Appeal No. UKEAT/0278/18/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 9 May 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

UPTON-HANSEN ARCHITECTS LIMTED — APPELLANT

MS X GYFTAKI — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MR ALEX ROBSON (of Counsel) Instructed by: Edwin Coe LLP 2 Stone Buildings Lincoln's Inn London WC2A 3TH

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

UNFAIR DISMISSAL – Mitigation of loss

UNFAIR DISMISSAL – Contributory fault

Upon her return from a period of absence at the start of October 2017, the Claimant was suspended from work pending investigation of an allegation that she had taken the absence without authority, and a further allegation relating to a period of absence the previous July. She subsequently resigned. The ET found that the decisions to suspend the Claimant, and to include the July matter, breached the implied duty of trust and confidence, and that she had been constructively unfairly dismissed and wrongfully dismissed. It made awards for wrongful dismissal and basic and compensatory awards. The Respondent appealed on various grounds.

Held:

1) The Tribunal had been entitled to find that there was no fair reason for dismissal, in view of the fact that the Respondent had not pleaded any such reason, and in view of its findings about the reasons why the Claimant had been suspended and why the July matter had been included in the investigation.
2) The Tribunal had not erred by confusing the section 98(1) **ERA 1996** test and the section 98(4) test and had not erred by not considering section 98(4). There being no fair reason for dismissal, the Tribunal rightly concluded that the dismissal was unfair, and section 98(4) did not need to be considered.
3) The Tribunal had not erred in not reducing the compensatory award for contributory conduct. While the Tribunal had been critical of the Claimant's conduct in one respect, it had been entitled to find that this had not caused or contributed to the Respondent's conduct which amounted to the repudiatory breach, and hence, the dismissal.

4) The Tribunal had been entitled to find that the Claimant's efforts to find work in the UK, and then her decision to relocate to Greece and to start her own business there, did not involve any failure by her to take reasonable steps to mitigate her loss.

5) The Tribunal had not sufficiently explained how it had arrived at the figure awarded for loss of remuneration, having regard to the information available to it. The appeal was allowed in this respect, and the matter remitted to the Tribunal to carry out that exercise afresh.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were in the **Employment Tribunal** (the "ET"), as Claimant and Respondent. It is the Respondent which brings this appeal. The Respondent is a firm of architects. The Claimant was employed by it from August 2013 until she resigned in October 2017 from the position she held at that time, of Senior Architect. She presented claims to the ET of unfair dismissal and wrongful dismissal. These were heard by Employment Judge Segal on 5 and 6 July 2018. He gave an oral decision that the Claimant had succeeded and went on also to deal with remedy. Subsequently, a written Judgment and Reasons were sent to the parties on 9 August 2018. The Judgment records that the claims of unfair and wrongful dismissal were upheld, and that the Tribunal awarded £3,127 net for wrongful dismissal, a basic award for unfair dismissal of £1,956 and a compensatory award of £29,000.

2. In his Reasons, the Judge describes how, in July 2017, the Claimant travelled to Greece but accidentally had booked one day's leave less than the number of working days the planned holiday lasted. She then also decided that she needed to stay on for a couple more days for family reasons. Those additional days' leave, plus the one extra that she already needed, were later granted.

3. The Judge goes on to describe that as of September 2017 the Claimant has exhausted her leave entitlement for the year. She then became aware that she might need to return to Greece to deal with certain family matters. On 14 September she bought a ticket to travel to Greece later that month, on the 28th, against the contingency that she would indeed have to return there for that purpose.

4. The Tribunal went on to describe that, on the evening of Tuesday 26 September 2017, the Claimant learned that she did indeed need to travel to Greece, to sign certain documents, on the 28th. On the morning of 27 September, she emailed her line manager, a director of the Respondent, Mr Upton Hansen, requesting permission. In the afternoon he emailed her asking the reason why she needed the leave, and she then replied.

5. The Tribunal records there was then no further contact from the directors of the Respondent before the Claimant left work that evening, but that she and Mr Upton Hansen ran into each other, at around 7pm, when she was leaving the office. The Tribunal found that there was a genuine misunderstanding at this point, the Claimant thinking she had been given permission to go, and Mr Upton Hansen believing that he had merely acknowledged receipt of her last email. However, the Tribunal found that, in any event, after further consultation with his fellow director, Mr Upton Hansen sent an email to the Claimant at 8.30pm confirming the refusal of permission, and the Claimant then responded at 9.20pm stating that she had to travel and could not postpone, and would therefore take the absence as unpaid leave.

6. The Tribunal went on to record that the directors thereafter took the view that they needed to take some action in relation to the Claimant's refusal, as they saw it, to comply with a reasonable management instruction not to take unauthorised leave. They contacted their advisers and a decision was taken to suspend the Claimant and hold an investigation meeting, using the services of an outside investigating officer. The Tribunal went on to record that, on the following Monday, when the Claimant returned to work, she was given a letter suspending her on full pay pending an investigation of the alleged misconduct.

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7. The Tribunal referred to the evidence of Mr Upton Hansen to the effect that, in view of the Claimant's seniority, and the fact that she was project lead on three important projects, he felt that suspension was a prudent step to take, to protect the organisation and preserve the confidentiality of the investigation, and to protect the Claimant from embarrassment.

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8. The Tribunal went on to refer to the Claimant having attended a meeting with the external investigator, who then prepared a report with recommendations, including that she remain on paid suspension pending the disciplinary hearing that he recommended take place. In the meantime, records the Tribunal, the Claimant had raised a grievance. So, she was invited to two meetings: a grievance hearing and then a disciplinary hearing, both to take place on 25 October. However, she resigned her employment on 23 October 2017, giving her reasons for doing so partly in her resignation letter and partly through a letter from her solicitors. The Tribunal went on to record that the Claimant had, by this time, gone off sick, as the suspension and investigation had caused her to become unwell, and also that, when she was suspended, her email account was suspended as well.

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9. The Tribunal directed itself as to the law, correctly, including as to the test of what amounts to a breach of the implied duty of mutual trust and confidence (which was the type of breach relied upon in this case) and as to the authorities concerning the implications of a suspension, in the context of such a claim.

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10. The Tribunal then referred to five matters relied upon by the Claimant, separately or cumulatively, as amounting to such a breach. The first was an incident whereby another director, Mr Mateu, was said to have unreasonably shouted at the Claimant. The Tribunal did not consider that to be of great significance. The second matter relied on the proposition that,

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on the night before the Claimant travelled, permission to do so had been given, but then later revoked. However, as the Judge had found that, what the Claimant had taken to be the initial giving of permission, was in fact the result of a genuine misunderstanding, he concluded that there was no *revocation* of permission, and no breach in that regard.

11. The next matter was the decision to suspend the Claimant on 2 October 2017, which the Tribunal described as being at the heart of this case. The Tribunal described the reasons given for the suspension as being essentially that the Respondent was nervous that the Claimant would behave inappropriately at work, were she not to be suspended. Those reasons were expanded in oral evidence to include, that she was likely to be obviously upset and so to set a bad example to her junior colleagues, and a concern that she might possibly breach any confidentiality obligation the Respondent had placed upon her.

12. The Tribunal then set out its conclusions in relation that aspect, in paragraphs 27 and 28 of its Decision, as follows.

> **"27. In my view there was no real evidence to support that stance on the part of Mr Upton-Hansen and it is certainly not the reason that was conveyed to the Claimant, either orally or in the letter of suspension from which l have quoted. In circumstances where the only issue to be investigated was whether the Claimant had good reason not to obey the 8.30 email on 27 September, I do not believe that suspension was warranted in order to protect the integrity of any investigation or protect the integrity of the Respondent's business. I also take the Claimant's point that in terms of maintaining the confidentiality of there being an investigation or disciplinary process from other staff (except from Ms Nossa who was told the true position), I consider it more likely that questions would be asked and inferences drawn given a protracted period of suspension where the Claimant had returned from holiday even though the suspension was not announced as such to staff, than had the Claimant simply resumed her normal duties having been told that she was under an obligation of confidentiality.**
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> **28. Finally, I note that the suspension began on 2 October but continued or would have continued for over three weeks; and where the Respondent was aware that the Claimant was suffering mental illness as a result of the suspension, that certainly exacerbates the concerns I have as to the propriety of it."**

13. The Tribunal then considered two further matters relied on by the Claimant. One was the removal of the computer terminal, which it regarded as innocent; and the other was the

A disabling of her email access when she was suspended, which the Judge would not have considered added anything, had the suspension itself been justified.

B 14. The next matter relied on by the Claimant was the inclusion of allegations about the Claimant's July leave of absence as part of the October 2017 disciplinary matters. The Judge said the following about that.

> **"31. <u>In October 2017 bringing into issue and making unjustified allegations about the Claimant's July 2017 leave of absence</u>: - I agree with the Claimant's submission that this was not justified; and to be fair to Mr Chaudhry no real explanation or justification was advanced to suggest otherwise, although he explained how as a matter of practical reality the situation had arisen. The July absences had been dealt with in July, in my view appropriately, by designating the absences as holiday. It is quite wrong for them to have been raised as potential issues of serious misconduct two months later."**

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D 15. Two other matters, to do with the handling of the Claimant's leave and of sick pay, were not regarded by the Judge as contributory to a breach of the implied duty.

E 16. Accordingly, the Judge concluded that the two matters of significance were the decision to suspend and the inclusion of the July absences as potential acts of serious misconduct. He commented further on these as follows:

> **"34. …. whilst I do not consider that there has been the most egregious breach of the term trust and confidence in this case, I do find that the Respondent without proper cause did in those respects conduct itself in a manner that was – objectively – likely to seriously damage if not destroy the relationship of confidence and trust between itself and the Claimant. It did in fact (subjectively) do so."**

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17. The Judge then said the following:

> **"35. In those circumstances it follows almost inevitably that there has been an unfair dismissal; but for the sake of completeness, I note first that the Claimant accepted those breaches within a reasonable timeframe and resigned in response to them and secondly that there is no fair reason for the dismissal in the sense that there is no fair reason for the breaches."**

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He then concluded that the complaints of unfair dismissal and wrongful dismissal must succeed.

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18. He then added some further comments at paragraph 37, beginning as follows.

> **"37. I make the following further comments.**
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> **(a) In my view this situation could have been avoided had either party communicated in a more sensible and timely way. The Claimant is to be criticised for not drawing to her employer's attention the fact that she might very well have to be absent on 28 and 29 September when she knew she had no holiday left. It may well be the case that her brother was unable to organise his affairs sufficiently in time to be 'definite about that until the day before, however that is not a good excuse for not putting her employer on notice. On the other side of the equation, there is no excuse for the employer dealing with what was in the circumstances an extremely urgent request early on the 27th to consider and either approve or not approve exceptional days' unpaid leave on the following two days until 8.30pm that evening. And 1 have some sympathy with the Claimant who says that by that stage the die had been cast in terms of her getting her brother to confirm the relevant arrangements with third parties."**

19. The Judge also observed at point (b) of this same paragraph, that, although he had not had to consider it to determine the issues, it appeared that there was significant dialogue between the Respondent and its advisers during the relevant period, and it appeared that Mr Mateu had been keen to see if dismissing the Claimant could be justified. The Judge also noted, at point (c), that it appeared that the advisers, at least, were taking the view that *any* charge of gross misconduct that was being investigated would generally warrant the suspension of the employee concerned.

20. In paragraph 38, he said: "In all three of those matters, I suggest that the relevant persons consider whether or not they should be acting differently in the future, as it seems to me they should."

21. The Judge then turned to the question of remedy, identifying the issues as being mitigation, contribution and whether compensation should be reduced on the basis of a failure on the Claimant's part to comply with the ACAS grievance procedure. He said:

> **"40. Dealing with the latter two points first, whilst I have criticised the Claimant's conduct in one respect I do not see that as causative of the matters in respect of which I have found the Respondent liable, which constituted a breach of the duty of trust and confidence. I therefore make no reduction on that score."**

He also did not think the Claimant could be criticised for not following the grievance process.

22. I need to set out in full the Judge's findings and reasoning in relation to mitigation, and then what he said about the amounts of the awards and how he arrived at them:

> **"42. In relation to mitigation, the facts are these.**
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> > **(a) The Claimant registered for work in the London area at least, with as many as agencies as she could without having a reference from the Respondent, which turned out to be four; and she pursued such job opportunities as were presented by those agencies which fell within the parameters she had set herself including a similar salary to that she had been earning with the Respondent.**
> >
> > **(b) From mid-December she returned to Greece for the financial and psychological support of her family and whilst in Greece was advised to and decided to pursue professional opportunities there rather than to continue to do so in the United Kingdom and set herself up in business from roughly February 2018, has begun to secure work and has some optimism that those efforts will be further awarded in the future.**
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> **43. The Respondent suggests that the Claimant is to be criticised in the following regards.**
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> > **1. She was overly narrow in her parameters, particularly in relation to salary in the first six to eight weeks following her dismissal.**
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> > **2. She was wrong not to approach the Respondent for a reference which in its own interest it is to be assumed (the Respondent argues) it would have provided her, enabling her to register with further agencies.**
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> > **3. If she chose to move back to Greece that was her decision and the Respondent should not be penalised for the fact that job opportunities and the salaries for those jobs in Greece are hugely reduced by comparison with the opportunities available in London; and moreover that the cost of living in Mykonos, where I believe the Claimant is now based, are as a matter of public knowledge considerable lower than in London.**
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> **44. 1 see some merit in all of those points, though it is difficult for me to adjudicate the first to any degree since we have not, through reason of time, been able to consider the precise details of jobs at lower salaries that the Claimant might have applied for but did not in those first few weeks.**
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> **45. In terms of not asking the Respondent for reference the Claimant says that she was confident she would not get a good reference. I can see why she says that, but in fact it is often the case that an employer is moved for purely self interested reasons to provide such a reference if merited, as it would have been in the present case.**
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> **46. I certainly accept that there is force in the proposition that one should not compare apples and pears, in terms of either available salary or cost of living, as between London and Greece.**
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> **47. Rather than do some pseudo-scientific analysis month by month, which would inevitably be an exercise in reverse engineering, I make the award that I consider in all the circumstances is just and equitable, taking in to account those matters.**
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> **48. I therefore make the following awards.**
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> **(a). In respect of the wrongful dismissal claim £3,127; that is net and covers the period in effect to 23 November 2017.**
>
> **(b). In respect of the unfair dismissal claim the basic award is agreed in the sum of £1,956.**

> **(c). As to the compensatory award I am going to award a sum equating to a full loss at £725 net per week for a period of forty weeks, being the sum of £29,000. I give brief reasons for doing so but reiterate that I do not pretend it to be a scientific approach.**
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> **Once the period of the Claimant's notional notice had expired she was only in practice looking for work in London for a period of a few weeks, probably no more than three. The prospects of the Claimant earning money in Greece appear reasonable within the parameters of the lower earnings available to her in Greece. And on the evidence before me, I anticipate that her business will be reasonably successful by at the latest the middle of 2019. In the interim she will have earnt at least 14,000 euros and believes that she has better than evens chances of a further project within that same time frame coming to fruition.**
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> **I do not consider the Claimant acted unreasonably in deciding to live and work in Greece. However, it is necessary to take into account that the effect of that decision is that the Claimant's earning potential and her cost of living are/will be considerably reduced. In all the circumstances taking into account a period of total loss of earnings and a period of partial loss of earnings, the figure I have given equating to 40 weeks of full loss seems to me appropriate."**

For reasons he went on to give, the Judge declined to increase the award for a purported failure by the Respondent to comply with the ACAS Code.

23. The Respondent's original grounds of appeal were as follows. In ground one it was asserted, relying on **Buckland v Bournemouth University Higher Education Corporation** [2010] ICR 908 (CA), that the test of whether there had been a breach of the implied term is an objective one, but the question of whether a constructive dismissal is a fair dismissal is answered by applying a different test, namely the band of reasonable responses. It was asserted, however, that the Tribunal had erred in paragraphs 35 and 36, as it was not inevitable, merely because there had been a breach of the implied term, that the actions of the Respondent were also outside the band of reasonable responses. The Tribunal had wrongly failed to address that distinct question, wrongly assuming that the questions were the same, when they were not. This error made a real difference. Alternatively, the reasons were, in this regard, not **Meek**[1] compliant.

[1] **Meek v City of Birmingham District Council** [1987] IRLR 250 (CA).

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24. Secondly, there was a ground to do with a failure to consider a **Polkey**[2] adjustment, which ultimately was not pursued before me.

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25. Ground three challenged the Tribunal's approach to the question of contributory fault, in particular asserting that its finding that there was no causal link between the Claimant's potentially blameworthy conduct, identified as being taking unauthorised leave, and the reason for her dismissal, was not a sustainable finding and was perverse.

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26. Ground four concerned the Tribunal's approach to loss of remuneration. There were said to be two errors. Firstly, the Tribunal failed to distinguish between the initial period during

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which the Claimant had no earnings at all, and the later period from when she started in business on her own account. Instead it had simply fixed a period of 40 weeks' full net loss to cover everything. Secondly, the Tribunal had failed properly to consider whether the

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Claimant's decision to move to Greece had broken the chain of causation; or at any rate it did not make clear or consistent findings about that.

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27. When the original grounds of appeal were considered on paper, HHJ Eady QC considered only ground four, relating to the calculation of the compensatory award by reference to the approach to loss of remuneration, to be arguable. Following that, an Answer was entered arguing that the Judge was entitled to, and did, take a relatively broad-brush approach to that

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question; and that the Judge had expressly addressed the argument as to whether moving to Greece broke the chain of causation. Further, it argued that, insofar as the Judge had considered that some account should be taken of the fact that the Claimant's outgoings would

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be less when living in Greece, that was an assumption in the Respondent's favour.

[2] **Polkey v AE Dayton Services Limited** [1988] ICR 142 (HL).

28. There was then a Rule 3(10) Hearing before HHJ Shanks, who considered all of the original grounds to be arguable and permitted a further ground to be added. This led to amended grounds of appeal setting out that additional ground as the new ground 1. It was that the Judge appeared to conflate the question of the overall fairness of the dismissal with whether the dismissal was for a potentially fair reason. There was an amended Answer in response, which disputed that the Judge had conflated these two things. Further, insofar as the Respondent was arguing that the Judge ought to have found that the reason for dismissal was a reason related to the Claimant's conduct, the Answer took issue with that.

29. Ground three, in the re-numbered grounds, which had to do with **Polkey**, was withdrawn in the run up to this hearing and therefore I had to consider grounds one, two, four, and five.

30. Before me, both sides had fresh representation. The Respondent was represented by Mr Kohanzad of counsel and the Claimant by Mr Robson of counsel. Both presented detailed skeleton arguments and I have heard substantial oral arguments today and was referred to various authorities.

31. I start with ground one. It is well established and is not in dispute, as such, that, as a matter of law, a constructive dismissal will not automatically, or necessarily in every case, also be unfair. Within the structure of the legislation, a finding of constructive dismissal is simply a finding that what has occurred fulfils the definition of dismissal in section 95(1) **Employment Rights Act 1996** (the "ERA"), through the route of section 95(1)(c). If such a dismissal is found, the determination of its fairness is, in principle, a distinct matter governed by section 98,

just as it is when dismissal is found to have occurred through one of the other routes in section 95.

32. Further, there are, of course, potentially two stages of the section 98 exercise. Firstly, it is for the employer, under section 98(1), to show "(a) the reason (or, if more than one, the principal reason) for the dismissal and, (b), that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee of the position which the employee held." I interpose that therefore the employer in fact has to show two things at the first stage, namely what, factually, the reason was, *and* then that it falls within section 98(1)(b), being either one of those kinds of reason listed in section 98(2) or some other substantial reason of the requisite kind.

33. If the employer does not, at the first stage, show the factual reason, and that it is a reason within section 98(1)(b) (incorporating, by reference, section 98(2)), then the dismissal will be unfair. But if, in the words of section 98(4), the employer fulfils "the requirements of sub-section (1)", then (at stage two) the determination of fairness or unfairness is made, having regard to the reason shown, and in accordance with the remainder of section 98(4).

34. That is why employment lawyers commonly talk of a reason which is shown as falling within section 98(1) (incorporating section 98(2)) as being a *potentially fair reason*, although that is not actually a phrase used in the statute. It is also well established that, while it is for the employer to show the reason, and that it falls within the scope of section 98(1), the burden in relation to section 98(4) is neutral.

35. Further it is long established, and again it is not in dispute before me, that in a case of constructive dismissal, the reason for the dismissal is deemed to be the reason for the conduct on the part of the employer by reason of which the employee was entitled to resign. See: **Berriman v Delabole Slate Ltd** [1985] ICR 546. I observe that the **Berriman** decision uses the precise language of section 95(1)(c), but of course it is also well established that, in order for conduct to amount to conduct in response to which the employee is entitled to resign, for the purposes of this provision, the employer's conduct must amount to a fundamental or repudiatory breach of the contract of employment at common law. Therefore, in a constructive dismissal case, the reason for the dismissal is the reason for the conduct which amounted to a fundamental breach.

36. For completeness, I note, of course, that the authorities also establish that the employee should not have waived the right to terminate in response to the breach, and that the fundamental breach must have been a material or contributory cause of the resignation, though it need not be the main reason. Those particular points were addressed by the Judge in paragraph 35, and there is no appeal in that regard, just as there is no appeal in relation to the finding of fundamental breach, as such.

37. However, against that legal background, what is now ground one is to the effect that the Tribunal erred in law by conflating the questions raised by section 98: the section 98(1) question(s) and the section 98(4) question. The key passage in the reasons is at paragraphs 34 to 36, from which I have already cited.

38. In his submission, Mr Kohanzad argued that the Respondent had suspended the Claimant because it considered that she may have defied a reasonable management instruction,

which was misconduct, and a potentially fair reason for dismissal. He postulated that if, for example, the Claimant had been expressly dismissed, following the planned disciplinary hearing, there would then have been no dispute that conduct was the reason for the dismissal. Responding to a point raised in the Answer – which was that the Respondent had not pleaded that *if* there was a dismissal, *then* it was fair – he noted that the defence contained the statement at the start: "Save as expressly admitted, all the Claimant's claims are denied in their entirety." Further, he said, in any event, the Judge had sought to address not only whether there was dismissal, but, if so, whether it was fair; and so it must be open to the Respondent to challenge on appeal what the Judge had said about that. Mr Kohanzad also postulated that the manner in which ETs generally deal with such cases is wrong, because they tend to assume that, because there has been a breach of the implied term, then dismissal must be outside the band of reasonable responses.

39. Mr Robson noted that the burden was on the Respondent to show the reason and that it was within the scope of section 98(1); and he asserted that the Tribunal was entitled to find that it had not done so. Further, where a claim is of unfair constructive dismissal, a respondent could choose to resist the claim purely on the basis that there was no constructive dismissal at all, the burden being on a claimant to show that there was. If it chose also to argue in the alternative, that if there were such a dismissal, then it was fair, then it had to plead that case, including the reason relied upon, and then prove it. See **Derby City Council v Marshall** [1979] IRLR 261. In this case, the Respondent had not advanced such an alternative case. In any event, said Mr Robson, it was *not* obvious that the reason was the Claimant's conduct, nor did the Tribunal so find. In particular, it was wrong to characterise the Claimant's conduct in relation to taking the unauthorised leave as the reason for the Respondent's repudiatory conduct.

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40. My conclusions on this ground are as follows. Firstly, I disagree with Mr Kohanzad that the Tribunal confused the section 98(1) and section 98(4) tests or somehow conflated them. In paragraph 35, the Tribunal said, "There is no fair reason for the dismissal in the sense that there is no fair reason for the breaches". It was plainly, in my view, addressing itself at this point to the reason for dismissal, and not to the section 98(4) question. It also correctly proceeded on the basis, this being a case of constructive dismissal, that the reason for the dismissal was the reason for the breaches – by which it plainly meant the two matters that it had just found, in paragraph 34 of its Decision, together amounted to the breach of the implied duty of trust and confidence.

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41. I also disagree with Mr Kohanzad that it was sufficient, for pleading purposes, that there was what was described as a headline defence at the start of the grounds of resistance, reading, "Save as expressly admitted, all the Claimant's claims are denied in their entirety." This is because, to repeat again, the onus is on the employer to show the reason, and that it is within scope of section 98(1). A generic denial of any matter not admitted does not serve to positively identify what, if anything, the employer's case will be on that aspect, in the eventuality that constructive dismissal is found. Further, in the particulars of response in this case, there was a specific section, headed "constructive dismissal", at paragraphs 31 to 35. This plainly joined issue on whether there had been a fundamental breach, and raised some other points. But it did not assert, in the alternative, that, if dismissal was found to have occurred by such a breach, such dismissal was fair, nor what the fair reason for dismissal would in that case be. Nor was there any other section of the pleading dealing with unfair dismissal or the topic of unfairness.

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42. I was referred, by both counsel, to the list of issues that was before the Tribunal. Under the heading, "unfair dismissal", paragraph one asked whether there had been a dismissal within the meaning of section 95(1)(c) and identified a list of eight matters relied upon by the Claimant as, individually or together, amounting to an individual or cumulative fundamental breach.

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43. Question two was: "If the Claimant was dismissed, was that dismissal unfair with regard to section 98(4) of the **Employment Rights Act 1996**?" Mr Kohanzad relied on the fact that section 98(4) was therefore on the list of issues; and argued that therefore, the Tribunal having found the Claimant was dismissed, it was bound to engage with the section 98(4) question. Mr Robson relied on the fact that section 98(1) was *not* on the list, and said that it was correctly omitted, as no positive case as to a reason for dismissal within section 98(1) had been advanced. He referred to **Chandhok and Anor v Tirkey** [2015] ICR 527 and the reminder that it contains of the importance of pleadings. I was also referred to **Scicluna v Zippy Stitch Ltd & Ors.** [2018] EWCA Civ 1320.

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44. In my view, in this case, the absence of any pleading that there was a fair reason for any dismissal, if so found, was a material omission. This was something that did need to be specifically pleaded by the Respondent if it was going to rely on such a case in the alternative.

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45. Mr Kohanzad submitted that, in practice, this is very often not done, and there is often a practical problem in a case where a claimant claims constructive unfair dismissal, by reference to a breach of the implied duty, relying upon multiple events as individually, or together cumulatively, amounting to such a breach. Until it is known, he submitted, whether the Tribunal has found there to have been such a breach, and, if so, by reference to *which* treatment, then it is not possible to know which matters are the matters, the reasons for which need to be

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examined, to see if they fall within scope of section 98(1) or not. This places a respondent in difficulty in pleading their case on that subject at the outset, he submitted.

46. As to that, I accept that, if a claimant's case is extensive as to the matters relied on as amounting to a fundamental breach, this may call for a similarly extensive response from a respondent. Further, if a claimant's pleading is unclear as to the matters relied upon, this may place a respondent in something of a difficulty. The answer, in principle, is that both sides should properly plead their case. If a claimant has not properly and clearly pleaded what are the matters relied upon as contributing to a fundamental breach, the respondent would be entitled to seek further particulars and clarification of that. If it is clear, or once it has been made clear, then the respondent is then, in principle, in a position to plead in response what it would say about any or all of such matters, and whether the reasons for them fall within section 98(1), if the decision goes against it in respect of fundamental breach.

47. In this case, I do not think that the framing of the list of issues takes the matter much further either way. I am not entirely sure that the Judge was directly following the list of issues at this point in his decision. He clearly was, when he worked through the list of eight matters said to constitute the fundamental breach. He may or may not have been, at paragraph 35, but either way the list of issues should fairly reflect the pleadings, and the position regarding the *pleadings* was as I have described. Furthermore, it does not entirely make sense that this list of issues *did* refer to the section 98(4) but *not* to the section 98(1) test. You cannot get to the section 98(4) test (or know if you need to) unless or until the 98(1) question has been answered. Indeed, section 98(4) itself stipulates that it has to be applied "having regard to the reason" shown.

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48. I turn back, then, to the Tribunal's actual decision. Once again, it bears repeating that the onus was on the Respondent, under section 98(1), to show the reason and that it fell within that sub-section (embracing section 98(2)). In saying that "there is no fair reason", the Tribunal was in effect saying that no such reason had been shown.

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49. Mr Kohanzad effectively argued that this conclusion, which was not as such any further explained in paragraph 35, was not properly reached, as he said the plain and obvious conclusion which should have been reached, was that the reason was the Claimant's conduct, or alleged conduct, in taking unauthorised leave. However, there are two difficulties with that argument.

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50. First, I agree with Mr Robson that it is in principle wrong to say that the reason for the dismissal in this case should have *necessarily* been found by the Tribunal to be the conduct of the Claimant in respect of which she faced disciplinary process. I disagree with Mr Kohanzad's suggestion that this can be inferred from the proposition that, if she had actually been dismissed, and the reason had been because she was believed to have committed such misconduct, there would then be no doubt that it was a conduct-related dismissal. That is because, to repeat, this being a case of constructive dismissal, the reason for the dismissal was the *reason for the Respondent's breach* or the things that contributed *to the breach*. Those things were found – and there is no appeal from these findings – to be the decision to suspend the Claimant (and/or to do so for as long as the Respondent did) and the decision to include in the disciplinary investigation, as a matter that might be subject to charges, the Claimant's conduct in relation the leave in July.

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51. As to the reasons for the suspension, the Tribunal considered this in the course of paragraphs 26 to 28. Although it was concerned there as to whether the act of suspension was, or contributed to, a breach of the implied term, it discussed, in the course of that passage, the evidence as to the *reasons* for suspension. It is not entirely clear whether the Tribunal fully accepted the evidence given as to the reasons for the suspension, as reflecting the true reasons why the Claimant was suspended; and the postscript to the liability decision, regarding the advice that the Respondent had received about suspending her in these circumstances, perhaps suggests that the Tribunal entertained some doubt about that.

52. But, even if the Tribunal accepted, or should have accepted, the evidence it heard about the reasons for the suspension, that evidence was that those reasons were to do with managers' fears about how the Claimant might react to being told, on her return, that there was to be a disciplinary investigation, and their belief about how that process was best managed. On the Respondent's own case, the reason for suspension was *not* what she was believed or suspected to have done, in terms of the taking of unauthorised absence, as such. On the evidence before it, the Tribunal would therefore have been fully entitled to take a view that the reason for suspension was *not* a reason relating to the Claimant's conduct.

53. Similarly, and again albeit in the context of considering whether there was a breach of the implied term, the Tribunal referred, at paragraph 31, to the question of how it came about that the July matter was brought in as an additional subject of the disciplinary investigation. The Tribunal, here, said that there was no real explanation for it and that the Respondent's representative could not assist on that point. Once again, the Tribunal was fully entitled to conclude that this element of the fundamental breach had not been shown to have occurred for a

reason falling within section 98(1), the issue here being not about the Claimant's own conduct in July, but the Respondent's conduct in adding the July matter to the disciplinary investigation.

54. In fact, I am inclined to think that the Tribunal was simply saying, at paragraph 35, that no such reason had been pleaded, or argued, and hence that none had been shown. Either way, it came to a wholly justified conclusion, which did not in the circumstances require any further explanation by it. In these circumstances, ground one of the amended grounds of appeal fails.

55. Ground two argues that the Tribunal erred in not considering whether the dismissal was within the band of reasonable responses, and/or in inferring from the fact that the Respondent had been found to have been in fundamental breach, that it therefore followed that dismissal was not within the band of reasonable responses; alternatively, that the reasons were not **Meek**-compliant.

56. In his written submission, Mr Kohanzad said that the primary legal issue posited by this ground was whether an act which has been found to give rise to a breach of the implied term can ever still be within the band of reasonable responses. A significant part of his written submission was devoted to this question, including a review of the authorities over the years, that have developed the jurisprudence on the concept of the band of reasonable responses; and the presentation of a detailed argument as to why the concept of what is, or is not, objectively, reasonable for the purposes of the implied term, and the concept of the band of reasonable responses, are not identical, interchangeable or co-extensive.

57. I can, however, address this ground quite briefly. First and foremost, that is because, ground one having failed, this ground is bound to fail as well. As the Judge was entitled to

conclude that there was no fair reason shown, the dismissal was unfair at that point. Section 98(4) simply is not engaged at all. Nor do I accept Mr Kohanzad's submission that the Judge had erred because he said, "…in these circumstances it follows almost inevitably that there has been an unfair dismissal." Firstly, he did not say "inevitably". He said "almost inevitably." Secondly, although some of a pedantic mind regarding the meaning of words would argue that either something is inevitable or it is not, and a thing cannot be "almost" inevitable, nevertheless in ordinary parlance this is a perfectly recognisable expression, intended to convey that something is very likely to follow in most cases, although it will not necessarily be so in every case. Mr Kohanzad argued, however, that the use of this phrase showed that the Judge had fallen into what he said is a common trap, into which (he said) both practitioners and Tribunals do fall. That was the making of the assumption that, if there was a fundamental breach, and dismissal had come about in that way, then it could not possibly be for a fair reason, and/or, even if for a fair reason, could not possibly be found fair under section 98(4).

58. I do not accept, however, that it is a correct reading of this decision that this Judge fell into any such trap. That is because he did, in terms, address all the further steps that he needed to, following the finding that there was a fundamental breach. Indeed, he properly recognised that those steps included considering whether the Claimant had waived or affirmed the breach, and whether the breach had contributed to the decision to resign, both of which he addresses in paragraph 35, before then turning also to the question of the reason for dismissal.

59. As I have already said, the Judge did not conflate the section 98(1) and section 98(4) tests, because he did not, and in this case did not need, to, consider section 98(4) at all. But, in case it assists, I would add that, in my view, should the issue of the comparison or contrast between the breach of implied term test, and the band of reasonable responses test, arise again

in some future case, it should not be necessary to mine the authorities going back some 40 years, because an invaluable starting point is to be found at Court of Appeal level in the **Buckland** decision, in particular the discussion at paragraphs 19 to 30 and then again at paragraphs 45 to 48.

60. As the Court of Appeal (Sedley LJ, Carnwath and Jacob LJJ concurring) explain in those passages, the test of breach of the implied term is a purely objective test. It is not the same as, and does not necessarily incorporate, a band of reasonable responses test – although the reasonableness of the employer's conduct *may*, in *some* cases, be one of the tools used in deciding whether there was a fundamental breach. The Court recognised that the application of section 98(4) in a case where there has been a constructive dismissal, appears not to be an "easy fit", given that it requires the Tribunal to consider whether the employer acted reasonably "in treating" the section 98(1) reason as a "sufficient reason for dismissing." But the Court did not rule out that a constructive dismissal could ultimately be found to be fair.

61. The discussion in these passages in **Buckland** is therefore the necessary, and invaluable, starting point for any Tribunal faced with an issue of this type in future. I do not, however, need to consider it any further for the purposes of what I have to decide.

62. I turn to ground four. This concerns the question of what is commonly called by practitioners contributory fault or contributory conduct, although this too is potentially another dangerous piece of common jargon, because there are two different tests: one, where the question being considered by the Tribunal is whether to reduce a basic award pursuant to section 122(2**) Employment Rights Act 1996**; and the other being applicable where it is considering whether to reduce a compensatory award pursuant to section 123(6), although there is an element of overlap between these provisions.

63. Mr Kohanzad confirmed that this ground of appeal related solely to the Tribunal's decision not to reduce the compensatory award pursuant to section 123(6), which provides as follows:

> **"123. Compensatory Award**
> **….**
>
> **(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.**
>
> **…."**

I have already referred to the relevant parts of the ET's Decision, in particular at paragraphs 37 to 40.

64. This ground argues that the Tribunal erred by concluding that there was no causal link between the Claimant's potentially blameworthy conduct and the reason for her dismissal, and that it was abundantly clear that the Claimant's conduct was something that should have been viewed as having caused the suspension. Mr Robson, however, submitted that there was no conduct which, on the Tribunal's findings, should have been viewed by it as blameworthy; but, in any event, that the Tribunal was entitled to take the view of the causation issue that it did.

65. It is clear from the authorities, that it is doctrinally *possible* for there to be a finding of contributory conduct, even in a case where the unfair dismissal has come about by virtue of a constructive dismissal. I was taken to **Frith Accountants Ltd v Law** [2014] ICR 805, a decision of the then EAT President, Langstaff J. I was also referred, in particular, to paragraph four, where he talks about the nature of the conduct that might justify a reduction, tracing back to the well-known guidance in **Nelson v British Broadcasting Corporation (No 2)** [1979] IRLR 346 (CA), and notes that what is required is more than just conduct of which the Tribunal disapproves, or conduct which might, on reflection, have been better. He also says that, for

A section 123(6) purposes, what is looked for need not be the sole, or even principal or main cause of the dismissal, but that the words "to any extent" nevertheless follow words of causation.

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66. Langstaff J also gives guidance on the approach to be taken to causation in paragraph 11, as follows:

> **"11. The question of causation has to be approached on a robust basis (see *Warrilow v Robert Walker Ltd* [1984] IRLR 304, 306, paragraph 21), adopting the well known appeal decision of *British Fame (Owners) v Macgregor (Owners)* [1943] AC 197. It is essentially a matter of fact for a tribunal to decide. It is only if a tribunal has abdicated its responsibility to make any finding, or has approached the matter in a wrong way, or has reached a wholly perverse conclusion, that a finding as to causation can be upset on appeal. This is inevitable since an appeal to tests such as the "but for" test of causation can lead to arguments, which may have some merit on a philosophical basis, that act X was the cause of result Y yet lack relevance in the context of litigation. The issue of causation has to be seen in the context here of litigation and compensation for the adverse effects of a wrong done to the victim. It is appropriate, applying such a test, that, as the courts have long done, a robust approach to causation be taken. This will not necessarily be a philosophical one."**

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67. Another decision to which I was referred, of Langstaff J and members, **Shipperley v Nucleus Information Systems Ltd** [2007] UKEAT 0340/06/JOJ, at paragraphs 19, 20, and 21, is to similar effect.

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68. Mr Kohanzad argued that in the present case, there was conduct that passed the applicable test of causation and that should have been regarded as culpable or blameworthy. That was, potentially, even so in respect of the Claimant's conduct in not alerting the Respondent, when she first booked the flight, that she *might* need to go to Greece; and/or it applied, he said, to the conduct in actually taking the leave in the event, despite having been told the night before, unequivocally, that she was not permitted to do so.

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69. Applying the wording of section 123(6), where a Tribunal has found that the dismissal *was* "to any extent" caused or contributed to by the employee, then it "shall" consider reducing

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A the compensatory award by such proportion as it considers just and equitable having regard to that finding. Authorities such as **Swallow Securities Limited v Millicent**, UKEAT/2097/08 establish that, in such a case, the Tribunal must, therefore, engage with that task.

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70. However, in this case, I consider that the Tribunal was fully entitled to come to the conclusion that the conduct for which it considered the Claimant deserved some criticism – namely not flagging up, when she made the booking, that she might need to take some leave – was conduct which, in the Tribunal's words, "was not causative of the matters … which constituted a breach of the duty of trust and confidence". The discussion in **Frith**, and the line of authorities which it follows, do not, perhaps, go quite as far as to say that a pure, "but for" cause, could *never* be found to be conduct meriting a reduction under section 123(6). But it makes clear that Tribunals should, on appeal, be allowed a wide margin of appreciation when making such judgments (just as a Court would be when applying the **Law Reform (Contributory Negligence) Act 1945**) and the EAT should not lightly intervene.

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71. I do not accept Mr Kohanzad's specific submission that the use of the words, "to any extent" in Section 123(6) mean that a purely "but for" cause *should* lead to some consideration of a reduction. This is neither the natural meaning of those words, nor would that approach be consistent with the guidance in the authorities. Rather, the conduct must be found, in some *material* sense, having regard to its nature and significance, to some extent to be a contributing cause, which the Tribunal regards as warranting a reduction of compensation to some degree.

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72. I respectfully agree with Langstaff J that consideration of whether the conduct in question is a "but for" cause of the dismissal, is an unhelpful and overly philosophical approach to this area of the law. It is, it may be said, necessary to a reduction under section 123(6), but

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most unlikely to be sufficient. I find it difficult to envisage a case in which a Tribunal might find the conduct to have been literally no more than that it amounted to a "but for" cause, and yet that it was just and equitable for it to sound in a reduction in compensation.

73. Bearing in mind that the Employment Tribunal in this case was concerned with whether the Claimant's conduct had, in the requisite sense, caused or contributed to the decisions (a) to suspend her and/or (b) to include the July matter in the disciplinary investigation, the Tribunal was fully entitled to come to the view that it did not see her conduct, by way of failing to warn the Respondent that she might need to take some leave later in September, as having been, for these purposes, causative of the Respondent's actions, and hence of this dismissal.

74. Although the Tribunal did not specifically address the question of whether her conduct in actually taking the leave in September, as such, was causative of that treatment, it would have been fully entitled to conclude not. In any event, it appears to me implicit that the Tribunal concluded that *that* was not conduct for which she deserved to be criticised. That is bearing in mind its observations at paragraph 37(c) about the Respondent not giving her a definitive answer until 8.30pm on the evening of the 27th, and its having some sympathy with the Claimant's account that, by that time, "the die had been cast." It seems to me, then, that the Tribunal did not specifically consider whether this conduct, in the requisite sense, caused or contributed to the treatment which amounted to the dismissal, because it did not in any event regard it as conduct which could, in all the circumstances, merit a reduction being applied under section 123(6).

75. I consider again that, although it did not expressly address the point, it can be inferred that the Tribunal also considered that the Claimant's conduct in relation to not warning of her

possible trip, did not, in its nature, cross the threshold of being potentially within scope of section 123(6) either. That is given the ET's comments (merely) that this was one of the matters on which there could have been more sensible and timely communication, and that these only formed part of observations made in a post-script to the outcome on liability, and having regard to the guidance in **Frith Accountants Ltd v Law**. However, in any event, it is sufficient that the Tribunal found, and was, as I have said, entitled to find, that this conduct was not, in the requisite sense, causative of the treatment that amounted to the dismissal.

76. Putting it all together, I therefore see no basis for me to interfere with the Tribunal's decision not to reduce the compensatory award under section 123(6); and ground four, therefore, also fails.

77. Turning to ground five, this is the ground which HHJ Eady QC originally allowed through on the paper sift, and it concerns the Tribunal's approach to the loss of remuneration, and its decision to award 40 weeks' net loss of earnings. I have set out the Tribunal's findings and Reasons in this regard already. The Respondent accepts that the Tribunal could not perform a fully scientific or precise mathematical calculation of the loss, but it submits that the Tribunal was at fault in two ways, or, at any rate, that its Decision was not **Meek** compliant in two respects.

78. First, it says that, rather than coming up with a single figure of 40 weeks' net loss of pay in addition to the award for the notice period, the ET could, and should, at least, have subdivided the Claimant's period of loss, as between the period when she had no earnings at all up until when she started her own business, and then the period from when she started her new business, and was then working with, at least, some earnings or potential earnings.

79. Secondly, it is argued that the Tribunal applied an inconsistent approach to the period after the Claimant moved to Greece and/or did not address itself sufficiently, in particular, to the question of whether this decision was a failure to mitigate and/or a break in the chain of causation of her loss. There is also some argument before me as to whether the Tribunal had made its position sufficiently clear in respect of whether there was any failure to take reasonable steps to mitigate in the initial period of job search in the UK.

80. My conclusions on this point are as follows. Firstly, in relation to the Claimant's efforts to find work in London, the Judge had some evidence about this, and discussed the point in the course of paragraphs to 43 and 45. The onus here was on the Respondent, and the Judge noted some deficiencies in the evidence about jobs that might have been available at the time. I think it is clear, from this section of the Decision, that the Judge did not find that there was any failure to take reasonable steps to mitigate, in her job search in this period; and clearly, from the remedy Decision as a whole, the fact that he made an award for a period that included, and went beyond, that period, shows that he did not consider that there was a failure to mitigate in that period. That is also clear from the fact that he did not suggest that there was any particular level of earnings to be imputed, that she could reasonably have achieved during that period.

81. That is an assessment to which the Judge was fully entitled to come, having regard to the detailed evidence he had in relation to the job search that *was* conducted by the Claimant, and as to the efforts she made, and her comments in her witness statement on various job advertisements which the Respondent had raised.

82. Secondly, the Judge did, in his decision, make a specific and reasoned finding, again one which he was entitled to make, that it was not unreasonable, in all the circumstances, for her to decide to stay in Greece, after travelling out there, and to set herself up in business on her own.

83. That part of the Judge's decision therefore properly disposes of any argument that he erred in his approach to the Claimant's efforts to look for work in London and, as to whether her decision to set up in business on her account in Greece involved a failure to take reasonable steps to mitigate. Therefore, that must also dispose of the Respondent's argument that the Judge should have considered that that decision involved a break in the chain of causation, which, in this context, is really simply another way of putting the mitigation point. Nor do I consider that these findings by the Judge are flawed by his observations about her lower earnings in Greece and the difference between the cost of living in Greece and London. In summary, the Judge, having considered all these matters, plainly concluded that, in all the circumstances, including these differences, there was no unreasonable failure to mitigate, in terms of the Claimant's efforts to find remunerative work, and that was a conclusion he was fully entitled to reach.

84. That, however, does not entirely dispose of this ground of appeal, because I need to turn now to the Respondent's arguments that the Judge has not properly approached, or sufficiently explained his decision as to, the overall calculation of the award for loss of remuneration: by failing, first, to deal separately with the two distinct periods, of unemployment in the UK, and then from the setting up of her own business; and then by failing to give a more reasoned decision as to how he arrived at the 40-week award.

85. As to this, the Judge made an award in respect of wrongful dismissal, which, as he calculated it, ran through to 23 November 2017. It follows that the compensatory award was, therefore, concerned with losses from that date going forward. A 40-week award, if referred to an actual period starting from that date, would run to beyond the dates of the ET hearing, being 5 and 6 July 2018. Having found that there had been no failure to mitigate, whether before or after the Claimant moved to Greece, the Judge was fully entitled, as such, to make an award covering losses up to the date of the hearing and then for something into the future.

86. A 40-week award of full net loss of earnings, calculated as running from 23 November 2017, would cover the period of running up to 30 August 2018, being a couple months into the future from when the Tribunal made its Decision. It is, however, I think, at least clear that the Judge was *not* making that 40-week award on the basis that the Claimant had suffered a full net loss of earnings for that 40-week period, and then no loss beyond.

87. In his Decision, the Judge records that the Claimant had produced some identifiable evidence concerning her new business regarding an amount she was about to be paid, or expected to be paid, for work already done, in July 2018, and, further specific amounts of expected earnings. The Judge was clearly drawing here on her schedule of loss, in which she referred to a €3,000 payment to be received in July 2018, and then further amounts that she anticipated receiving in September and December and then May 2019, of €3,000, €4,000, and €4,000, respectively. Those four sums together correspond to the total figure of €14,000, which he gives in his Decision as her prospective earnings up to May 2019.

88. It is clear, at least, therefore, that the Judge had on board that the Claimant had the prospect of having some earnings that she would receive before 30 August 2018, and the prospect of some further earnings up to around mid-2019, which is the point at which he said he

anticipated the business would be "reasonably successful". It can be inferred, at least, therefore, that he was making a reckoning by offsetting the fact that she had not received, and would not receive, any income from the business up until July, against the fact that she had the prospect of significant income coming in between then and the following May.

89. Mr Robson argues that, given all of that, and given the difficulties of assessing the earnings of someone in business on their own account, and given also that the Tribunal did not, in fact, have any hard information about the comparative cost of living in Greece and in the UK, beyond the general proposition that the cost of living is not as expensive in Greece as it is in this country, the Tribunal was fully entitled to take the broad brush approach that it did, and to come up with a figure of 40 weeks.

90. I have some sympathy with that argument, and with the task that the Tribunal faced. It can be notoriously difficult for a Tribunal to get a handle on future loss of remuneration in cases where a claimant has set up in business on their own account. Very often, the Tribunal is obliged to speculate about the future in a way that it would not have to do, in respect of someone who has fixed and predictable earnings from employment. In some cases, the problem may be compounded by a lack of final, or even management accounts, of details of expenditure that may need to be offset against prospective income, and so forth. The Tribunal may have no choice but to take a broad-brush approach in some cases; and it may not be proportionate to postpone the decision, if ordering further disclosure is not realistically likely to yield much better information. In such cases the Tribunal does just have to do the best that it can, with what it has.

91. However, in this case, it is, in my view, right that the Tribunal could, at least, have addressed with some greater specificity how it had come to the figure of 40 weeks. Mr Robson

says that, since the Tribunal did have clear information about when the Claimant started in her business, namely in February 2018, it can be inferred that it took into account in arriving at the award of 40 weeks, the initial period, from the end of the notice period until the start of the business, during which she had no earnings (or prospect thereof) at all. That may well be the case, but the Tribunal does not actually say so, in terms; and it could have done so, by splitting the calculation of its award into an amount in respect of the period up to when she started the business, and an amount in respect of the period thereafter.

92. In respect of the period from when she started the business, the Tribunal also had the information provided by the Claimant, about the specific payment she expected to receive in July, and then further specific sums that she expected to receive in the period up until the following May, and it referred to those in its Decision. This was information that, potentially, one might have expected would have informed the Tribunal's decision in coming to the final figure, in some way, even if not in a precise mathematical way. However, if so, the Judge does not tell us how it informed his 40-weeks' reckoning, or, if not, why not.

93. Similarly, we do not know if the Judge was concerned that there was a lack of certainty about expenses to be offset, or about other possible income that might be earned, or whether he was specifically concerned to take into account the lower Greek cost of living. I do not agree with Mr Robson that it can be inferred that this was specifically why he decided to apply a broad brush, from what he says in paragraph 47, where he abjures a pseudo-scientific analysis. That follows paragraph 43, in which he had set out three issues about mitigation, and 44, 45, and 46, in which he has dealt with each of those issues in turn. But paragraph 47 does not, obviously, refer *back* to anything specific in those preceding paragraphs. It reads more

naturally as the Judge, having completed his consideration of the mitigation issues, now leading into the discussion of the Claimant's past and future loss, that follows in paragraph 48.

94. Ultimately, I have come to the conclusion that, whilst the 40-week figure *may* have been reached by a process that was entirely justified, the Judge could and should have given more of an insight as to how he arrived at that figure, even taking on board that he was dealing with a number of imprecise and uncertain features, and the limitations of the evidence he had on those matters. I have come to the conclusion, therefore, that the Decision was not **Meek** compliant in this respect. In this respect, solely, namely the determination of a final figure for underlying loss of remuneration – not in any other aspect, whether in relation to mitigation or alleged breach of the chain of causation of loss or otherwise – but only in this respect, therefore, the matter will have to be remitted to the Tribunal for further consideration, and a fresh, reasoned, finding.