Neutral Citation Number: [2023] EAT 145

Case No: EA- 2022-000235-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 November 2023

Before :

THE HONOURABLE MR JUSTICE CHOUDHURY
MR NICK AZIZ
MISS EMMA LENEHAN

- -

Between :

STUART HARRIS ASSOCIATES LIMITED **Appellant**

- and -

MS A GOBUDHUN **Respondent**

- -
- -

Ms Naomi Ling, Counsel (instructed by **Saul Marine & Co**) for the **Appellant**
Mr Ian Rees–Philips, Counsel (instructed by **Derrick Bridges & Co**) for the **Respondent**

Hearing date: 17–18 October 2023

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JUDGMENT

SUMMARY

Ms Gobudhun ("the Claimant") worked as an accountant. She was subject to disciplinary proceedings for "insubordination" for not adhering to an instruction from the Respondent employer to include figures for expenses incurred described as "estimates" in clients' tax returns. These estimates were not based on actual records of expenditure and were routinely much higher than actual records would suggest. The Claimant was given a final written warning after which she resigned claiming constructive dismissal. There was insufficient time to complete the hearing before the Tribunal and the matter was adjourned. Prior to the resumed hearing, the Tribunal prepared a lengthy case summary containing an account of legal research by the Judge and what were described as "preliminary views". These included the view that the Claimant had been constructively dismissed. After the resumed hearing, the Tribunal gave judgment reaching the same conclusion. In doing so, the Tribunal also found that Mr Harris of the Respondent had been either dishonest or incompetent in engaging in the expenses practice that had led to the Claimant's resignation.

The Respondent employer contends that the Tribunal erred in law in that, amongst other matters, the Tribunal had prejudged the case, descended into the arena by conducting its own extensive research into the law and practice of filing tax returns, and determined that the Respondent's principal, Mr Harris, had been either "dishonest" or "incompetent" when it had not been put to him in terms that his conduct was dishonest or incompetent.

Held (upholding the appeal in part), that the failure to put to Mr Harris that he had acted dishonestly amounted to a serious procedural irregularity which meant that the finding of dishonesty had to be

set aside. However, there had been no prejudgment of the case and the Tribunal's conduct of the hearing had not otherwise been unfair. Given that the Tribunal's conclusions as to unfair constructive dismissal could stand irrespective of the finding as to dishonesty, the decision overall would stand and would not be set aside.

THE HONOURABLE MR JUSTICE CHOUDHURY:

1. We shall refer to the parties as "the Claimant" and "the Respondent" as they were below. The Respondent appeals against a decision of the Watford Employment Tribunal (Employment Judge Hyams presiding) ("the Tribunal") that the Claimant had been unfairly constructively dismissed from her job as an accountant. The Respondent is a limited company controlled by Mr Stuart Harris, and which provides accountancy services mainly to small businesses. The Claimant was subject to disciplinary proceedings for "insubordination" for not adhering to an instruction from Mr Harris to include estimated figures for expenses in clients' tax returns where there was little or no supporting documentation for such "estimates". The Claimant was given a final written warning about her conduct and subsequently resigned claiming that the instruction required her to act unlawfully thereby destroying the relationship of trust and confidence with her employer. The Tribunal upheld her claim and awarded her compensation of over £46,000 as well as a £10,000 contribution towards her costs.

2. The Respondent contends that the Tribunal erred in law in that, amongst other matters, the Tribunal had prejudged the case, descended into the arena by conducting its own extensive research into the law and practice of filing tax returns, and determined that what the Respondent had instructed was "dishonest" or "incompetent" when it had not been put to Mr Harris in terms that his conduct was dishonest or incompetent.

Factual Background

3. The Claimant commenced employment with the Respondent on 1 November 2014. Both the Claimant and Mr Harris are Chartered Certified Accounts and members of the Association of Chartered Certified Accountants ("ACCA").

4. The Claimant had little knowledge of the law relating to income tax before joining the Respondent and relied principally on Mr Harris for direction in this regard. The Tribunal found that Mr Harris had assured the Claimant that it was appropriate when preparing client tax returns to adopt a practice summarised by the Tribunal as the practice of:

> **"…calculating clients' taxable remuneration using an estimate for the clients' expenses (which was always higher than the amount stated to the respondent by the client as the client's expenses; it was never lower than that amount) without drawing that fact to the attention of HMRC when either:**
>
> **15.1 the client had stated in terms precisely what the actual known amount of the expenses was, or**
>
> **15.2 the client had that year given to the respondent incomplete (or even no) documentary evidence to show that expenses had been incurred."**

5. We shall refer to this as "the expenses practice".

6. During 2020, the Claimant became aware that the tax return of one of the Respondent's clients, "KT", had been investigated by HMRC and that HMRC had refused to accept the figure given by the Respondent for KT's estimated expenses. The Tribunal accepted the Claimant's evidence that Mr Harris had informed her that this was a "one off" and that he had negotiated a settlement with HMRC in respect of the relevant tax return. KT was in the building trade and had claimed to have incurred expenses in 2014 of £17,944 but had only

lodged documents evidencing expenses of £7,977.20. HMRC had eventually allowed only £3,950 of the amount claimed as expenses, that figure being based on "10% of the declared turnover on a without prejudice basis". Notwithstanding this, the Claimant was instructed to use the same "estimated expenses" as the 2014 return as the basis for subsequent returns.

7. The Claimant became concerned that the use of estimated expenses in KT's subsequent returns amounted to wrongful accounting practice and that the expenses practice was also wrongful insofar as it was being applied to other clients.

8. On 27 May 2020, Mr Harris received an email from another client, KN, in which KN raised a number of queries as to her draft tax return which he had prepared. Whilst KN's records for website expenses came to £409.26, her draft return had recorded her expenses as £924.00. Similarly, whilst KN's records for print, film, photo and stationery expenses produced a figure of £467.50, the draft return had included a figure for these items as £1,297.00. KN also queried whether she should use the figure of £39,949 for net profit for her mortgage application, or the lower figure, after deduction of expenses, of £35,278. Mr Harris's reply on 27 May 2020, explained to KN that:

> **"Essentially, we take your figures and then add a bit more by way of estimates.**
> **This is to cover the bits and pieces that clients often forget to record.**
> **Are you happy with this and/or do you want us to revert to your figures?**
> **Re the mortgage: £39,949 is the profit figure at the bottom of page 3 of the accounts".**

9. Mr Harris's explanation for this practice was that KN might have forgotten something that she had spent on the cost of earning her remuneration and that it was a matter of judgment

as to whether it was a material matter which needed to be highlighted to HMRC by including further information in box 19 on the tax return.

10. The Claimant also responded to KN by stating that Mr Harris had instructed her that these estimated expenses be included and were the same estimated expenses used in the previous year's tax return but "increased by 5% and £10".

11. The Claimant contacted ACCA about the expenses practice and received advice that "estimated expenses" should be excluded from tax returns. On 3 June 2020, Mr Harris emailed the Claimant in respect of another client, AM, instructing her to include an estimated expense of £469 for insurance. The Claimant could not understand why a figure for insurance should be the subject of an "estimate". She replied to Mr Harris on 4 June 2020, questioning whether such expenses would be allowed by HMRC given that similar estimated expenses had been disallowed for KT. Mr Harris responded by stating, amongst other matters, that HMRC had allowed some estimates for KT.

12. By a further email dated 5 June 2020 in respect of client, PG, Mr Harris instructed the Claimant to include an estimated expense of £308 for insurance, and "For other jobs, [to] please put through estimates as per previous years". The Claimant replied that she was not willing to do that, and, in a subsequent email, stated that she would "not be following [Mr Harris's] instructions to post the 'estimated expense ['] as they were unsubstantiated deductions in the accounts".

13. On 8 June 2020, Mr Harris emailed the Claimant to say that her refusal to follow his instructions on the inclusion of estimated expenses was a disciplinary matter and suspended her from work. A disciplinary meeting was held, via Zoom, on 15 June 2020. In the course of that meeting (which was recorded), Mr Harris accepted that "lots of estimated expenses" have been included in clients' tax returns. He also said:

> **"I get what you're saying, you're not happy with the inflation of 5% and £10. So, the reason for that 5% is inflation, inflated by 5%, and the only reason I stuck the 10 quid in is just to rough it up a bit."**

14. This practice of inflating expenses claims by 5% and £10 each year was also part of the Respondent's expenses practice. Mr Harris asked the Claimant why she was questioning the use of estimates now when she had used them in previous years without challenge. She replied that it was because she had been instructed to do so and had relied on him due to her lack of experience. Mr Harris maintained that the "bottom line" was that "HMRC allow estimates".

15. On 23 June 2020, the Claimant was given a first and final written warning for refusing to comply with the instruction to apply the expenses practice. On 22 July 2020, the Claimant's appeal against that sanction was rejected. After a short holiday in early August 2020, the Claimant returned to work and resigned on 17 August 2020 with immediate effect. The reason for resignation was said to be Mr Harris's repudiatory breach of contract.

16. The Claimant issued proceedings on 8 January 2021. The claim form, which was self-drafted, included the following particulars:

> **"To my mind, if an expense is a legitimate expense, there should be an actual figure for the expense based on an invoice or debit entry in a back statement and there should be no need to use an estimated figure for the expense… Stuart Harris however was instructing me to file a significant proportion of tax returns with estimate figures and without any explanation for the use of those estimated figures. I feel therefore it was right and professional for me not to prepare tax returns using estimated figures without an explanation from him for their use. Stuart Harris disagreed and treated my questioning of the use of estimates as insubordination and he issued me with a final written warning. Following the use of that warning, I was again instructed to use estimated figures without any explanation. This and the written warning, broke down all trust and confidence that I had in Stuart Harris and I resigned. I felt compromised professionally by continuing to work for Stuart Harris."**

17. The Respondent resisted that claim principally on the basis that the Claimant had failed to appreciate that HMRC did permit estimates and that the expenses in question were not "unsubstantiated". Although the Claimant did not expressly assert that she was, in effect, being required to engage in unlawful conduct, the Respondent's Response at paragraph [24], provides:

> **"In receiving a first and final written warning, the Claimant was not being forced to conduct any fraudulent or unlawful practice, She was simply being instructed to carry out the permitted practice of posting estimates in future accounts."**

18. It would appear from that statement that the Respondent well understood that the implication of the Claimant's claim was that she was being required to engage in fraudulent or unlawful practice. As to the alleged breach of trust and confidence, the Respondent stated that it had at no time "behaved improperly" and that it had "at all times followed standard accountancy practice as set out in the [HMRC] Manual".

19. The Claimant's claim was listed to be heard by the Tribunal on 13 and 14 December 2021. During that hearing, at which both parties were represented by Counsel, the Tribunal read the documents, heard oral evidence on liability from the Claimant and Mr Harris, and read written closing submissions from both Counsel. However, there was insufficient time to

hear final oral submissions and the case was adjourned to 14 February 2022 for three days. In adjourning the matter the Judge informed the parties that he would:

> **"…write a detailed record of the hearing of 13 and 14 December 2021 and that [he] would include in the document containing that record a discussion about the applicable law, including anything which I came across in research conducted after that hearing had ended."**

20. We are told that neither Counsel raised any objection to that course.

21. Between 14 and 20 December 2021, the Judge did as he said he would and conducted some research into the law (and practice) relating to income tax. Having done so, he wrote a lengthy record of the hearing as a case management summary ("**the Case Summary**") with a view to: "(1) assisting the parties to prepare for the resumed hearing and (2) ensuring fairness to the parties". The Case Summary included the factual background to the claim, an account of the evidence heard and the result of the Judge's research. He also stated that his "provisional" view was that the Claimant had been constructively dismissed and gave his reasons for that view. The Respondent contends that the Case Summary discloses a concluded rather than a provisional view.

22. By the time of the resumed hearing on 14 February 2022, the Respondent had obtained a report from specialist tax counsel, Mr Barrie Akin, on the use of estimates in tax returns. The Judge granted the Respondent permission to rely on the report as a "set of submissions" rather than as an expert report. The Judge then proceeded to hear oral submissions from both Counsel. That took until 15.34 on Day 1 of the resumed hearing, at which point the case was adjourned to the following day. At the outset of Day 2 of the resumed hearing,

the Judge announced his decision on liability, finding in the Claimant's favour, before proceeding to deal with quantum and costs over the next two days.

The Tribunal's Judgment

23. A considerable proportion of the Case Summary was reproduced in the Judgment. As to whether the Claimant had been constructively dismissed, the Tribunal found as follows:

> **"92 In my judgment, the practice which Mr Harris followed here as summarised in paragraph 15 above but as examined by me above in considerable detail was plainly one which had the effect of causing clients to understate their income to HMRC. That is for the following reasons.**
>
> **92.1 Expenses are capable of being quantified precisely. If proper records are kept of expenses incurred then the quantification of the expenses will be capable of being precise.**
>
> **92.2 An estimate of expenses can honestly be used if it is known that an expense was incurred but precise records of the expenditure are lost, such as where one buys a travel ticket with cash but one loses the ticket. Nevertheless, there will usually be some contemporaneous independent evidence to support the assertion that the expenditure was incurred, such as (in the case of an expense incurred in travelling for work purposes) a diary entry to show that the taxpayer had to travel to the place in question. If there is not, because the arrangements were made only orally, then the taxpayer puts him/her/itself at risk of a penalty being imposed (albeit that the risk may in practice be very small) on the basis that the claim to have incurred the expense is not supported by independent contemporaneous evidence.**
>
> **92.3 A taxpayer cannot in my judgment lawfully claim to offset against his/her/its income an estimated expense on the basis that the taxpayer may have forgotten about the expense. If a person only may have forgotten about an expense then it is pure speculation whether or not that person has incurred the expense. It cannot be consistent with the obligations imposed by section 8 of the Taxes Management Act 1970 to offset against a taxpayer's precisely-recorded income an expense which the taxpayer only may have incurred. The taxpayer either has or has not incurred expenditure and in stating a figure for expenditure, the taxpayer is asserting that the expenditure has been incurred: not that it may have been incurred.**
>
> **93 In my judgment, Mr Harris well knew that he had to keep hidden from HMRC the fact that he was following the practice which I have summarised in paragraph 15 above in order to avoid HMRC seeing that the expenses figures used by his clients on the basis of his advice were at least in some cases (and probably in most cases) not capable of being justified by objective evidence. That was evident if nothing else from Mr Harris' own words, which the respondent (probably acting through Mr Harris himself) caused to be recorded and transcribed, set out in paragraph 33 above. Those words and the practice followed as described in those words was in my view**

> **dishonest, and requiring the claimant to follow it was plainly a breach of the implied term of trust and confidence. If I had concluded that Mr Harris did not know that what he was doing and requiring the claimant to do was dishonest then I would have concluded that he was plainly incompetent and that, albeit for a slightly different reason, requiring the claimant to follow that practice was a breach of the implied term of trust and confidence.**
>
> **94 Equally, routinely adding 5% to the previous year's estimated (or even actually-incurred) expenses of a taxpayer was either dishonest or plainly incompetent. That is because inflation varies from year to year. If an estimated figure for an expense could lawfully be used and the amount of the expense could lawfully be assumed to be precisely the same as the amount of the expense incurred in the preceding year, then the increase would have to be calculated by reference to the actual amount of inflation, not 5% year on year, especially when £10 is added to it every year, irrespective of the actual rate of inflation.**
>
> **95 It would not be a defence to an allegation of professional misconduct by an accountant through the accountant advising a taxpayer to act unlawfully when filing or authorising an income tax return, that the taxpayer took the advice and signed or otherwise authorised the filing of the return.**
>
> **96 For the avoidance of doubt, in case it is not already clear from what I have said in the preceding paragraphs above, in my judgment requiring the claimant to follow the practice summarised in paragraph 15 above was likely seriously to damage the relationship of trust and confidence that should exist between employer and employee. There was not reasonable and proper cause for requiring the claimant to follow that practice. Requiring the claimant to follow that practice was therefore a breach of the implied term of trust and confidence. That breach was compounded by disciplining the claimant for refusing to follow that practice and then giving her a final written warning for that refusal. The claimant resigned in response to that (in my view clear) breach of the implied term of trust and confidence.**
>
> **97 In my judgment the claimant did not, by appealing the written warning given to her on 23 June 2020, then stating a grievance about the matter as described in paragraph 43 above, and then not resigning until 17 August 2020, affirm the contract. I concluded that she did all that she could to persuade Mr Harris to change his mind and then entered into negotiations with a view to a mutually agreed termination of the employment on the payment by the respondent of financial compensation. When those negotiations failed, she resigned and she did so in response to the fact that she had been given a first and final written warning for refusing to following the practice summarised in paragraph 15 above. That warning was, metaphorically speaking, a sword of Damocles hanging above her head, and she cannot in my judgment sensibly be said to have affirmed the contract of employment in the circumstances and thereby lost the right to resign in response to the existence of that "sword"."**

24. The Tribunal went on to conclude that the dismissal was unfair and that the Claimant had not contributed to her own dismissal to any extent.

Grounds of Appeal

25. Ms Ling of Counsel, who appears for the Respondent (but who did not appear below), relies on seven grounds of appeal:

i) Ground 1 – The Judge had prejudged the case by reaching a concluded view on key issues prior to closing submissions.

ii) Ground 2- The Judge "descended into the arena" in that:

a) He conducted and relied upon his own extensive research on the law;

b) He framed the issues to be determined differently from the Claimant;

c) He took over the cross-examination of Mr Harris.

iii) Ground 3 – The Judge made a finding of dishonesty without the point being raised by the parties or put to the witness in evidence.

iv) Ground 4 – In determining whether there was dishonesty, the Judge did not apply the test in *Ivey v Genting Casinos* [2018] AC 391 at [74].

v) Ground 5 – The Judge gave inadequate reasons for his finding on dishonesty.

vi) Ground 6 – The Judge failed to apply the objective test in determining whether there was a breach of contract.

vii) Ground 7 – By recharacterising the breach, the Judge was not able to conclude that the Claimant had resigned in response to the breach that had in fact been alleged.

26. We shall deal with each of these grounds in turn.

Ground 1 – Prejudgment

27. Although Ms Ling made clear that the Respondent was not seeking to overturn the conclusion that the expenses practice was unlawful, it is the Respondent's case that the decision of the Tribunal is vitiated by inappropriate conduct and apparent bias on the part of the Judge. Ms Ling submits that, whilst it is open to a Judge to express a provisional view on the merits, the trenchant views expressed in the Case Summary, when scrutinised, would lead the fair-minded informed observer to conclude that the case had already been decided, notwithstanding the numerous references to those views being "provisional". By taking the unusual step of setting out what Ms Ling describes as "findings of fact, conclusions as to the law and the determination of the issues in writing" (and thereby adopting a procedure not sanctioned by the ET Rules), the Judge was doing far more than expressing a provisional view. This is supported by the fact, she submits, that the so-called preliminary views are the subject of extensive reasoning, as opposed to being an immediate or rough and ready response to events at the hearing. This apparent bias means that the judgment must be set aside, irrespective of any view that the court might have as to strength of the case.

28. Mr Rees Philips (who appears for the Claimant as he did below) submits that one cannot disregard the numerous caveats expressed in the Case Summary, and notes that its entire purpose was to express a preliminary view in order to assist the parties to focus their submissions at the resumed hearing. He submits that if one focuses on the Case Summary alone, rather than viewing it with the benefit of hindsight and the Judgment (which incorporated large tracts from the Case Summary) it is clear that there is no prejudgment. Given the nature of the defence, the Judge was entitled to express the views that he did and in so doing he did not manifest a closed mind.

Ground 1 - Discussion

29. In *Southwark LBC v Jiminez* [2003] ICR 1176, the tribunal adjourned after a 10-day hearing in order to enable a further witness to attend the resumed hearing. In doing so the tribunal expressed what were said to be "preliminary views" about the respondent Council's treatment of the claimant, which was said to be "appalling", and concluded by inviting the parties to settle. There was no settlement and the matter was decided against the Council after the resumed hearing. The EAT allowed the Council's appeal, holding that the use of the term "appalling" could only have been applied to the Council's conduct if the tribunal had already reached a fixed, strong adverse view against the Council. The Court of Appeal disagreed. Having had the benefit (which the EAT did not) of the tribunal's comments on the allegation of bias, Peter Gibson LJ said as follows:

> **"25 It is common ground that (1) a judicial decision may be vitiated by the appearance of bias no less than actual bias and that the test for such apparent bias is whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased: see *Porter v Magill* [2002] 2 AC 357, 494H, para 103,**

> **per Lord Hope of Craighead; and (2) that the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias.**
>
> **26 On the first point it is important to stress that the test to be applied is an objective one. The fact that the tribunal were amazed at the allegation of bias or that the council and its legal advisers were surprised at what was said or regarded the comments as displaying bias cannot be determinative for the appellate tribunal which must conduct an objective appraisal of all the ^ material facts. It is no less important to emphasise the qualities of the observer through whose eyes the appraisal is conducted, viz of being fair-minded and informed. The observer in the present case must be assumed to have been present throughout the hearing and to be aware that on 12 March 1999 the evidence was very largely completed but with submissions yet to be heard. The observer must also be taken to have informed himself of the procedure and practice of tribunals in this jurisdiction.**
>
> **27 In that context the remarks of Sir Thomas Bingham MR (giving the judgment of this court consisting of himself, Stuart-Smith and Beldam LJJ) in *Arab Monetary Fund v Hashim* (1993) 6 Admin LR 348, 356A-C are relevant:**
>
> **"In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be." (Emphasis added)**

30. At [38] to [40] in the same judgment, Peter Gibson LJ said this:

> **"38 The council's representatives could have been in no doubt that all the views which the chairman proceeded to give on 12 March 1999 were expressed to be preliminary views, and that included the view that the way the council treated Mr Jiminez was appalling. I have some difficulty in understanding why a strongly expressed view cannot be a provisional view, leaving it open to the party criticised to persuade the tribunal as to why that view was wrong and why the party's conduct was justified. Of course the more trenchant the view, the more the attachment of the label "preliminary" may need scrutiny to see whether the view was truly preliminary and not a concluded view. But it is in my judgment unduly cynical to reject the repeated assertions that the views were preliminary thoughts or views, particularly when the tribunal have gone to the trouble of pointing out the various matters which needed to be addressed in the submissions directions for which were given. It is not inconsistent with the preliminary nature of**

> **the views that the various points would, if not answered to the tribunal's satisfaction, leave Mr Jiminez successful in his claims against the council. If the tribunal had really closed their minds to the possibility that the council might answer their concerns satisfactorily, they need not have bothered to set out those concerns. Particularly in the light of the chairman's comments, I can see no proper basis for doubting the genuineness of the tribunal in saying that the views were only preliminary. Nor does the encouragement of a settlement show that the tribunal's views were fixed.**
>
> ***Conclusion***
> **39 Accordingly, I would respectfully disagree with the conclusion of the appeal tribunal. This is not a case like the *Simper* case [1986] IRLR 19 where concluded views were being expressed in unqualified form against the employer even before its case was opened and its evidence heard. On the contrary, in this case the bulk of the evidence had been heard and the tribunal would have been well aware of the impression made on them by that evidence. It was helpful to the parties to be given that indication of preliminary views so that the submissions yet to be prepared and, if thought g fit, further evidence could be properly focused on the tribunal's concerns. In my judgment no apparent bias was shown.**
>
> **40 In conclusion I would add a word of caution for tribunals who choose to indicate their thinking before the hearing is concluded. As can be seen from this case, it is easy for this to be misunderstood, particularly if the views are expressed trenchantly. It is always good practice to leave the parties in no doubt that such expressions of view are only provisional and that the tribunal remain open to persuasion. But for the reasons given I would allow the appeal, set aside the order of the appeal tribunal and restore the decision of the tribunal." (Emphasis added)**

31. In our judgment, applying those principles to the present case, it is clear that there was no concluded view at the stage of the Case Summary and prior to final judgment.

32. It is significant that the Case Summary was produced at the conclusion of much of the evidence and having considered brief (written) closing submissions at the end of the first hearing. This was far from being a 'knee-jerk' or fixed reaction to the case at an early stage or before the evidence was heard. Moreover, the Judge's purpose in producing the Case Summary was made abundantly clear at the outset, where the Judge stated in terms that it was being "written with a view to assisting the parties to prepare for the resumed hearing … with a view to ensuring fairness to the parties so that they could see the case law on which [he] was planning to base [his] determination of the claimant's claim and the

result of [his] researches". He expressly states that the views expressed are how he is "currently" minded to determine the issues "before any further submissions are made…". The Case Summary is peppered with references to the views being expressed as "provisional" or "before submissions": see e.g. [19], [22], [65] and [73] of the Case Summary. At [73] in particular, the Judge, having set out his views on the issues, which views were undoubtedly expressed in strong terms, said as follows:

> **"It will be open in the parties in make submissions about any of the matters which I state above, with which they take issue, as l have come to no firm conclusions on any of the issues before me."**

33. It seems to us, having read the Case Summary as a whole, that the Judge was at pains throughout to point out the provisional nature of his views. The fact that the Judge regarded the Respondent's case as inherently weak or such as to require something exceptional to persuade him otherwise does not indicate a closed mind. Judges are entitled to express views on the merits as they see them, and can do so in strong terms, so long as it remains clear that they remain willing to be persuaded otherwise. The Judge did that here unequivocally. The views were not expressed in order to precipitate a settlement but to assist the parties in focusing their final submissions. That is a perfectly legitimate approach to take.

34. Thus, for the Judge to say that he was "struggling to see how he could lawfully come to any other conclusion" than that the Respondent was in breach of the implied term, is simply another way of stating that the Judge considered the Respondent's case to be inherently improbable. Similarly, the use of terms such as "plainly", "inescapable conclusion" and "the only logical answer" must all be read in the context of the Judge's repeated statements

to the effect that these were provisional views on which he remained willing to hear submissions. Even where the Judge appears to make a finding of fact by "accepting" the evidence of the Claimant on an issue, he expressly qualifies it by saying, "subject to any further submissions that may be made, i.e. provisionally." Had that qualification not been made clear then the Respondent might have made some headway under this ground. As it is, the Judge did qualify his views, and having done so, we can see no reason to gainsay what is said.

35. The fact that these views are fully reasoned rather than more tersely stated cannot, in our view, be a reason to doubt their contingent nature. A preliminary view is no less so just because it is the product of extensive reasoning. Indeed, a preliminary view expressed without any supportive reasoning might be more susceptible to an accusation of apparent bias on the basis that it is a 'knee-jerk' or unconsidered response to the case or based on prejudgment.

36. Ms Ling also submits that, despite having concluded at the resumed hearing that Mr Akin was correct that there was no legal obligation to complete box 19 of the tax return, the Judge failed to revisit the view expressed in the Case Summary that Mr Harris's responses to questions about completing the box were "evasive" and "wrong". She submits that this is a clear instance of a fixed prejudgment which was not altered despite clear contradictory evidence accepted by the Judge. In order to understand this argument properly, it is necessary to set out the relevant passages of the Case Summary and the Judgment in full:

37. At [21] and [22] of the Case Summary, the Judge said:

> **"21 When it was put to Mr Harris that HMRC will not know that estimated figures have been used unless that fact is stated in box 19 of the tax return, he said:**
>
> **"I cannot comment; it is a narrative box; I am not sure that they can read it They analyse the numbers and HMRC sometimes say they cannot read the box."**
>
> **22 [Before hearing oral submissions, I came to the provisional view] that that answer was evasive and wrong. That was because it appeared to me that there was only one logical answer to the question and it was "yes".**

38. This view in the Case Summary was largely replicated in the Judgment at [26] to [27], with the words in square brackets being replaced by, "I could not escape the conclusion…" However, by that stage the Judge had accepted that part of Mr Akin's report stating that there was no legal obligation to declare in the return that estimates were being used. At [164] to [167] of the Judgment, in a section dealing with remedy, the Judge said as follows:

> **"164 When I first considered the claim, that is to say on the first day of the hearing, I had difficulty understanding the basis on which the claim could reasonably be resisted. After the first two days of the hearing, when it adjourned, I spent much time researching the law and thinking the case through. I then sent the detailed case management summary to the parties to which I refer in paragraphs 3 and 4 above. In it, I said that I was "struggling to see how I could lawfully come to any conclusion other than that the respondent was in breach of the implied term of trust and confidence in requiring the claimant to use estimates in the circumstances discussed above". I explained that view as being based on (among others) this proposition:**
>
> **"If an estimate of expenses is used then it must be disclosed to HMRC at that time. In my view that is an escapable conclusion from the statutory framework, requiring a statement of earnings and the expenses incurred in obtaining those earnings, but it is also (see paragraph 45 above) required by HMRC and it is (see paragraph 47 above) the view expressed in Simon's Taxes."**
>
> **165 The respondent then produced the opinion of Mr Akin which showed that as a matter of law, it was not necessary to state that an estimate had been used. I accepted that I was wrong in that regard, but in my view that did not alter the result of the application of the implied term of trust and confidence, and in my view also it should have been clear to the respondent that the reason why it was in some circumstances acceptable not to state that an estimate had been used was because in those circumstances the estimate was objectively justifiable, for example where the taxpayer had lost one or more railway tickets for which cash had been paid.**
>
> **166 Where, however, an estimate was the result of the application of a practice such as that which I have summarised in paragraph 15 above, then in my view the reason for not stating that an estimate had been used was likely to be that if it had been said**

> **that an estimate had been used then HMRC might have investigated the situation. Thus, the question whether or not the fact that estimates had been used needed to be stated on the income tax return was not determinative. Rather, the matter was subject to basic principles, and the applicable basic principle here was that a taxpayer is under an obligation to state honestly and to the best of his or her information his/her income and expenses. And in my view expenses either are or are not incurred. It is not a matter of guesswork: it is a matter of fact. If one knows that one has spent money on something, but one has lost the records or other documentation which evidence that expenditure, then one can properly (i.e. honestly and therefore lawfully) use an estimate. That estimate, however, has to be based on some objective phenomena such as the fact that the taxpayer went to a particular destination in the course of doing the work for which the taxable remuneration which is the subject of the income tax return was paid.**
>
> **167 If only because of Mr Harris' own words set out in paragraph 33 above, I could not escape the conclusion that he knew all along that what he was doing was wrong. However, in my judgment, if he did not know that, then he plainly should have done."**

39. It is undeniable that the Akin Report did cause the Tribunal to alter one of its preliminary views, namely the view that there was an obligation to declare the use of estimates. That in itself indicates something other than a closed mind. The Judge also went on to explain, albeit in the section of the Judgment dealing with remedy, why that did not alter his views on whether or not there had been a breach. It also remained open to the Judge to conclude, as he did, that Mr Harris's answers to the questions about filling in Box 19 were "evasive". That is because those answers were not in response to a proposition that there was a legal obligation to fill that box, but to the altogether different issue of whether HMRC would have been alerted to the use of estimates if the box were not filled. It follows that we do not accept the submission that the failure to alter the views expressed at [21] and [22] of the Case Summary evidences any prejudgment.

40. For these reasons, Ground 1 of the Appeal fails and is dismissed.

Ground 2 – Descending into the arena

41. Ms Ling submits that the Judge impermissibly entered the arena: (i) by conducting his own extensive research; (ii) by framing the issues to be determined in a manner more favourable to the Claimant; and (iii) by taking over the cross-examination of Mr Harris.

42. As to (i), Ms Ling submits that, as both parties were represented, it was open to the Judge to invite Counsel to undertake research into any area that he considered had been inadequately dealt with, and that by undertaking his own research to the extent that he did he gave the impression of seeking to advocate for the Claimant's case. Furthermore, it is said that the research went beyond legitimate areas of inquiry, such as the law, and strayed into the details of HMRC practice, which does not have the status of law and is therefore evidence. Reliance was placed on dicta of Langstaff P in *East of England Ambulance Service NHS Trust v Sanders* [2015] ICR 293 where it was said that it was "not for the tribunal itself to investigate evidence and rely on its own investigations". Ms Ling also submitted that such research on the lawfulness of the expenses practice was not necessary in any event given that the claim was founded on an alleged breach of the implied duty of trust and confidence, and not whether she had been required to follow an unlawful instruction.

43. We found that last point difficult to follow: even a cursory reading of the Claim Form and the Claimant's evidence in support reveals that the Claimant's primary allegation was that she was being required to do something that was unlawful. Thus we see that:

    i) In her self-drafted claim form, the Claimant complains about being asked to enter estimates "without explanation";

ii) At [15] of her statement she complains that the use of estimated expenses meant that she was being required to engage in "wrongful practice";

iii) At [36] she states that "no accountant should be arbitrarily and routinely increasing their client's expenses" and that the Respondent was involved in "wrongful accounting practices by increasing the clients' expenses to defraud HMRC and as he describes '*save*' the clients tax".

iv) At [39] she states her belief that the practice of including "so called 'estimated expenses' is very serious wrongdoing".

v) Her Counsel's closing submissions referred at [8] to "being directed to carry out an exercise which she knew fell well outside the bounds of appropriate professional practice, could well be professionally negligent, was tantamount potentially to defrauding HMRC, and which would be unsustainable if investigated [by HMRC]"

44. There can be no doubt, given the way in which the case was put, that the foundation of the Claimant's case was that she was being required to follow an unlawful instruction. Moreover, the Respondent's response to that allegation (at [24] of the Grounds of Resistance) stated that the Claimant was "not being forced to conduct any fraudulent or unlawful practice". It is difficult to see why a case would be resisted in those terms unless it was understood that that was the allegation being made.

45. In these circumstances, the Judge cannot be criticised for determining whether the instruction to enter estimated expenses in the manner described above did amount to an instruction to commit an unlawful act.

46. As to the research itself, no issue appears to be taken to the research on the law. Whilst the better course, generally, particularly where parties are represented, will be to invite them to undertake research on any points which in the Judge's view need more explanation, it is open to a Judge to undertake some limited, relevant research of their own, provided that the parties have a fair opportunity to deal with the fruits of any such research. That is what the Judge did here, with the parties being given an express opportunity at the resumed hearing to address in detail the points set out in the Case Summary.

47. In the context of this case, it cannot be said that research into HMRC practice was outside the bounds of proper judicial inquiry. Ms Ling attempted to categorise such material as 'evidence'. However, whilst such practice statements from HMRC do not have the status of law, they are a guide to HMRC's understanding of the law and how HMRC can be expected to deal with certain situations. Such practice was far from irrelevant to the issues in the case. Indeed, both parties sought expressly to rely on HMRC Manuals in their statements of case:

    i) The Claim form refers to the Claimant's views on the Respondent's practice as being supported by the "HMRC Self Assessment Manual" and goes on to quote from that document.

ii) Her statement in support refers to "HMRC Guidance" and also to "HMRC SAM 121190".

iii) That same HMRC manual (121190) is referred to by the Respondent in its Response.

48. In the face of such reliance on HMRC Manuals by both sides, it is not open to the Respondent, in our view, to contend that the Judge was overstepping the bounds of legitimate inquiry by identifying other potentially relevant passages in related HMRC manuals. The critical proviso in all of this is, of course, that the parties have a fair opportunity to comment on the material so identified. As stated above, the Judge ensured that they were given that opportunity.

49. Ms Ling's second point under this head is that the Judge sought to reframe the issue for determination in a manner prejudicial to the Respondent. That is to say, the Judge considered whether Mr Harris was "dishonest" or "incompetent" when following the expenses practice when in fact the only issue was whether there had been a breach of the implied duty of trust and confidence. There is not much substance in this point, not least because, as Ms Ling accepts, the judgment that there was a breach of the implied duty of trust and confidence could stand irrespective of the finding that Mr Harris's conduct was considered to be dishonest or incompetent. As we have set out above, the issue was clearly identified as being whether the Claimant was given an unlawful instruction in relation to the entering of estimated expenses. In making that allegation, the Claimant has referred to the expenses practice as the arbitrary and routine inflation of clients'

expenses figures even where these were unsubstantiated. The Respondent has expressly understood that allegation as being one which could give rise to an allegation of fraudulent or wrongful conduct. In those circumstances, far from amounting to a re-framing of the allegation, the Judge's references to such practices as potentially involving either dishonesty or incompetence flow inexorably from the allegation of being required to overstate expenses. That said, as we explain further below, there may be a procedural irregularity in respect of the finding of dishonesty. However, that does not assist the Respondent in its contention that there was a re-framing of the issues so as to suggest that the Judge was advocating on the Claimant's behalf.

50. The final point under Ground 2 is that the Judge sought to cross-examine Mr Harris and in so doing went beyond clarifying or eliciting the evidence. Ms Ling sought to make good this contention by reference to several extracts from the cross-examination. Before turning to those extracts, we remind ourselves of the relevant principles. These were set out recently in the case of *Serafin v Malkiewicz* [2019] EWCA Civ 852 (upheld by the Supreme Court [2020] UKSC 23) where the Court of Appeal considered whether a trial had been rendered unfair by the trial judge's conduct which had included aggressive questioning of a litigant in person. At [108] to [111] of its judgment, the Court of Appeal set out the principle of fairness:

> **"The principle of fairness**
>
> **108. It is a fundamental tenet of the administration of law that all those who appear before our courts are treated fairly and that judges act - and are seen to act - fairly and impartially throughout a trial.**
>
> **109. It is perfectly proper - indeed a duty - for a judge to intervene in the course of witness evidence for the purposes described by Rose LJ in *R v Tuegel* [2002] Cr App R 361, namely "to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear".**

> **110. It is wrong, however, for a judge "to descend into the arena and give the impression of acting as advocate" (per Lord Parker CJ in *R v Hamilton* (unreported, 9 June 1969) cited by the Court of Appeal in *R v Hulusi* (1973) 58 Cr. App. R 378, 382).**
>
> **111. In *Michel v The Queen* [2009] UKPC 41, Lord Brown JSC, giving the judgment of the Court, made it clear that the issue whether a trial has been fair was not to be judged merely by the correctness of the result:**
>
> > **"27. There is, however, a wider principle in play in these cases merely than the safety, in terms of the correctness, of the conviction. Put shortly, there comes a point when, however obviously guilty an accused person may appear to be, the appeal court reviewing his conviction cannot escape the conclusion that he has simply not been fairly tried: so far from the judge having umpired the contest, rather he has acted effectively as a second prosecutor. ...**
> >
> > **28. Lord Bingham was, of course, right to recognise that by no means all departures from good practice render a trial unfair.... Ultimately the question is one of degree. …**
> >
> > **31. …[N]ot merely is the accused in such a case deprived of "the opportunity of having his evidence considered by the jury in the way that he was entitled". He is denied too the basic right underlying the adversarial system of trial, whether by jury or jurats: that of having an impartial judge to see fair play in the conduct of the case against him. Under the common law system one lawyer makes the case against the accused, another his case in response, and a third holds the balance between them, ensuring that the case against the accused is properly and fairly advanced in accordance with the rules of evidence and procedure. All this is elementary and all of it, unsurprisingly, has been stated repeatedly down the years. The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials." (emphasis added)**
>
> **112. These principles, of course, apply with equal rigour whether or not litigants are legally represented…"**

51. Ms Ling also drew our attention to the case of *Nawaz v Docklands Buses Ltd* (2015) UKEAT/0104/15/DM, a judgment of Singh J (as he then was), in which the Judge below was said to have intervened excessively in cross-examination. Singh J held:

> **"33. … As counsel fairly accepted, the fundamental issue, however, is not one that turns on the precise number of interventions but essentially in our judgment on the nature and quality of those interventions. In particular, in our judgment, there can be no doubt that regrettably this Employment Judge did, in conflict with the principles of law we have already summarised, enter the arena and would be**

> **perceived by the fair-minded observer as making points that were not asked by way of open questions to elicit and clarify the Claimant's evidence or other evidence but rather, for example, to cross-examine the Claimant and to put points to him seeking his agreement."**

52. The question in the present case, therefore, is whether the Judge would be seen by the fair-minded impartial observer as acting as the Claimant's advocate and/or whether, by asking the questions of the witness that he did, the Judge went beyond merely seeking clarification or eliciting information.

53. As is usual in the Tribunal, there is no transcript of proceedings. Instead, there are brief notes prepared by Counsel and more extensive notes taken by the Judge. From these, Ms Ling relies upon the following:

i) An intervention by the Judge during Mr Harris's cross-examination, in which the question of HMRC concessions was being discussed. Mr Harris sought to suggest that he was the "expert" in such matters and the Judge said that it was a matter of law. The notes then record the Judge stating that if Mr Harris disagreed, he "may go to the EAT". The Judge accepted that he referred to the possibility of an appeal "in response to the proposition from Mr Harris that it was proper practice for an accountant or anyone else to use an estimated figure for an expense which was known." The comment that Mr Harris "may go to the EAT" could be seen as nothing more than a simple statement of fact that a party has a right of appeal against a finding of law. However, telling a party they can appeal could, depending on tone, the context in which it is said and whether the party is represented or not, amount to conduct verging on the oppressive. In our judgment, the conduct here

would not be considered by the fair-minded impartial observer to be oppressive. There was a legitimate disagreement between Mr Harris and the Judge as to whether a matter amounted to a question of law for the Tribunal or one on which the witness could himself opine. There is no suggestion here that the Judge adopted an inappropriate or bullying tone when saying what he did. It was a statement of fact, no doubt made to emphasise to the witness that the matter is one of law rather than his opinion, and in respect of which he has a right of appeal.

ii) Ms Ling relies upon three incidents (at CB/161) which are said to amount to points being put to the witness by the Judge and to which agreement was expected. The questions arise in the context of a series of cross-examination questions as to Mr Harris's understanding of the extent to which HMRC would accept estimates. The questions from the Judge are those beginning "me":

Q; but she is relying on you for your expert advice not just on the law but also HMRC practice.
A: It is about materiality.

Q; [me; over twice the amount stated to have incurred?
A; Not a lot of money; £500.]

Q; but if I said to my accountant that I might have forgotten a sum would throw a fit. Why does your understanding differ so much?
A; HMRC do accept estimates; but can be a difference of opinion on the amount.

Q; you are saying that appropriate use of an estimate; and I will come to "appropriate" is to take a previous year's figure and increase by a small account and use rather than base on an accurate figure known about? Is that fair?
A; no; I do not put estimates through; there are genuine reasons why clients do not record everything they should.

[me; if you do not record it you cannot claim it?
A; I disagree; HMRC does not expect people to keep 100% records.

Me; but still need a justification for a claim?
A: e.g. costco; might buy stationery;

me; but need to have the receipt for such?

A; HMRC do not expect you to keep full records.]

54. In our judgment, these questions amount to seeking clarification or eliciting further evidence. The Judge queries, understandably, the implied proposition that a figure of twice the recorded amount of expenses could be correct. The witness's response is that it was "Not a lot of money; £500". The cross-examination then resumes. At one point the witness states that there may be genuine reasons why clients do not record everything they should. The Judge puts to him that if it is not recorded then it cannot be claimed and asks two further questions. Whilst these are not open questions as such, the Judge is not seeking to put words in the witness's mouth. Rather, he is seeking clarification and further explanation of the witness's responses about his practice of putting through unrecorded expenses. In our judgment there was nothing illegitimate or improper about that.

55. Ms Ling then referred us to an intervention during which the Judge referred to his own personal experience of filing returns, in a discussion dealing with how HMRC would be aware that estimates were used. We do not see anything improper in the Judge giving some context to a question by reference to such experience.

56. At a later point in the cross-examination, the Judge is recorded as putting points about costs to Mr Harris and concluding with the words, "You may disagree with my judgment. The costs are what they are." This was said following a series of questions about the assessment of expenses. Once again, the questions seek clarification of Mr Harris's evidence.

57. The final comment relied upon, which Ms Ling describes as "questionable behaviour even for an advocate", arises out of the following exchange:

> **Q; so does that not mean that when HMRC investigated this client he was able to put together all of his receipts and the £10k you estimated he was not able to show was in any way accurate at all?**
> **A; My argument is that it was reasonable; but it is academic as HMRC did not allow it; HMRC are the arbiters in this.**
>
> **[me; have you heard of the phrase chancing an arm?**
> **A: I have but that is not what were doing here.**
>
> **Me; I think that that is what you were doing here?**
> **A; they charged the minimum penalty which was 15%; could have gone back further; and could have charged more.]**
>
> **[me; that is based on an assumption that they have enough staff to do it.]**
>
> **We prepare figures and get clients to approve them and submit the return.**

58. We accept that this was injudicious language. Whilst the phrase "chancing an arm" could, in some contexts, refer to the taking of a substantial risk with significant adverse consequences if it does not pay off, it could also suggest to the witness that the Judge took a dim view of the conduct and was telling the witness in terms of that view. This phrase should not have been used, however surprising the Judge may have found Mr Harris' responses. This was a clear departure from good practice.

59. However, as stated in *Serafin* citing from *Michel*, it is right to recognise that "by no means all departures from good practice render a trial unfair…" Ultimately the question is one of degree.": see *Serafin* at [111].

60. This is not a case where the Judge intervened excessively – the extracts above represent a relatively small proportion of the cross-examination overall - or where the witness was

repeatedly harangued or made to feel beleaguered. The witness was represented throughout. The questions were, for the most part, seeking to clarify points that were seemingly unsupportable to the Judge. Whist the Judge did on one occasion use language which we would regard as injudicious and inconsistent with good practice, we do not consider that, overall, what the Judge did or said rendered the trial unfair. The Judge's conduct fell far short, in our judgment of the sort of serious conduct that would need to be present before it could be said that the Respondent had not had a fair trial.

61. Ground 2 therefore fails.

Ground 3 – Dishonesty not being put.

62. The contention here is that there was a failure to put to Mr Harris in terms that his treatment of expenses in tax returns was dishonest or incompetent and that the failure to do so amounted to a serious procedural irregularity such that the conclusion that Mr Harris was either dishonest or incompetent cannot stand. Ms Ling also submits that it was no part of the Claimant's case that there was dishonesty or incompetence and that the question of honest belief was only raised by the Respondent to support the argument that the implied terms of trust and confidence had not been breached.

63. Mr Rees Phillips submitted that Mr Harris was found to be "evasive" with some of his responses and gave "pathetic and misguided" answers to seek to justify the expenses practice. Furthermore, Mr Harris would plainly have been aware, given the allegation of engaging in unlawful practices, that he may be found to be dishonest. In these

circumstances, submits Mr Rees Phillips, expressly putting to Mr Harris that his practice was dishonest would not have achieved anything more than the extensive questioning on the wrongfulness and impropriety of his practice already did.

Ground 3 - discussion

64. In *City of London Corporation v McDonnell* [2019] ICR 1175, the tribunal had upheld a whistleblowing claim. In doing so, the tribunal had reached conclusions as to the reason for dismissal, which reasons implied that the dismissing officer was acting in bad faith. However, those conclusions had been reached without giving that officer the chance to respond to the tribunal's interpretation of his evidence. On appeal, the EAT, after a review of the relevant authorities, held as follows:

> **"50 In our judgment, the principles, relevant to this appeal, which may be drawn from those cases are as follows.**
> **(a) The tribunal does have the power to deal with points not identified by the parties, although it would be especially careful not to do so where both sides are represented: *BAE Systems (Operations) Ltd v Paterson* [2013] ICR D3, para 31.**
> **(b) Although it is open to the tribunal to make findings of fact not contended for by either party, where the tribunal's conclusion of fact is likely to be tantamount to a conclusion that there was bad faith on the part of a decision-maker or reliance upon an improper reason then it is likely to amount to a serious procedural irregularity for the tribunal to reach such a conclusion without giving that decision-maker an opportunity to respond: *BAE Systems (Operations) Ltd v Paterson*, para 31 and *NHS Trust Development Authority v Saiger* [2018] ICR 297, paras 99—100.**
> **(c) Parties would usually be given an opportunity to make submissions as to the effect of a finding of fact not contended for by either party, although that would not apply where the legal effect of the findings of fact that are to be made is obviously and unarguably clear: *Judge v Crown Leisure Ltd* [2005] IRLR 823, para 21.**
>
> **51 [Counsel] submits that there was a serious procedural irregularity in this case in that Mr Bennett did not have the opportunity to answer the tribunal's interpretation of the evidence, particularly where that interpretation led to the drawing of an inference that was tantamount to a finding of bad faith on the part of Mr Bennett and was not one which the claimant himself was pursuing. We agree with that submission. None of the**

> **tribunal's interpretations of Mr Bennett's evidence considered above were put to him. They ought to have been. Even if, contrary to our view, the tribunal had been entitled to reach the findings of fact that it did, this was not a case where the legal effect of those findings was unarguably clear such as to obviate any need for the parties to make submissions as to that effect.**
>
> **52 The claimant submits that the employer had ample opportunity in the course of this six-day hearing to raise the points that it is now making or to invite the judge to give the employers witnesses an opportunity to be heard on these issues. The difficulty with that submission is that the employer would have been unaware of the tribunal's approach to Mr Bennett's evidence until it saw the tribunal's judgment, by which stage it would be too late to recall any witnesses. In our judgment, there was a serious procedural irregularity arising out of that approach."**

65. Those principles are relevant to the present case. We were also taken to the case of *Kalu v University Hospitals Sussex NHS Foundation Trust* [2022] EAT 168, a decision of HHJ Auerbach in which it was held that it was unfair for the tribunal to find that the claimant had acted in bad faith in raising a grievance in circumstances where the judge below had prevented the respondent's Counsel from putting that specific point in cross examination. At [38] to [41], HHJ Auerbach said as follows:

> **"38. As to the law on the procedural point, I was referred to a number of authorities, but a lengthy doctrinal exegesis in the present decision is not necessary. It is not always the case that it is wrong for a tribunal to consider and determine a point that has not been put in cross-examination. <u>But, given the seriousness of an allegation of dishonesty, if the bad faith finding was a material part of the tribunal's reasoning, then it would be unfair to the claimants, if the point had not in the course of their cross-examinations, in substance, been fairly put.</u> See: *Secretary of State of Justice v Lown* [2016] IRLR 22 at [49] – [51]; *City of London Corporation v McDonnell* [2019] ICR 1175 at [50]." (Emphasis added).**

66. It was contended by the employer in that case that such specific questioning on bad faith was not necessary in the interests of fairness where there had been cross-examination about a range of matters relating to the claimants' motivation for acting as they did. The EAT rejected that contention, stating as follows:

> **"55. Nor do I think that it is a sufficient answer that there was general cross-examination about the claimants' motivations or, no doubt, a whole range of related matters about aspects of their conduct during the course of the various stages of events. The issue of whether they honestly believed the allegations of discrimination**

> **on the part of Ms Burns made in the January collective grievance to be true was a distinct point that needed to be put. It was not fair to them that the tribunal found them to be in bad faith in that regard, when Mr Kibling had not been permitted to put that specific point.**
>
> **56. This part of this ground therefore succeeds. The tribunal erred in concluding that, because the claimants were, with respect to the January 2015 grievance, in bad faith, that did not amount to a protected act, because of this procedural irregularity."**

67. The finding of procedural irregularity did not, however, lead the EAT in *Kalu* to set aside the decision overall. It went on to conclude:

> **"74. Neither *Saiger* nor *McDonnell* indicates that a procedural irregularity of this sort in relation to a particular complaint or issue must necessarily be treated as rendering the whole proceedings unfair, or all other outcomes of them invalid. I observe that an irregularity of this sort does not intrinsically taint the whole trial in the way that, for example, a judge's personal connection to a party resulting in apparent bias would.**
>
> **75. In the present case, as I have held, the specific finding that the January grievance was in bad faith was tainted by a serious procedural irregularity. But the tribunal in any event considered the victimisation complaints in question on the assumption that, in addition to the other protected acts, the January grievance was a protected act; and it dismissed those complaints on the causation point. The irregularity affecting the tribunal's conclusion on the question of whether the January grievance was a protected act does not affect that separate and distinct conclusion. That conclusion was by itself fatal to those complaints, and, as ground 2, relating to it, has failed, it must stand."**

68. Thus, where the findings on the substantive issue of (in that case) unfair dismissal could stand independently of the finding of bad faith made in respect of whether a particular grievance was a protected act, it was not necessary to treat the entire decision as vitiated.

69. It seems to us that the questions to be considered in the present case in light of those principles are as follows:

i) Was there a finding that Mr Harris had been dishonest?

ii) If so, was Mr Harris given an opportunity to address the allegation of dishonesty in evidence?

iii) If not, was it unfair in the circumstances for him not to have been afforded such an opportunity?

iv) If it was unfair, what consequences (if any) flow from such unfairness for the case as a whole?

70. Dealing with each of these in turn:

(i) Was there a finding of dishonesty

71. There was no emphasis on dishonesty or incompetence in the Case Summary and those matters appear not to have been the basis for the Judge's preliminary view at that stage that the Claimant had been constructively dismissed:

> **"67.5 Thus, requiring the claimant to use estimated figures for which there was insufficient or incomplete supporting documentary evidence without stating that the estimate had been used, why it had been used, and how it had been arrived at, was in my view plainly a breach of the implied term of trust and confidence. Giving the claimant a first and final written warning for refusing to do so was also, separately, such a breach."**

72. The finding under challenge is at [93] of the Judgment:

> **"93 In my judgment, Mr Harris well knew that he had to keep hidden from HMRC the fact that he was following the practice which I have summarised in paragraph 15 above in order to avoid HMRC seeing that the expenses figures used by his clients on the basis of his advice were at least in some cases (and probably in most cases) not capable of being justified by objective evidence. That was evident if nothing else from Mr Harris' own words, which the respondent (probably acting through Mr Harris himself) caused to be recorded and transcribed, set out in paragraph 33 above.**

> **Those words and the practice followed as described in those words was in my view dishonest, and requiring the claimant to follow it was plainly a breach of the implied term of trust and confidence. If I had concluded that Mr Harris did not know that what he was doing and requiring the claimant to do was dishonest then I would have concluded that he was plainly incompetent and that, albeit for a slightly different reason, requiring the claimant to follow that practice was a breach of the implied term of trust and confidence." (Emphasis added)**

73. Although there is a reference to an alternative finding of incompetence, that was conditional on a finding that Mr Harris did not know that what he was doing was dishonest. In other words, the Judge concluded that Mr Harris did have that knowledge. That, in our judgment, is unequivocally a finding that Mr Harris was acting dishonestly in following the expenses practice. A similar finding is made at [94] of the Judgment:

> **"94 Equally, routinely adding 5% to the previous year's estimated (or even actually-incurred) expenses of a taxpayer was either dishonest or plainly incompetent…."**

(ii) Was the question of dishonesty put to Mr Harris?

74. In considering whether the issue of dishonesty was put to Mr Harris, we consider first whether dishonesty, as found by the Tribunal, was alleged as part of the Claimant's case. The ET1 did not expressly make that allegation. In our judgment, although the issues in the claim did raise the question whether the expenses practice that the Claimant was instructed to adopt was unlawful and/or likely to defraud HMRC, it was not specifically asserted that Mr Harris had acted dishonestly in engaging in the practice. The highest that the case was put is perhaps best reflected in the following extract from the Claimant's submissions where it was stated:

> **"8. Accordingly, it appears inescapable that C resigned in relation to being directed to carry out an exercise which she knew fell well outside the bounds of appropriate professional practice, could well be professionally negligent, was tantamount potentially to defrauding HMRC, and which would be unsustainable if investigated. This is foursquare with there being a repudiatory breach of the implied term of trust**

> **and confidence, which she elected to accept and treat the employment contract as at an end."**

75. We accept Ms Ling's submission that the Claimant's allegation (which was in qualified terms: "tantamount potentially to defrauding HMRC") falls short of an express allegation of dishonesty on Mr Harris's part.

76. We turn then to the evidence and in particular to the questioning of Mr Harris. It was perhaps because, as we have found, dishonesty was not an express part of the Claimant's pleaded case, that experienced Counsel acting on the Claimant's behalf did not put to Mr Harris in terms that he had been dishonest. Mr Rees Phillips did submit to us, however, that the questioning to which Mr Harris was subject was about conduct that could, in the context of completing tax returns, only be viewed as either dishonest or incompetent, and that it was inherent in all of the cross-examination that was what was being put. It seems to us, however, that the seriousness of an allegation of dishonesty in this professional context (as is evident from the investigative steps being considered by ACCA in light of the Judgment) is such that general questioning about the impugned conduct does not suffice. The question of dishonesty was a distinct point, which, if there was to be an adverse finding on it, ought to have been put to the witness.

77. Mr Rees Phillips further submits that the issue of whether the conduct was "fraudulent" was clearly put to the witness and that ought to suffice even if the term "dishonesty" was not used. Reliance is placed on the following passages in the cross-examination:

> **Q; Ok; but if taxpayer accountant being asked to do sth {*something*} plainly wrong then will not want name on the return?**
> **A; that is diff if money laundering; in 4 cases I have to be careful bout {*about*} resigning and tipping off; so I would not want to be associated with someone doing sth fraudulent.**
>
> **Q; so no one would say it was with their advice if fraudulent?**
> **A: Not one single Invn {*investigation*} of sth fraudulent in 40 years.**
>
> **The only cases we have ever had are aspect inquiries wehre HMRC query normal figures but anything more formal, absolutely noth.**
>
> **Q: but that is still not an answer to my question.**
> **The simple point is that if HMRC see a tax return which on the face of it has been signed off by a tax adviser with a name on it then HMRC can take from it that what is there is not fraudulent or wildly out of line with HMRC practice.**
>
> **A; accts have to be true and fair and have to follow generally accepted practices; we prepare accts on behalf of the client.**
>
> **Q: KN; said to you effectly {*effectively*}; I am querying some of these inclusoins; you say to tell clt {*client*} to say we are adding 5% and £10 to last year's estimate that is advice that it is acceptable to HMRC, is it not?**
> **A: Yes.**

78. It can be seen from this exchange that it was Mr Harris who first raised the question of fraudulent conduct in his response to a question about conduct that was said to be "plainly wrong". In our view, whilst this exchange does refer to fraudulent conduct, it is not put to Mr Harris that he was engaging in conduct that could be described as such. Instead, the focus of the questioning is directed to whether an accountant would wish to be associated with a return that was "plainly wrong".

79. It is also notable that the Judge, whilst questioning Mr Harris about various matters (as seen above), did not suggest to him at any point that his conduct was dishonest. That is notwithstanding the following extract from the Judge's note which suggests that the Judge did regard at least one aspect of Mr Harris' conduct as dishonest:

> **Q; but it is capable from inferring from your email that the approach you have indicated in the email is acceptable?**
> **A: sorry; do not understand what you are asking?**

> **I am going to have to ask you again to ask the question.**
>
> **We do it in such a way that the client is aware that estimates are included.**
>
> **[me; cannot see how it can be honest to say it is more than £409.26]**
>
> **q; all the guidance sets out that estimated figures can be used only when you do not know is an accurate figure. Cannot add something for what you might have forgotten? A; OK but in the real world it does happen. Ticket would be gobbled up. An estimate cannot just be plucked from the air.**

80. It is agreed that the entry on the 6th line of that extract ("[me; cannot see how it can be honest …]") was not a question put to the witness, but a note to self. The witness was not, therefore, given an opportunity to address the apparent concern about dishonesty that was on the Judge's mind.

(iii) Was it unfair?

81. These omissions from the questioning of Mr Harris are not just about form: they raise an issue of fairness. Whilst objectively it may be difficult to interpret the expenses practice as anything other than dishonest, it is quite possible that, if given the opportunity, Mr Harris would have sought to explain his conduct in a number of ways that did not involve dishonesty. It was part of his case that he had an honest belief that he was not instructing the Claimant to engage in improper conduct; implicit in that is that he did not believe the expenses practice to be dishonest. It was suggested that the practice itself was widespread and one in respect of which he had sought and obtained positive advice. It is relevant to note that Mr Harris, an experienced accountant of many years' standing, was not seeking to be clandestine about the expenses practice. He was at all times open about it and went as far as to subject the Claimant to a disciplinary process for not complying

with his instructions to implement the practice. This openness about the practice might have been invoked in response to a direct allegation that it was dishonest.

82. The improbability of a finding other than dishonesty was not a reason (in this case) to deprive the witness of the opportunity to address the allegation of dishonesty directly. Mr Harris was not given that opportunity. In our judgment, in the circumstances of this case, that was unfair and amounts to a serious procedural irregularity. The same cannot be said in relation to the finding of incompetence. Whilst incompetence was also not part of the Claimant's case, the Judge was entitled to draw the inference that conduct was incompetent from the facts found. The failure to put the question of incompetence directly to the witness is a deficiency but is not as serious a deficiency (even in this professional context) as the failure to put the question of dishonesty to him. The former is a procedural irregularity but not one that is sufficiently serious in this context to warrant the finding of incompetence to be set aside.

(iv) What consequences (if any) flow from that?

83. Although the Judge made a finding that Mr Harris had been either dishonest or incompetent, he went on to conclude as follows at [96]:

> **"96 For the avoidance of doubt, in case it is not already clear from what I have said in the preceding paragraphs above, in my judgment requiring the claimant to follow the practice summarised in paragraph 15 above was likely seriously to damage the relationship of trust and confidence that should exist between employer and employee. There was not reasonable and proper cause for requiring the claimant to follow that practice. Requiring the claimant to follow that practice was therefore a breach of the implied term of trust and confidence. That breach was compounded by disciplining the claimant for refusing to follow that practice and then giving her a final written warning for that refusal. The claimant resigned in response to that (in my view clear) breach of the implied term of trust and confidence."**

84. It is clear from that passage, and as Ms Ling accepts, that the Judge's finding that there was a constructive unfair dismissal stands irrespective of the finding of dishonesty (or incompetence) on Mr Harris' part. The mere fact of requiring the Claimant to adopt the expenses practice was sufficiently serious to undermine the relationship of trust and confidence. We are fortified in our interpretation of the independent nature of this finding by the fact that the Judge expressed a strong preliminary view in the Case Summary that the Claimant had been constructively dismissed without reliance upon a finding of dishonesty or incompetence: see [71] above.

85. In these circumstances, the procedural irregularity that underpins the finding of dishonesty did not taint the whole trial so as to render it unfair overall. In our judgment, whilst the Judge's conclusion as to dishonesty should be set aside on the grounds of procedural irregularity, the finding that there was a constructive unfair dismissal stands.

86. To that extent, Ground 3 of the Appeal is upheld.

Ground 4 – Failure to apply the test in *Ivey v Genting Casinos* (UK) Ltd [2018] AC 391.

87. The Supreme Court in this case confirmed that the test to be applied when considering whether a person has acted dishonestly contains both a subjective and objective element as described by Lord Hughes as follows:

> **"74…When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is**

> **established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."**

88. Ms Ling submits that in reaching the finding of dishonesty, the Judge did not apply the first subjective stage of the *Ivey v Genting* test. That is to say, whilst the Judge referred to Mr Harris's evidence at [23] to [31] of the Judgment, there were no findings as to Mr Harris's actual (subjective) state of knowledge or belief about such matters. Thus, there were no specific findings about Mr Harris's understanding of GAAP and the concepts of "true and fair" and "materiality" within GAAP, or as to his understanding of the advice he received about the expenses practice (both of which were relied upon to explain and justify the expenses practice), or any analysis of the openness with which he addressed it during the disciplinary meeting. Instead, submits Ms Ling, the Judge simply concluded that Mr Harris's "words as set out in paragraph 33 and the practice followed as described in those words" were dishonest. It is said that this was an "impulsive and intuitive response" to one statement with which the Judge disagreed rather than a proper application of the two-stage test taking account of all the relevant evidence.

89. Mr Rees Phillips contends that the Judge plainly applied the correct test in that having decided that Mr Harris knew that he could not simply advise clients to use estimated expenses as a matter of course, such conduct was obviously and inescapably dishonest when judged by the standards of ordinary decent people.

Ground 4 - Discussion

90. In our judgment, Ms Ling's submissions on this ground are to be preferred. The Judge did not refer to and was not invited to consider *Ivey v Genting*. That he was not referred to that case is consistent with neither side considering that dishonesty was an issue on which there needed to be any finding, a matter which we have already addressed under Ground 3 above. Of course, the failure to refer to an authority does not give rise to an error of law if the Judge has in substance applied the law correctly. In our view, it cannot safely be assumed, even on a generous reading of the Judgment, that the Judge did apply the correct test in reaching the conclusion that he did. There is, as Ms Ling submits, a dearth of findings as to Mr Harris's subjective state of knowledge and belief about the expenses practice. The Judge did make findings as to what the expenses practice entailed and that included Mr Harris's conduct of inflating expenses by 5% year on year and adding on £10 "just to rough it up a bit". However, there are no findings on the contextual matters to which Ms Ling refers and which might have enabled the Judge to come to a fully informed view on the first (subjective) stage of the *Ivey v Genting* test. Instead, the Judge, having made findings as to the operation of the expenses practice, found that Mr Harris knew this was dishonest and moved (in effect) straight to the application of the objective test of whether the conduct would be considered dishonest by the standards of ordinary people. Whilst we would not agree with Ms Ling that the Judge's conclusion was "impulsive" or impressionistic, it did fail to take account of Mr Harris's subjective view. The fact that the issue of dishonesty was not put directly to Mr Harris, thereby not giving him the opportunity to express his subjective beliefs as to his conduct, lends support to that conclusion. That is a further reason that the finding of dishonesty cannot stand.

91. Ground 4 is therefore upheld. For the reasons set out under Ground 3, the only consequence of that conclusion is the setting aside of the finding of dishonesty.

Ground 5

92. This is a reasons (*Meek*) challenge that is relied upon in the alternative to Grounds 3 and 4. As those grounds have been upheld, it is not necessary to address this ground further.

Grounds 6 and 7

93. These two grounds are premised on the fact that the Judge focused on the question of dishonesty and/or incompetence and in so doing failed to apply the objective test in determining whether there was a repudiatory breach of contract, and/or determined the case on the basis of a breach that had not actually been alleged. The difficulty with this submission is, as Ms Ling very fairly concedes, that the Judge's decision on constructive unfair dismissal (as set out in [96] of the Judgment) is not dependent on a finding of dishonesty (or incompetence). Accordingly, these grounds of appeal are rendered academic, and they are, for that reason, dismissed.

Conclusion

94. Grounds 3 and 4 of the Appeal are upheld. All other grounds are dismissed.

95. The Judge's findings as to dishonesty in [93] and [94] of the Judgment are set aside. However, the Judgment - that the Claimant was constructively unfairly dismissed, that there was no contributory conduct on her part, and that she is due a basic award, compensation and costs - stands.