Robson complains by ground 5 of the Notice of Appeal that that letter was not disclosed by the Respondents until after the evidence had been completed and immediately prior to closing submissions and that the Tribunal should therefore not have relied upon it.

103. However Mr Robson, again with professional candour, in response to questions from us, confirmed that although he "moaned" about the lateness of the disclosure of the letter – with good reason – he did not go further by way of objection to its omission and did not ask that the Claimant or anyone else should be recalled to give evidence about it or to be permitted to cross-examine on it. His argument on appeal is not that the letter should not have been admitted into evidence, but the Tribunal, because of its lateness, should not have given it the weight which they did; but unsurprisingly he was not able to distil that argument into a point of law. In our judgment, once the letter was in evidence, the Tribunal were entitled, within the bounds of rationality – and it is not suggested that they stepped outside those bounds -- to give the letter such weight as they thought fit.

104. This ground of appeal therefore also fails.

Conclusion

105. For the reasons we have set out, all the Claimant's grounds of appeal are dismissed except ground 1 upon which the appeal is allowed only in respect of the Tribunal's finding that the breach had been cured and ground 2 upon which the appeal is allowed only in respect of the first and second of the protected disclosures in respect of which the Claimant has brought her claim. The cross-appeal is allowed only on the ground that the Tribunal should have decided but did not decide whether there was affirmation; all other grounds are dismissed.

106. Those conclusions of course raise the question – what should now be done? At the end of oral submissions there was much discussion as to the next step; but there were so many grounds of appeal and cross-appeal to be resolved that the answers provided to the burning question, whether any remission should go back to the original Tribunal or to a new Tribunal – had necessarily to be surrounded by numerous ifs and buts. The position is now much clearer. There are two undecided areas, as we have identified them above. The bulk of the criticisms of the Tribunal's judgment has been rejected. Applying the principles in **Sinclair Roche and Temperley v Heard** (2004 IRLR 763) at paragraph 46, the outstanding issues can and should properly be decided by the original Tribunal. We can see no need for any further evidence. The Tribunal must resolve those issues on the basis of the evidence which they have had so far.

107. Since hearing the arguments in this case, the attention of the EAT has been drawn to the EAT decision in **Smith v London Metropolitan University** (2011 EAT/0364/10) in which the EAT held that the setting out of grievances do not amount to protected disclosures. We have not invited further submissions on this authority, which does not add anything to what we have decided above.