Appeal No. UKEAT/0127/15/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 January 2016

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR J HOLMAN — APPELLANT

DEVON COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS EIWEN PIERROT (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR SIMON TIBBITTS (of Counsel) Instructed by: Devon County Council County Hall Topsham Road Exeter Devon EX2 4QD

SUMMARY

Constructive Dismissal

The Employment Tribunal had erred in its construction of the Respondent's "Conduct Policy and Procedure" ("the policy"), which was agreed to be part of the Appellant's contractual terms and conditions. Suspension is a serious matter (see **Crawford and Anr v Suffolk Mental Health Partnership NHS Trust** [2012] EWCA Civ 138 at paragraph 71) and the Employment Tribunal had erred by concluding that the suspension was lawful because the manager suspending the Appellant had power to do so without considering the argument that he might have been disqualified from doing so by his previous involvement in matters of controversy as between the Appellant and the Respondent. The Employment Tribunal also erred as a matter of construction in concluding that the word "should" in paragraph 17,5 of the policy was permissive and not mandatory as to the discussion of redeployment. The appeal was allowed and the matter remitted to the same Employment Tribunal.

HIS HONOUR JUDGE HAND QC

1. This is an appeal from the Judgment and Written Reasons of an Employment Tribunal comprising Employment Judge Carstairs, Mr Knox and Mr Howard sitting at Exeter over three days in July 2014 and four days in September 2014, with two further days in Chambers (one in September and one in October 2014). The Judgment and Written Reasons were sent to the parties on 1 December 2014 and they represent a detailed and careful analysis of the factual material and the relevant law relating to this case.

2. The decision was that the Appellant, who had resigned by a letter dated 19 April 2013, had not been constructively dismissed, there having been no repudiatory breach of his contract by the Respondent. The Employment Tribunal concluded that there had been what has been described as a "technical breach" on the part of the Respondent because when the Appellant's job had been evaluated under a job description written by a Mr Black, the Head of Service for Planning, Presentation and Environment, and that job description had been sent to a panel for the allocation of an appropriate salary grade under the Job Evaluation for New and Changed Jobs Policy and Procedure, no effective date had been agreed (see paragraphs 6.1.10, 6.2.1 and 6.2.2 of the Written Reasons). It is clear from the Judgment that the Employment Tribunal did not regard this, however, as a repudiatory breach.

3. The Employment Tribunal also found had there been no unauthorised deductions from his wages, which was a second claim the Appellant had made. During the course of the hearing he had withdrawn a third claim complaining of public interest disclosure detriments. Neither is relevant to the appeal and I mention them only for the sake of completeness.

4. Today the Appellant, who represented himself before the Employment Tribunal, has been represented by Ms Pierrot of counsel, acting under the Bar Pro Bono Scheme. I, for one, am very grateful to her because although the Appellant, as appears from his preparation of the case and the material in it, seems to be a man of very considerable intelligence, nevertheless, it is helpful to this Tribunal to have the assistance of counsel in the presentation of an appeal. The Appellant, I expect, is also grateful to her. The Respondent has been represented by Mr Tibbitts of counsel, who did appear below, and I am equally grateful to him for the able submissions that he has made to assist me.

5. Before turning to the grounds of appeal I should sketch in the background. The Appellant had been working for the Respondent under a series of fixed-term contracts for over seven years when he was appointed as a Climate and Energy Ambassador in March 2012. The appointment was described in the letter offering employment as being a "temporary appointment" and it was under the provisions of a three-year fixed-term contract. It was graded at salary scale F (see pages 108 and 109 of the appeal bundle). The letter refers to the appointment as being:

> **"… on the terms and subject to the conditions stated in this letter, the Statement of Particulars and related enclosures."**

One of those enclosures was "Statement of Particulars" (see pages 110 to 115 of the appeal bundle). That states the Appellant "general terms and conditions," to be:

> **"… covered by existing collective agreements negotiated and agreed with a specified trade union or unions recognised by this Authority for collected bargaining purposes for your employment group or from decisions of the Authority. …"**

It goes on to state:

> **"These agreements are contained in the Scheme of Conditions of Service … for Local Government Services as well as in other documents …" (see page 110 of the appeal bundle)**

At the end of the particulars there is the following statement:

> **"The collective agreements that directly affect your terms and conditions of employment are contained in the "National Joint Council for Local Government Services National Agreement on Pay and Conditions of Service" (Green Book) which sets out the national provisions …"**

The details of methods of publication are then supplied but it is not necessary to set them out.

6. The Employment Tribunal refers at paragraph 3.3 of the Written Reasons (see page 3 of the appeal bundle) to the Green Book and notes, in particular, that the Job Evaluation for New and Changed Jobs Policy and Procedure of the Respondent is required by section 2.1(6) of the Green Book to meet:

> **"3.3. … the standards required for an equality-proofed job evaluation scheme as well as the principles of the NJC scheme. …"**

7. It is common ground between Ms Pierrot and Mr Tibbitts that a document which starts at page 127 and runs to page 142 of the appeal bundle, and is entitled "Conduct Policy and Procedure" is a contractual document. That is to say has been incorporated into the terms and conditions of employment. On its frontispiece the following words appear:

> **"To be read in conjunction with DCC Corporate Conduct Policy & Procedure Management Guidance"**

That document is also included in the bundle. It runs from pages 143 to 149. The parties do not, however, regard that of itself as having been incorporated in to the terms and conditions of employment and, thus, being part of the contract of employment. Whether anything of significance turns on that distinction is perhaps one of the questions I need to consider in this appeal.

8. The Appellant's new post had been advertised at Grade F but the job description had been written at Grade E. This inconsistency was resolved by the then Environmental Policy

Manager rewriting the job description as a Grade F post. The Employment Tribunal describe this as an "artificially 'beefed up' " role (see paragraph 3.2 of the Written Reasons). The Appellant's contention was that this job description did not properly reflect his duties. So, he produced a draft of a new job description, but his line manager, Mr Eltham, and his superior, Mr Black, produced another. Although the latter was unsatisfactory so far as the Appellant was concerned, he did sign it and it was submitted to a job evaluation panel, which perhaps, with some degree of predictability, downgraded the Appellant's post to Grade E to take effect from 21 January 2013. Downgrading would have resulted in a pay cut of about 20%.

9. The Appellant reacted to this by indicating that with effect from the due date, 21 January 2013, he would no longer carry out those features of his current work which involved him with something called the South West Devon Project. He maintained that the rewritten job description did not include such duties. His managers and, in particular, Mr Black did not agree and there followed a period of discussion and negotiation but at a meeting on 27 November 2012 between the Appellant and Mr Black the Employment Tribunal found that the latter had suspended the Appellant on the basis that he had been guilty of gross misconduct by "failure to follow a reasonable management instruction". Technically speaking, at that stage the Appellant was only in anticipatory breach of the management instruction. The instruction referred to the dispute over the interpretation of the job description and to the fact that management maintained the Appellant was required to carry out the whole range of duties under the terms of the job description. By his anticipatory refusal to do so he was in breach of management instructions.

10. What happened at that meeting has been the subject of some debate during the course of the hearing. The Employment Tribunal's findings about the matter are set out only at

paragraphs 3.48 and 3.49 (see page 16 of the appeal bundle). Paragraph 3.48 narrates what I take to be the Appellant's account of what he said at that meeting. It is worth noting that the invitation to the meeting sent to the Appellant by Mr Black in an email was an invitation to a "Catch up" meeting (see paragraph 3.47 of the Written Reasons at page 16 of the appeal bundle). Mr Black's side of it is explained at paragraph 3.49 in these terms:

> **"3.49. Mr Black said that there was no option but to consider this as a potential gross misconduct issue. Due to the seriousness of the issue and the previous history of emails to Mr Eltham and others, Mr Black informed the claimant he was "going to instigate a suspension". As the Designated Officer or Disciplinary Officer, Mr Black was the appropriate person to make this decision."**

11. At one point during the hearing of this appeal it appeared as though there might be some controversy as to what had actually happened at that meeting, but that has all been resolved. Mr Black, at that meeting, is recorded at 3.49 as having informed the Appellant that Mr Black was going to instigate a suspension. The Employment Tribunal make a further finding about the matter at paragraph 6.1.12 at page 31 of the appeal bundle. The first three sentences of which read as follows:

> **"6.1.12. Application and continuance of suspension: The claimant was suspended at a meeting which, he had been told, was a catch up meeting. The claimant was not warned that he might be suspended (the ACAS code does not provide that an employee should be warned of a possible suspension). The Conduct Policy and Procedure does not require that such a warning be given. …"**

The rest of paragraph 6.1.12 deals with Mr Black's reasons for suspending the Appellant and the paragraph ends with these three sentences:

> **"6.1.12. … The Tribunal considers it unlikely that the claimant would have so contacted others, to the disadvantage of the respondent, while suspended. However, the Tribunal cannot substitute its own view for that of Mr Black as it was a view he was entitled to reach. The Tribunal concluded, therefore, that there was a reasonable and proper cause for suspending the claimant …"**

12. After that meeting the Appellant requested redeployment but the matter went in to a disciplinary procedure which appears to have been conducted not by Mr Black, although that might have been the original intention, but by Ms Denton and Mr Bott. This is dealt with by

the Employment Tribunal at paragraph 3.56 of the Written Reasons. The expression used there is "*that it was more appropriate that the disciplinary hearing should be conducted by someone else*". The Employment Tribunal do not explain that further, although they were perfectly aware that there was an inquiry undertaken by Mr Bott about "*the relationship between the claimant, Mr Eltham and Mr Black*" (see the first sentence of paragraph 3.54.10). The Appellant had in fact complained that Mr Black had "*behaved inappropriately*" (see paragraph 3.54.2). Mr Bott is recorded in that paragraph as having asked Mr Black about whether "*he had had any concerns about the claimant's behaviour or performance in the past*". Mr Black referred to some emails.

13. The first appears to have been an email sent to Mr Eltham by the Appellant on 13 September 2012. The context is dealt with at paragraph 3.8 of the Employment Tribunal's Written Reasons and I need not go into it in any detail. The problem appears to have related to an expenses claim and the Appellant wrote an email to Mr Eltham in terms set out at paragraph 3.8; subsequently he said that he had regretted sending an email in those terms. This resulted in a discussion at a meeting between Mr Black and the Appellant on 14 September (see paragraph 3.9 of the Written Reasons). Mr Black plainly did not appreciate the language used by the Appellant which he regarded as "*inappropriate language*" which could be "*perceived as threatening*". The meeting between the Appellant and Mr Black was the subject of a confirmatory email sent by Mr Black to the Appellant on 14 September 2012.

14. There was a further email on an entirely different subject sent by Mr Black to the Appellant on 5 October 2012 (see paragraph 3.10 of the Written Reasons at page 5 of the appeal bundle). In this email Mr Black required the Claimant to follow correct procedure in relation to some financial matters. This had in fact resulted from a meeting about the job description (see

paragraphs 3.21 and 3.22 of the Written Reasons at pages 8 and 9 of the appeal bundle). The Employment Tribunal made some findings about the relationship at paragraph 3.27. The Employment Tribunal pointed out that Mr Black in respect of the effective date of the change from Grade F to Grade E had acted in a way beneficial to the Appellant because, as mentioned above, the job description had not contained an effective date and Mr Black had remedied that by inserting the date 21 January 2013, which was beneficial to the Appellant because it was a somewhat longer period than necessary and so that was to the Appellant's advantage.

15. The Employment Tribunal recorded Mr Bott's findings about the emails at paragraph 3.54.2 and at paragraph 6.1.21 noted that:

> **"6.1.21. Any concerns there were about Mr Black conducting the disciplinary hearing were allayed by the fact that Ms Denton was appointed to deal with it …"**

16. The Employment Tribunal had also dealt with the way that Mr Black had assembled the case against the Appellant at paragraph 6.1.19 saying:

> **"6.1.19. … The Tribunal accepts that Mr Black's commissioning document could be seen as tendentious. However, the 'request for an investigation' form required that it included "all relevant allegations …". That was all that Mr Black did, also including the premise for the claimant's proposed action, namely that he felt aggrieved that his role had been regraded at grade E."**

17. At paragraph 3.53 there is reference to a "'*request for an investigation' form*". I understand this to be the same document as the commissioning document referred to in paragraph 6.1.19. The Employment Tribunal at paragraph 3.53 quote part of that document in these terms:

> **"Mr Black continues: "The role in the SWDCEP is clearly a project that could be identified as part of [the claimant's] job description and a key element of the role as outlined to [the claimant] by his line manager, by Doug Eltham on the 16th November 2012. On this basis, [the claimant] is refusing to work to his job description and in doing so is refusing to follow a reasonable formal instruction which is potentially an act of gross misconduct."**

18. All of this indicates that there was a degree of interaction between Mr Black and the Appellant at a stage before the suspension on 28 November 2012. It was common ground as I have already said that there had been no discussion on 27 November 2012 of any alternative to suspension. The Appellant subsequently requested redeployment but the matter went into the disciplinary procedure. Under that procedure a disciplinary hearing was due to be heard by Mr Bott, but before it was held the Appellant resigned. Subsequently he brought these proceedings in which he alleged a large number of fundamental and repudiatory breaches of contract. He grouped them, in fact, under the umbrella of a breach of the implied term of trust and confidence. All but one of them were rejected by the Employment Tribunal, the breach found proved was regarded as "*technical*" as I mentioned at the start of this judgement.

19. There is an alternative view of the Employment Tribunal's Judgment, namely that some breaches may have been found to have occurred but they were not regarded as repudiatory. It is possible to read paragraph 6.1.13 (quoted above), and in particular the last sentence of it, as amounting to a finding that the failure to discuss alternatives to suspension amounted to a breach but not to a repudiatory breach. That is the language used in the last sentence of paragraph 6.1.13. Similar language is used at paragraph 6.1.16 in relation to the continuation of the suspension. And the Tribunal at paragraph 6.1.24 appear to have collected together a group of three potential breaches and considered the cumulative effect. The Tribunal dealt with the lack of the agreed effective date, the non-discussion of alternatives to suspension and the slow speed of investigation in that paragraph and went on to say:

> **"6.1.24. … the Tribunal did not consider that the respondent had shown an intention to abandon and altogether refuse to perform the contract of employment (*Lewis, Tullett Prebon plc* and *Heaney*)."**

20. That would suggest that the Employment Tribunal was, at the very least, considering whether there were breaches and whether they amounted to a repudiatory breach, either when

considered individually or collectively. The ultimate conclusion is stated at paragraph 6.1.25 in these terms:

> **"6.1.25. Accordingly, having regard to the Tribunal's findings above, the Tribunal concluded that the respondent had not been in repudiatory breach of the contract of employment entitling the claimant to resign without giving notice. As a result, the claimant's resignation did not amount to a dismissal. His complaint of unfair dismissal therefore fails."**

21. The grounds of appeal are comprehensive; they occupy pages 37 to 50 of the appeal bundle. As a result of the sift procedure of this Tribunal, however, HHJ Shanks considered that only the second and third grounds of appeal should proceed to this hearing. The second ground of appeal - the first ground to be considered by me - is that the suspension of the Appellant by Mr Black amounted to a repudiatory breach of contract because Mr Black was disqualified from making such a decision. Under paragraph 3.7 of the Conduct Policy and Procedure (see page 129 of the bundle) there is a reference to the Principles of Natural Justice. There is a preamble which reads:

> **"Essential to the fair and reasonable application of these procedures, is the underlying commitment to the basic fundamental principles of fair treatment, namely:**
>
> **…"**

There follow a number of bullet points, the third of which reads:

> **"Any decision made will be by an Officer who is not associated directly with the employee and has acted in good faith."**

22. The Employment Tribunal set this all out at paragraph 3.46.2 of the Written Reasons. Two further passages are relevant to this, the first, which is paragraph 3.49, already quoted above. The last sentence of paragraph 3.49, which reads, "*As the Designated Officer or Disciplinary Officer, Mr Black was the appropriate person to make this decision,*" obviously relates to paragraph 17 of the Conduct Policy and Procedure document, which deals with suspension. Also relevant to this issue is paragraph 9 at page 134 of the appeal bundle where

reference is made to delegated authorities (see paragraph 9.2) and to Designated Officers in paragraph 9.3, which reads:

> **"Disciplinary action, within the Conduct Policy, may only be taken by a person with the appropriate authority. For the purposes of this policy the person with delegated authority to take disciplinary action, shall be known as the 'Designated Officer', who will act in good faith and free from bias. The 'Designated Officer' may be an Officer at senior management level, as appropriate to the case, with the delegated authority to dismiss."**

23. Insofar as the Employment Tribunal recognised any complaint about Mr Black's role in the suspension procedure, they deal with it in the last sentence of paragraph 3.49. Otherwise they do not give any consideration to Mr Black's role as the officer suspending the Appellant. Paragraph 6.1.21, to which I have already referred, deals with his role in the disciplinary procedure, where the fact there were concerns about him conducting the disciplinary procedure were recorded.

24. The second ground before me, the third ground of appeal, is that at paragraph 6.1.13 the Employment Tribunal erred in its construction of the contract of employment. Paragraph 6.1.13 reads as follows:

> **"6.1.13. The policy states that alternatives to suspension "should" be discussed. There was no such discussion when the claimant was suspended. However, the Tribunal noted that the word "must" was used elsewhere in the policy (paragraphs 3.7, 13.8 and 17.5). Accordingly, the Tribunal concluded that it was not compulsory there should be such a discussion about alternatives to suspension but that it merely was encouraged. Failure to discuss alternatives did not, therefore, amount to a repudiatory breach of contract (*Buckland* and *Malik*)."**

25. As I have already said, the use of the word repudiatory there might be thought to suggest that a breach had been found, but looking at paragraph 6.1.13 overall it seems more likely that having concluded that a discussion about alternatives was not compulsory, the Employment Tribunal regarded the lack of discussion of alternatives at the meeting on 27 November 2012 as not being a breach at all. The matter resurfaces at paragraph 6.1.24, as I have already indicated. Again, one of two views might be taken: either the Employment

Tribunal are considering that as a fact not as a breach of contract in relation to deciding whether taken cumulatively matters might amount to a repudiatory breach of contract, or the Tribunal is considering it as a breach. Having found it was not a repudiatory breach, it would still fall to be considered in a cumulative sense in deciding whether looked at overall there was a cumulative breach.

26. As well as those two grounds of appeal two ancillary questions have been ventilated before me. Firstly, whether if either of those or both of those grounds are made out, that would have made any difference to the outcome; counsel have described this as a materiality issue. Secondly, if I find either ground of appeal established to the extent that it is arguable there has been a repudiatory breach, how should the appeal be disposed of; this has been described by counsel as the remission issue.

27. Turning then to the arguments. Ms Pierrot submitted that one should consider the question of suspension against the background of the Court of Appeal having said in the case of **Crawford and Anr v Suffolk Mental Health Partnership NHS Trust** [2012] EWCA Civ 138 at paragraph 71 in the Judgment of Laws LJ that suspension is a serious matter. The learned Judge describes this as a footnote but it is worth considering the exact words that he uses, which were:

> **"71. This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in *Gogay v Herfordshire County Council* [2000] IRLR 703, even where there is evidence supporting an investigation, that does not meant that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty**

and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him."

28. Therefore, even though suspension is not necessarily a disciplinary matter and it should be noted that is made clear in the Conduct Policy and Procedure document, which forms part of the contract of employment, its importance to an employee should not be underestimated. What paragraph 3.7, which imports natural justice into all decision making, does is to guarantee a degree of independence. If a manager has a prior association with an employee and is to take a significant decision such as suspension, then the contractual entitlement under the terms of this contract, importing paragraph 3.7 into it, was for that decision to be made by somebody who did not have any prior history with the Appellant. In some organisations this would simply be an impossibility, but in an organisation of the size of the Respondent, Ms Pierrot submitted, this was a perfectly workable and sensible contractual provision. Mr Black was not to be regarded as appropriate, as the Employment Tribunal had found at paragraph 3.9, simply because he might fit the description of a "Designated Officer" in paragraph 9.3.

29. One of the fundamental questions in this context was whether this point was ever actually in play at the Employment Tribunal. Ms Pierrot submitted that it was. One could consider the Claimant's witness statements, in particular at paragraphs 89 and 90 at page 116. A second indication that this was in play arose from paragraph 5 or point 5 in annex 4 to the Appellant's skeleton argument, which referred to paragraph 3.7 and the issue of independence. She also relied upon the Appellant's written closing submissions at page 121 of the appeal bundle. At page 123 and paragraph 6(iv) there was a reference to the independence of Mr Black and, although that might be looked at in the context of the disciplinary procedure rather than inception of suspension, she submitted that the Employment Tribunal should have looked beyond that and put the matter into context. In any event, her fourth point was that paragraph

8(iii) of the skeleton argument on page 124 made the allegation clear so that, looked at overall, the matter had been clearly raised.

30. Mr Tibbitts submitted that this was taking too broad a view of the way the Appellant had put the matter. First of all, the agreed list of issues at page 106 of the hearing bundle at paragraph 1(iii) set the sub-issue of suspension into the broad - one might say portmanteau - allegation of a breach of the implied term of trust and confidence. The Appellant's case, submitted Mr Tibbitts, had really been that Mr Black had sent him home on 27 November and, having done so, was not empowered then to suspend him in the letter that he sent on 28 November. Suspension, as I have already said, is dealt with in paragraph 17 of the Conduct Policy and Procedure document. The concept of sending home is dealt with in paragraph 16 (see page 140 of the appeal bundle).

31. When one looks more closely at paragraph 90 of the Appellant's witness statement at page 116 of the appeal bundle and at page 123 paragraph 8(iii), what is being complained about is that this was a meeting at which he had been sent home. As I have already mentioned, there was some confusion as to exactly what line was being taken by the Appellant but ultimately it comes to this: the Appellant did not dispute that Mr Black might have discussed suspension at the meeting, but the Appellant did not understand that he had actually been suspended until he received the letter of suspension on 28 November. This was, therefore, not a complaint about the relationship between Mr Black and the Appellant, or the independence of Mr Black, it was a complaint about the way in which Mr Black had conducted himself in dealing with the matter of suspension.

32. Mr Tibbitts developed a further point, which was that, looked at overall, the Employment Tribunal's decision did not in find that Mr Black was in any way lacking independence. An analysis of the various factors discussed by the Employment Tribunal in respect of the relationship between Mr Black and the Appellant showed that the Employment Tribunal made no finding about a lack of bona fides on the part of Mr Black, nor did the Employment Tribunal find any resentment on the part of Mr Black. Indeed, as I have already mentioned, the Employment Tribunal found that Mr Black had acted favourably towards the Claimant and, in all other respects, did not suggest that Mr Black should be criticised.

33. All of this supported his contention, he submitted, that first ground (i.e. ground 2 of the grounds of appeal) rested on a basis that had never been put forward to the Employment Tribunal. The criticism of the finding at paragraph 3.49 about Mr Black being "the Designated Officer or Disciplinary Officer" and being "*the appropriate person to make the decision to suspend*" is looking at the matter on a basis never put forward at the Employment Tribunal. That reasoning, argued Mr Tibbitts, is adequate to deal with the matter that was in play so far as the independence of Mr Black is concerned, namely the issue of him having been sent home. Paragraph 3.49 amounts to a complete answer to the criticism raised about the Employment Tribunal not having dealt with this matter.

34. I do not accept Mr Tibbitts' submission. It does not seem to me that the Employment Tribunal has ever addressed properly the issue of whether Mr Black was an appropriate person to suspend the Appellant in terms of paragraph 3.7. In my judgment, the evidence establishes that Mr Black was clearly associated directly with the Appellant and, in those circumstances, the only issue is as to whether or not it can be said that paragraph 3.7 applies only to dismissal. Mr Tibbitts submitted that looking at the whole of paragraph 3.7 and the other bullet points which I have not referred to before, namely knowing the allegations made and having an

opportunity to deal with them and having a right of appeal, are all matters that relate naturally to dismissal and not to suspension. I do not accept that submission.

35. There is no distinction made in the Conduct Policy and Procedure as between one sort of decision and another or one procedure or another. The preamble to the bullet points in 3.7 is in entirely general terms and it seems to me that the principles of Natural Justice apply to the decision to suspend which is a serious decision (see **Crawford**) just as they do to other decisions to be taken under the procedure. Nor do I accept that the point was put in such a narrow way as Mr Tibbitts has analysed it. The terms of the witness statement at paragraph 90 are perfectly plain (see page 116). The assertion that it was not Mr Black who should have suspended and that he was not independent is quite clearly made at that point. It is true that in appendix 4, page 119, in the fifth point the context may well be partly the sending home, that is dealt with in the references in the second column, but Mr Tibbitts' submission ignores the text which quite clearly states that the decision as to whether to formally suspend or not should be made by somebody not associated directly with the employee and must be made in good faith.

36. I should say for the sake of completeness that it does not seem to me that the Employment Tribunal accepted that Mr Black had not acted in good faith. Their analysis of his overall position does not seem to me to support such an extreme suggestion (see, in particular, paragraph 6.1.2 referred to above). Nevertheless even accepting that there might have been some overlap between sending home and suspension, it seems to me obvious that the point was in play. Nor do I think that it was in any way abandoned by the closing written submissions made by the Appellant. It seems to me that Ms Pierrot is correct to say that when looked at overall paragraphs 6, 7 and 8 of those make it clear that a complaint was being made about the

fact that it was Mr Black who had made the suspension decision. The Tribunal simply have not dealt with that in terms and I regard the first ground as established.

37. I turn then to the second ground, ground 3 in the grounds of appeal, which is the construction point. As I have already said, this is dealt with in paragraph 6.1.13 of the Employment Tribunal's Decision. If the Employment Tribunal was the recipient of the same excellent submission made by Mr Tibbitts analysing the different uses of the words "must" and "should" in the Conduct Policy and Procedure document, it is perhaps not surprising that they came to the conclusion which they did at paragraph 6.1.13. Clear though his analysis was, however, it does not seem to me to be the right analysis. At one point I thought that Employment Tribunal must have concluded that the parties had adopted what is described by Lewison LJ in his work on the Interpretation of Contracts in Chapter 5 Section 10 as their own dictionary. This is quite clearly something that happens from time to time as Lord Hoffmann observed in **Chartbrook Ltd v Persimmon Homes Ltd** [2009] 1 AC 1101. But on reflection I think the issue was really just the construction of one single word in the contract.

38. What seems to me to be the right approach, and it is that adopted by Ms Pierrot, is to simply look at the words as they occur in paragraph 17.5 and to ask oneself what do those words mean; or putting it another way, what would a reasonable observer looking at all the circumstances at the time the contract was entered have understood the ordinary meaning of the words to be. One of the circumstances, as it seems to me to be that suspension is a serious matter, not the very words used by Laws LJ in paragraph 17 of his judgment in the **Crawford** case but the concept underlying then.

39. Looked at from that standpoint, the analysis of the Employment Tribunal on the question of construction seems to me simply untenable. Deciding what the word "should"

might mean in paragraph 17.5 by reference to the very many ways in which the words "must" and "should" have been used in other parts of the document is not a first step to construction. It is a step that might be justifiable if one could not understand what the words in the first sentence of paragraph 17.5 mean. It seems to me, however, that Mr Tibbitts' analysis that they are words of encouragement to a process that can be adopted or neglected as the employer sees fit is not a sensible understanding of the words used in the first sentence. It is certainly the case that the requirement for a meeting, and the requirement for the discussion at that meeting of alternatives to suspension, is qualified by the words "whenever possible". I would regard those words as qualifying both limbs and it is not difficult to think of circumstances where it might not be possible either to have a meeting or possible, if there is a meeting, at that meeting to discuss alternatives. Lurid examples of sexual assault and other forms of violence have been canvassed at this hearing, but it is not necessary to go through a list of alternatives. It is sufficient to simply note that there might be exceptional circumstances. That is quite frequently the case with contractual provisions, but it does not mean that therefore they are any the less contractual provisions. It does not mean that the words are to be read in a sense that does not require there to be a meeting.

40. The only way in my judgment in which a meeting should not take place or in which at that meeting alternatives to suspension, including redeployment, need not be discussed is when the factual matrix establishes that it was not possible to do so. It is a matter that may need to be investigated factually as to whether Mr Black had any basis for thinking that it was not possible at the meeting to discuss alternatives to suspension. Nevertheless, it seems to me that the Employment Tribunal have made an error of law at paragraph 6.1.13. Accordingly, I accept both submissions made by Ms Pierrot.

41. The question that has exercised my mind considerably during the course of the submissions is whether any of that makes any difference to the outcome in this case. Mr Tibbitts has cogently submitted that I can confidently reach the conclusion that the outcome would have been the same even if the Employment Tribunal had recognised that these were contractual breaches and even if they had recognised that these were repudiatory breaches. I have been very attracted to that proposition. I should perhaps mention that was something with great prescience that HHJ Shanks seems to have foreshadowed when putting this matter through to a Full Hearing.

42. I have been reminded, however, by Ms Pierrot of the terms in which the Court of Appeal in **Jafri v Lincoln College** [2014] IRLR 544, [2014] EWCA Civ 449, addressed this matter through the Judgment of Laws LJ at paragraph 21:

> **"I must confess with great respect to some difficulty with the 'plainly and unarguably right' test elaborated in *Dobie*. It is not the task of the EAT to decide what result is 'right' on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

43. I bear in mind factors that I will need to consider again in relation to remission, namely that this is a case that has already occupied nine days of the Employment Tribunal's time, resulting in what I accept from Mr Tibbitts' submissions is a relatively careful and detailed Judgment. It is tempting to say looking at the sequence of events it is very difficult to see how these matters in November 2012 can have still been active in April 2013. Nevertheless I am persuaded by Ms Pierrot that issues of whether or not there has been an affirmation of a repudiatory breach and the materiality of the repudiatory breach at the time of resignation are issues that have not been explored by the Employment Tribunal and are fundamentally issues of

fact that if the matter is to be remitted should be explored by the Employment Tribunal and not assumed by me.

44. The issue is put, as one might expect, very pithily by Laws LJ are paragraph 21 when he says that this Tribunal:

> **"21. … must send the case back unless (a) it concludes that the error cannot have affected the result … or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. …"**

I think I have a fair idea what it might have been but that is not what Laws LJ tells me I should act upon. Indeed, the whole point of paragraph 21 of **Jafri** is to correct the practice that had grown up in this Tribunal of this Tribunal acting pursuant to its powers given by the Rules and substituting its own conclusions. That can only happen where the outcome is clear and the error cannot have affected it. I do not think that I can regard either as being so clear in this case.

45. How then should I deal with the matter? Ms Pierrot submits that the case should go back to being reheard by a differently constituted Employment Tribunal. This is a case, she submits, where there is a second bite of the cherry, one of the factors set out in the well known passage in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Looking at the factors at paragraph 46 of the Judgment of, the then President, Burton J this is a case, she submitted, where there is certainly likely to be a second bite of the cherry, where this has been a totally flawed decision and where, although time has passed and proportionality must be a consideration, the latter factors are outweighed by the former. I do not accept that.

46. It seems to me Mr Tibbitts is right. This is a matter that should go back, having regard to proportionality, to the same Employment Tribunal with a direction to consider the two issues

identified in this appeal and decide whether those breaches were repudiatory breaches, still having an effect and being material to the resignation and not having otherwise been affirmed. Accordingly, the matter will be remitted to the same Employment Tribunal. It seems to me that it would be disproportionate, much of the evidence having been heard, for this case to be completely reheard. Some time has passed, but it does not seem to me that it is so long that the Employment Tribunal cannot pick up the thread again, nor do I think that this can be described as a totally flawed decision and I do not regard a second bite of the cherry as being a real danger. The Tribunal appear to me to have approached their task conscientiously the first time around and I see no danger that they will not do so again.

47. Accordingly, the appeal will be allowed and the matter will be remitted to the same Employment Tribunal and subject, of course, to any difficulties that might arise, which, no doubt, can be dealt with by the Regional Employment Judge. The Employment Tribunal should consider, as I have just said, whether the breaches that I have identified amounted to repudiatory breaches, which I think is a matter for them not me, and whether those breaches, if repudiatory, have been affirmed and, if not, whether they were material at the time of the letter of resignation and were part of the reason why the Appellant resigned.