Appeal No. UKEAT/0052/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 December 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR S CHADWICK APPELLANT

SAINSBURY'S SUPERMARKETS LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS KATHERINE NEWTON (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR NATHAN ROBERTS (of Counsel) Instructed by; Sainsbury Supermarkets Ltd (Legal Services) 33 Holborn London EC1N 2HT

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

UNFAIR DISMISSAL – Constructive dismissal

An Employment Tribunal had heard two days of evidence from the Claimant, who had brought a complaint of constructive unfair dismissal. At the start of the third day, when the parties had expected the Respondent's case to begin, the Tribunal raised of its own motion the possibility of striking out the claim. It went on to do this. A reason given for adopting this course was the pressure of resources on the Tribunal and the likelihood of the hearing lasting at least the rest of that day, if not another day.

Reconsideration was sought and (it appears) granted in a further hearing, although the same decision was then reached.

The EAT held, on the facts, that the Tribunal had erred in law in finding, in respect of the "last straw" doctrine in constructive dismissal, that the threat of disciplinary action was an "entirely innocuous act". The case was remitted for rehearing.

The EAT commented that short-cuts taken for, or influenced by, resource issues often prove to be more wasteful of resources in the long run.

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HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against a Reconsideration Judgment (which I will abbreviate to "RJ") given by the Employment Tribunal ("ET") sitting at Manchester, Employment Judge Holmes sitting alone, sent to the parties on 3 May 2017.

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2. That Judgment followed an earlier Judgment, the original Judgment, which I will abbreviate to "OJ", in which the Tribunal struck out the claim. This followed two days of evidence and the parties arrived at the Hearing ready for the start of the Respondent's case.

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3. Instead, in what the Tribunal described as, "an unusual and rare occurrence", it decided of its own motion to raise with the Claimant (who was unrepresented) and the Respondent, the question whether it should strike out the claim at that stage. The Claimant had closed his case at the end of the previous day. No evidence had been heard from the Respondent.

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4. The Tribunal gave as a reason for adopting this unusual course the pressure of resources on the Tribunal and the likelihood of the case lasting "at least the rest of the day, if not another day." There followed a further rehearing on Reconsideration, resulting in the lengthy Judgment under appeal and a further hearing on the Respondent's application for costs, no doubt prompted by the strike out. Case law shows how often short-cuts taken for, or influenced by, resource issues often prove to be more wasteful of resources in the long run.

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5. The Reasons do not record what form the deliberations followed as to whether the strike out should proceed and there is no note of any observations made on the part of the Respondent which was legally represented. However, I was told today by Mr Nathan Roberts, who

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represented the Respondent here and below, that the Respondent supported the Judge's proposal.

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6. The Tribunal concluded that the Claimant's claim for constructive unfair dismissal was bound to fail as (in the briefest of terms) the "last straw" doctrine did not apply on the facts as advanced by the Claimant.

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7. The Claimant applied for Reconsideration of the decision to strike out his claim, which took place on 7 April 2017. The application, which is to be found at page 68 of the appeal bundle, sought to advance his case in more detail. Paragraph 20 of the letter seeking reconsideration said this:

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> **"20. It has come to my attention that I can appeal to the Employment Appeal Tribunal. I do not intend to do so. It seems to me that the Tribunal having heard the arguments is in the best position to decide the facts of the case and whether or not reconsideration should be successful."**

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8. A hearing duly took place, the ET allowed consideration of the additional material but reached the same conclusion. Although the RJ states at the outset that the application for reconsideration was dismissed, it is common ground that what actually happened was that the ET allowed Reconsideration and then upheld the original Decision. Rule 70 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("ET Rules")** provide that a Tribunal may reconsider any judgment where it is necessary, in the interests of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked, and, if revoked, may be taken again.

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9. The original grounds of appeal were considered by HHJ Eady QC, on the sift, which was refused but came back before HHJ Stacey at a Rule 3(10) Hearing, at which the Claimant was represented under the ELAAS Scheme by Ms Katherine Newton.

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10. Following that Hearing, Judge Stacey allowed the matter to proceed and Ms Newton has, to her credit, continued to act for the Claimant through the *bar pro bono* unit for which I, and, I am sure, Mr Chadwick, are most grateful.

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11. There is a cross-appeal stemming from the ET having allowed fresh evidence to be adduced as the basis for allowing reconsideration. The point is stressed by Mr Roberts that it is not open to me to treat this appeal as though it were an appeal of the OJ, something which the

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Claimant expressly chose not to do.

12. I am grateful to both counsel for their helpful skeleton arguments and oral submissions.

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I am anxious to deliver an *ex tempore* Judgment before the Christmas break, to which end I will not recite their submissions in great detail, I have, however, had full regard to everything placed before me both oral and in writing.

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13. It is not necessary to state the background to the case in much detail. Mr Chadwick was a long-serving member of staff at a supermarket operated by the Respondent. He claimed that he had been picked on over a long period of time by a member of staff, Mr McKendry, who

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was his direct manager and the deputy Manager at the store. Matters came to a head at a meeting which took place on 19 December 2015. At that meeting the Claimant says that he was told that, as a result of being behind in submitting staff appraisals, known as CPRs, this would

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lead, or would potentially lead, to disciplinary action being taken against him. (see OJ paragraph 14). The Tribunal quotes from the Claimant's witness statement as reporting that Mr

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McKendry, "*told me he was going to take disciplinary action against me for not completing my outstanding CPRs*."

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14. The Claimant left and wrote a letter on 24 December 2015 resigning "on grounds of constructive dismissal," the stated reason being, [*Mr McKendry's] decision to instigate disciplinary action against me for outstanding CPRs … despite my making him aware I did not have enough hours on my department to fulfil my job role*."

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15. The "last straw" arose in circumstances which are set out in the "OJ" in the following paragraphs:

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"….

21. The claimant was of course, at that stage, unaware of what had happened before being called into the meeting with Alex. He was unaware of it, and indeed could not at that stage have been aware of it. Since then, however, he has become aware of what the respondent has said about how that meeting came about. That is from two sources: first of all the witness statements in this case, in particular from Mr McKendry himself, and secondly because after his resignation the claimant did then raise a grievance which was subsequently investigated firstly by Mr Lamb and then subsequently on appeal by My Chason., In the course of that investigation both Ms Blackett and Mr Mckendry gave accounts, initially, to Mr Lamb, and in relation the events of 19 December in particular Ms Blackett gave account about those events to Mr Lamb, in her interview which starts at page 91 of the bundle. In relation to what happened at the meeting and how it came about, on pages 91,92 and 93 she refers expressly to how that meeting came about.

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22. In particular what she said, and indeed this corroborates what Mr McKendry has says in his witness statement, about how this meeting came about, is that it was she who was concerned about the outstanding CPRs and, indeed she had had a conversation with Carolyn from HR about them. Consequently, it was her who gave the instruction to Mr Mckendry to deal with the outstanding CPRs and to speak to the claimant. In terms of the timing of it, she makes clear in her interview and indeed Mr McKendry says in his witness statement that it was Mr McKendry who suggested leaving the discussion of the CPRs until after Christmas, but Ms Blackett insisted that he had that discussion with the claimant there and then or soon thereafter, and certainly before Christmas. So in terms of the choice of timing that was, it turns out, Ms Blackett's.

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23. In terms of the claimant, of course, he was unaware of that, and it is appreciated that this is part of the respondent's evidence in the case, and it is in the respondent's witness statements and the respondent's documents. It is not of course part of the claimant's evidence, but in cross examination, and in questioning from the Tribunal the claimant has accepted those accounts. He would not, if Mr Mckendry was to give evidence for example, cross examine him about the events of 19 December, and suggest that his account of how the meeting came about, or who decided it would be held then, and not after Christmas, was in any way wrong and he would, on that basis, accept the account of Mr McKendry in his witness statement, and indeed what Ms Blackett said in her interview with Mr Lamb. So, consequently, he would he would not be challenging the factual basis upon which that meeting came about.

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24. Furthermore, it is apparent in his evidence that what, as it were, triggered his walking out and indeed resigning, as it turned out to be, was not so much the meeting being held that day, nor indeed its contents, in the sense that the claimant accepted that the issue of outstanding CPRs was a legitimate one to be raised with. He said that had Ms Blackett been the person

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who raised these matters with him, even on the 19 December, that he would not have resigned or walked out in those circumstances. In other words, as he made clear in his answers to the Tribunal's questions, it was the identity of the person who was conducting the meeting, not its contents or indeed its timing that was the trigger. Had Ms Blackett carried it out he would not have resigned in those circumstances.

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25. The question then arises as to whether or not that can constitute a final straw so as to satisfy the test of constructive dismissal, and particularly the test in *Omilaju* as to what a final straw has to be. In terms of that test, of course, it is apparent that the Tribunal has to look at this matter objectively not subjectively. As the claimant himself has been quite candid and frank to accept, these were his perceptions at the time, and indeed he has not been challenged on that. Even if he were, for these purposes, the Tribunal perfectly accepts that his perceptions were what he says they were, but, of course to whether they were objectively correct is another matter, and whether the Tribunal could regard those as objectively correct is a contentious issue. To that extent, therefore, the Tribunal has to look not at how the claimant saw it, but whether or not, objectively, he could legitimately have regarded those events on 19 December 2015 as constituting a final straw.

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26. As the Omilaju judgment makes clear, particularly at paragraphs 19-22 the test, as Mr Roberts for the respondent accepted, is a low threshold but it is nonetheless a threshold in terms of what final straw must be. It is clear that it does not of itself have to amount to a breach of conduct. It may not even have to be unreasonable or blameworthy, although it very frequently will be. But, as the judgment makes clear, the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which the learned Judge reffered.

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27. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. That is why, as the Employment Judge has tried to make clear to Mr Chadwick, for these purposes it would be accepted and assumed that the earlier acts may well constitute potential breach of the implied term of trust and confidence, but the Tribunal does not for these purposes look at those, and will not be entitled to do so if there is in fact no final straw. As the judgment goes on to say:

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> ***"A claimant cannot subsequently rely on those acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."***

Moreover, and this is an important part of the judgment:

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> ***"An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence have been undermined is objective."***

So to the extent that the claimant might have been perceived that as being the case, the Tribunal cannot rely solely on that, it must look objectively on the acts complained of on 19 December 2015 and then decide whether that alleged final straw is capable of being so.

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28. In his submissions today to deal with this point, which the Tribunal appreciates was an unexpected one, and for which the claimant was not initially prepared, but was afforded time by the Tribunal to prepare, and considers he has been able to do so, the claimant made this point, which is that whilst Mr Mckendry holding the meeting when he did may have been the responsibility ultimately of Julia Blackett herself, and whilst had she carried it out at that time he would not have resigned or left as he did, Mr McKendry in not, as it were, challenging Julia Blackett at the time with what he knew about the circumstances thereby did act in breach of contract, or certainly acted in a way that could be regarded as a final straw. He makes that assertion on the basis that Mr McKendry being in charge as he was of the allocation of labour and therefore familiar with the allocation of hours, would or should have been aware, in fact the claimant does put it in the former actually, was aware and not necessarily should have been but he definitely was, that Mr McKendry having under-allocated hours to the claimant

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in the way that he sets out and did in his evidence at some length, over a number of months was well aware that if the claimant had not been able to perform the CPRs that he was required to, that this was actually Mr McKendry's fault and that he, Mr McKendry, knew that and at that point should have challenged Ms Blackett in terms of then taking the matter up with the claimant.

29. The Tribunal has considered that argument, as it is a matter that had not previously been advanced, but in doing so the Tribunal has to consider the events of 19 December 2015 and look at them, as I say, objectively, and whilst it may be a matter of criticism of Mr McKendry, and the Tribunal will accept that he would not necessarily agree with this, but accepting for a moment the claimant's case at it highest that that may be so, the Tribunal still struggles to see how in those circumstances the meeting of the 19 December 2015 in itself can be said to constitute a final straw. That Mr McKendry could and, Mr Chadwick submits, should have challenged Ms Blackett at that point is something that may well be right, but that is not what the claimant is complaining about. He is complaining about the meeting, which he accepts had Ms Blackett decided to carry out herself would not have been a problem for him. Now, of course, if she decided to carry out the meeting herself it may well also have been the case that prior to that Mr McKendry should have told her not to do so because of what he knew about the claimant's difficulties with his hours for which he was responsible. The meeting in those circumstances might have been diverted, but in terms of what actions were taken towards the claimant Ms Blackett could well have continued with that action, and left that to be determined in any subsequent meeting. The claimant, of course, would have been able, as he knows as a manager from the disciplinary procedures with which he was familiar, to advance in any disciplinary or performance review of his own conduct, anything he wanted to in his defence. So whether Mr McKendry did or did not take the opportunity, or should have taken the opportunity, to tell Ms Blackett that it was actually not the claimant's fault that he was behind with his CPRs seems to me to be neither here nor there. The fact is that if Ms Blackett had conducted that meeting, whether Mr McKendry had or had not done that, it would still have occurred, but the difference would have been that the claimant would not have reacted as he did.

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30. He did so, it seems to the Tribunal, overwhelmingly, and he probably agrees with this, because of his perceptions at that time, and indeed because of his own personal circumstances, his feelings, and possibly also his health. It was, he probably accepts now, something of an over-reaction. It was one which he had a chance to reconsider and resile from, as the respondent did not immediately treat him as having resigned there and then, but which he confirmed in his resignation letter.

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31. In terms of whether or not that makes it a final straw, of course, there is the danger that the subjective element overtakes the objective. When one looks at it objectively, for the reasons I have indicated, it seems to the Tribunal that the final straw that he alleges cannot objectively be viewed as that; it was the person conducting the meeting to which the claimant objected which, whilst ultimately may have been a matter that caused him upset, the Tribunal, given the concession by the claimant that this all came about because of Ms Blackett's decision to have a meeting at that time, and to raise those matters, nonetheless cannot in the Tribunal's view have any reasonable prospects of amounting to a final straw. The Tribunal bears in mind that the wording in the rule is "no reasonable prospects", not "no prospects", and applying that test, the Tribunal remains of the view that any argument that the claimant raises or could raise that the events of 19 December 2015 constituted a "final straw" have not more than remote, and hence not reasonable, prospects of success.

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32. If it cannot have that prospect then the claimant cannot have any prospect of this constructive dismissal claim succeeding, because without a final straw there can be no constructive dismissal. So the Tribunal at this point finds that that is a potential difficulty which might entitle it to strike out his claims.

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16. From Mr Roberts' recollection, inevitably faded as the Hearing was two years ago, having heard submissions the Judge delivered an *ex tempore* Judgment more or less immediately. The Hearing is likely to have concluded at around lunchtime as RJ paragraph 2,

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A records that at 14.20 hours on the same day the Tribunal received an email in the following terms:

> ***" It occurred to me as I was coming home that it had not been clear why a conversation between Julia and myself and Alex and myself were implicitly different irrespective of personal relationships. With Alex it could only be about a disciplinary procedure. If I wanted to appeal that decision it would go to Julia. With Julia it would only have been a coaching conversation. Julia does not disciplinary investigations as she is the line of appeal. If Julia issues warnings the line of appeal becomes Neil Chason and that would not have been applicable, so if it had been Julia than yes, I wouldn't have walked out but it wouldn't have been a disciplinary meeting it would have been a coaching conversation."***

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17. At the Reconsideration Hearing the Judge summarised the core of the Claimant's argument in the paragraphs set out below:

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> **"9. Consequently it was that, particularly with reference to the authority of _**Omilaju**_ which, as the claimant has said this morning, he was provided with in the last hearing, the Tribunal looked at his evidence of what the last straw was said to be. Again, accepting his account of what happened in that incident, in response both to cross examination and the Tribunal's own questions, it was on the basis of his evidence that the Tribunal, on the previous occasion, came to the conclusion that the claimant had no reasonable prospects of establishing that that incident, on 19 December, could constitute a last straw within the meaning of _**Omilaju**_ so as to give him the entitlement to resign, and that consequently was fatal to his prospects of success in the constructive dismissal claim and that is the reason why it was struck out.**
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> **10. In relation to that finding, the claimant effectively relies upon the evidence that he would have (if he had thought more on the question) given to the Tribunal, in essence, to the effect of the difference in the two individuals concerned, Alex McKendry with whom he had the meeting and Julia Blackett, who was the store manager superior to Mr McKendry. The difference in their roles was such that Julia Blackett would not, ordinarily, conduct a disciplinary meeting but Mr McKendry would do, and that as it was Mr McKendry who was having this meeting in which the claimant says, and for these purposes the Tribunal accepts (and in any event notes Mr McKendry's own evidence, is very much to this effect in his own witness statement), that the claimant was told that there was going to be a disciplinary which the claimant, of course, says in paragraph 139 of his witness statement. So clearly that was before the Tribunal on the last occasion.**
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> **11. The point made by the claimant in his application, and indeed very shortly after that hearing concluded on 6 October, was that as Julia Blackett did not ordinarily conduct disciplinary meetings, he would not have taken a meeting with her as being a potential disciplinary, but in the case of Mr McKendry he did, and indeed his evidence was that that was said, and the Tribunal accepts that for these purposes. That, he says, was something of what he describes as a "light bulb moment" later, as he was returning home, and that is why he emailed the Tribunal as he did and that email, of course, is very similar in terms to the main basis of his application in paragraphs 1-7 of his application today. It is, as he puts it quite rightly, the guts of the application.**
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> **…**
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> **14. In terms of the main contention made by the claimant, the essence, of course, is the difference in status and position of the two individuals concerned, Alex McKendry and Julia Blackett. The claimant was familiar with their evidence, in the form of their witnesses statements, and indeed commented upon evidence that they had given, in the case of Mr McKendry in his witness statement, or indeed as both of them gave in the course of the investigation that was carried out after his resignation. In terms of what he wishes to put forward, effectively it seems to me what he is saying is that in answer to the Tribunal's questions as to whether, had it been Julia Blackett that held this meeting as opposed to Alex McKendry, he would still have resigned, to which he accepts, and is clearly the case that he answered "no", he would not have done in those circumstances, that he would have added, as it were, a gloss to that evidence, by making reference to the difference in status that they held, and how it would not be usual or normal for Julia Blackett to hold a disciplinary He would therefore not regard a meeting with her as disciplinary."**

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18. As I have indicated, above, the Respondent opposed the reconsideration on the basis that this was allowing the Claimant a second bite at the cherry. The Tribunal rejected the submission at paragraph 17, saying:

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> **"17. Whilst appreciating the force of what the respondents submit in that context, the Tribunal does not accept that argument. Whilst appreciating that a second bite at the cherry is not something that reconsideration applications can be legitimately used for, the Tribunal does take very much into account the unusual circumstances giving rise to this application, and indeed giving rise to the Tribunal's previous judgment. Those circumstances were that having heard the claimant's case in its entirety the Tribunal of its own motion raised the question, because of course it is one that goes to jurisdiction ultimately, as to whether the Tribunal could be satisfied that the claimant had reasonable prospects of success in an essential element of his claim. That was a surprise, the Tribunal accepts, to both sides, but obviously in particular to the claimant, because it affected his case particularly rather than the respondents' case. So in terms of the circumstances in which he was put, the Tribunal accepts that they were unusual and doubtless were somewhat difficult for him.**

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> **18. In terms of time, the claimant accepts that he was afforded time and the Tribunal has recorded that fact and both parties were offered the opportunity to take as long as they want to consider the issue, and the claimant indicated that he had had the time he needed. He contends that during the time that he was considering the matter and considering the case of *Omilaju* which he was provided with, the respondent's counsel interrupted his preparations for other reasons, and whether or not that happened, frankly, seems to me not to be of great moment. The fact is the claimant had a limited amount of time, and whilst he considered that he had had enough time and did not raise with the Tribunal when he came back into the hearing on 6 October that he had been interrupted in his preparations, it is not surprising that in those circumstances under a degree of pressure, and, of course, as an unrepresented litigant, that he did not think of something that he did later think of. He thought of it clearly very soon after the hearing, because he emailed the Tribunal at 2.20pm, and it was, I am quite satisfied, something of an oversight, and a result of the somewhat pressurised conditions that he was operating under that the claimant omitted to give that answer, or make that point at that point in the hearing. Whilst I do not hold the respondents responsible for that, and do not think it greatly matters whether they were or were not, it seems to me that the mere fact that he has sought to add an additional factor, or a gloss to his evidence or a point he would have made, having raised it so soon after the Tribunal concluded its judgment on 6 October, I do not think that that of itself precludes the Tribunal from considering in this application the matters that he now seeks to put forward. So, whilst it may be to some extent a second bite at the cherry, it is one that the Tribunal thinks that the claimant ought to be able to raise, given the somewhat unusual and difficult circumstances in dealing with a highly technical and legal application, and issues that were raised suddenly and unexpectedly in the course of the hearing on the last occasion. So that argument the Tribunal considers is not fatal to his application and the Tribunal will therefore go on to consider the more important aspect, perhaps, and that is the effect of the additional matters the claimant relies upon in relation to the Tribunal's previous finding, and whether those matters incline the Tribunal to alter its previous finding and reverse it so as to hold that the claimant has reasonable prospects of success, and should be allowed to continue with the hearing."**

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19. The Tribunal concluded at paragraphs 30 and 31 in the following terms:

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> **"30. In terms of the *Omilaju* test as to whether or not all this satisfies that test, what the Tribunal would be left with is what would otherwise be a perfectly legitimate and innocuous management request in relation to looking into an admitted issue in relation to the CPRs at a time when the Store Manager had decided it should be dealt with, and had then delegated the matter to Mr McKendry. It seems to the Tribunal that in those circumstances, as it believed previously and still finds, the overwhelming reason for the claimant's reaction was "the singer, not the song", as it were: it was the personality, the identity, of the person holding the meeting, and that, of itself, is not capable of amounting to a final straw. In short, if the claimant would have no grounds to resign and complain of constructive dismissal if Ms Blackett had held even a potentially disciplinary meeting with him at that time, and for those reasons, that cannot change simply because the same actions were then taken, on her instructions, by someone else. The claimant may not have expected any such meeting to become disciplinary if held by her, but he would not have been entitled to resign in those circumstances if it had. We come back to the identity of the person carrying out the action, rather than the action itself, when judged objectively. Given that the claimant, though given time to reflect, and not act in haste,**

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> **did not reflect in this way upon these matters and withdraw his resignation, but confirmed it, the Tribunal can see no basis for reconsidering his prospect of success.**
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> **31. So whilst appreciating the claimant's very cogent application, and everything that he has set out, and having considered, as the Tribunal thinks it was entitled to, the matters that he has put forward, the Tribunal does not, however, find that those are of sufficient weight to revoke or vary the judgment that it made. The Tribunal's conclusion remains the same and therefore the previous judgment is confirmed."**

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20. Although the language is confusing it is common ground, as I have already noted, that this was a case where the Tribunal *did* reconsider: had it not done so paragraphs 17 and 18 of the RJ, see above, would have been otiose.

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21. The first question for me is whether the Tribunal erred in law in reconsidering at all. Was this a case where, as Mr Roberts argued, new evidence ought not to have been admitted, the basis of so doing as set out in **Ladd v Marshall** [1954] 1WLR 1489 not being explored by

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the Tribunal far less satisfied?

22. I have had regard to the points which he made as to the evidential position, the Claimant

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having in effect conceded at the Hearing that he would not challenge the version of events advanced by the Respondent at the Hearing, namely that Mr McKendry had, in fact, pushed against there being a meeting with the Claimant prior to Christmas, but Ms Blackett, the Store Manager, insisted.

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23. However, the "light bulb moment" (to adopt the expression in the decision), it seems to me, was not seeking to advance new evidence but to correct a misunderstanding or

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misinterpretation on the part of the Judge as to the Claimant's answers to the Tribunal.

24. The Claimant had been taken entirely by surprise on the third day of the hearing, when

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he would not have been expecting what is, on any view, an exceptional and unusual course. It is a case which the weight of authority counsels strongly against. He was unrepresented. It is

hardly surprising that his submissions were not those which might have been expected had he had time to reflect. True it is that he said he was ready, but as a litigant in person he was undoubtedly placed in an exceptionally difficult position. The "interests of justice" test should not, in my judgment, be narrowly defined. I see no error of law in the Judge deciding that, given these highly unusual circumstances, it was in the interests of justice to allow the reconsideration. So, the cross-appeal fails.

25. There is no dispute as to the legal test in **<u>Omilaju v Waltham Forest London Borough Council</u>** [2004] EWCA Civ 1493. The issue for the Tribunal, given the path it had chosen, was to consider whether the events of 19 December were "entirely innocuous" (see paragraph 27 of the OJ) judged on the correct objective test.

26. The core of what I consider the Claimant was trying to put forward, albeit not with the greatest of clarity, was that there would not have been the threat of disciplinary action had Ms Blackett been conducting the Hearing. During the Appeal Hearing, I was taken to notes of a meeting held in connection with a grievance that the Claimant had initiated. Ms Blackett was being interviewed about the matter. She was asked whether the meeting which she had asked Mr McKendry to have with the Claimant was to be a disciplinary meeting. Her response was, and I am summarising it, that it was not to be a disciplinary meeting, rather a plan to coach him to improve.

27. The Tribunal's approach, both in "OJ" and the RJ, was that it was the person holding the meeting, and not the contents of it that caused the Claimant to resign. It restated, at paragraph 30, that the meeting with Mr McKendry was a "*perfectly legitimate and innocuous management request in relation to looking into an admitted issue in relation to CPRs*."

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28. What the Tribunal failed to do was to examine whether the making by Mr McKendry of a threat of disciplinary proceedings, which he had not been asked to deliver, changed the position. I stress that Mr McKendry has not given evidence, and nothing I am now saying should be taken as prejudging the issue. However, given the alleged history of Mr McKendry picking on the Claimant over a period, it is clear that the making of such a threat, if established, is something which takes the matter squarely into the legitimate territory of a permissible "last straw".

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29. Ground 2 of the Notice of Appeal asserts that the Tribunal erred in its approach to, and/or conclusions, in respect of, the last straw doctrine, and Ms Newton argues that no reasonable Tribunal could have reached the conclusion that the threat of disciplinary action was an "entirely innocuous act". I am mindful of the high threshold required to establish perversity on the part of a Tribunal, but I am satisfied that, on the facts of this case, it has been crossed.

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30. The other grounds seem to me to be largely directed at the OJ which is not the subject matter of the appeal. However, having made the findings that I have in relation to ground two, they become academic in any event.

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31. It seems to me that, in the light of my allowing the appeal, it must follow that, had the Tribunal correctly found that, given the state of proceedings, it was open to the Claimant to argue that there was a "last straw" argument, it must have revoked the OJ. As there was only one option open to it, in accordance with the principles in **Jafri v Lincoln College** [2014] EWCA Civ 449: I can deal with the matter myself. I direct that the original Judgment is revoked and that the matter is reheard from the start. It is for the Regional Employment Judge

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to decide whether the Employment Tribunal should be constituted as before or differently: there is no reason to question the ability of the original Employment Judge to rehear the case.

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