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Case Number: 2301349/99

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EMPLOYMENT TRIBUNALS

BETWEEN

Applicant	and	Respondent
Mrs A I Oldfield		Kingston University

DECISION OF THE EMPLOYMENT TRIBUNAL

HELD AT	**London South**	**ON**	**12, 13 and 14 January 2000** **12 April 2000 (in Chambers)**
CHAIRMAN	**Mr I S Lamb**	**MEMBERS**	**Mr J R Callingham** **Mr C Easterling**

Appearances

For Applicant: **In person**

For Respondent: **Mr T Kibling, Counsel**

DECISION

The unanimous decision of the Tribunal is that the complaint of unfair dismissal is well-founded.

EXTENDED REASONS

THE ISSUES

1. By her Originating Application presented on the 29 March 1999, the Applicant complains of unfair/constructive dismissal. She particularised her claim by Further and Better Particulars contained in a letter dated the 3 June 1999. At the beginning of

the hearing, Mr Kibling submitted a document which set out the issues, on the basis of the pleadings, and the Tribunal adopts it as follows:-

(i) Whether the Respondents were entitled under the contract with the Applicant to relieve her of her responsibilities as Course Director of the MA in Personnel Management Course.

(ii) In any event, did the Applicant agree to the variation to the terms of her contract of employment.

(iii) If not, whether the decision to relieve the Applicant of those responsibilities amounted to a significant and fundamental breach of contract.

(iv) If so, given that it occurred on the 4 March 1998, whether the Applicant affirmed that breach of contract by her resignation on the 20 November 1998.

(v) If not, was the resignation an acceptance of the repudiation constituted by the breach of contract. The Respondents contend that the resignation was in consequence of the offer of a post at Surrey University.

(vi) Alternatively, was a breach of contract constituted by a breach of the implied term of trust and confidence entitling the Applicant to resign and claim constructive dismissal.

(vii) If there was a dismissal, was the dismissal fair for "some other substantial reason".

2. The Further and Better Particulars set out in some detail the contentions of the Applicant related to the alleged breach of contract constituted by the removal of her responsibilities. The breach of implied term is also particularised, and concentrates upon the period between December 1997 and November 1998 when the Applicant was pursuing a grievance through internal procedures, in turn related to her relationship with Professor Christine Edwards, the Head of School of Human Resources Management. We return to these particularised contentions later in these reasons.

THE RELEVANT FACTS

3. The parties put before the Tribunal a bundle of documents. The Applicant gave evidence on her own behalf, and asked the Tribunal to take into account the written statement of Mr Ernest Wollmer, on her behalf. The Respondents called four witnesses. They were Peter Scott, Vice Chancellor of the University; Professor David Miles, Dean of the Business School; Elizabeth Lanchbery, Personnel Director; and Felicity Wiltshire, Senior Personnel Officer.

4. Mrs Oldfield was employed by Kingston Polytechnic, the predecessor of the Respondent University, under the terms of a letter of appointment dated the 16 April

1991, as Senior Lecturer in the Faculty of Business and Law. By a letter dated the 2 July 1992, her appointment was confirmed. By then, the polytechnic had become Kingston University.

5. By a letter dated the 22 November 1993, the University promoted Mrs Oldfield to Principal Lecturer (Associate Course Director, Professional Management Foundation Programme) with effect from 1 October 1993. The letter stated that her salary was at Point.1 on the Principal Lecturer's scale, and "all other terms and conditions of employment" would remain unchanged.

6. By a letter dated the 18 September 1997, the Respondents confirmed to the Applicant "that under the academic salary progression scheme you have passed through the Principal Lecturer Bar with effect from 1 September 1997", and it stated her new salary, and that it was Point 5 on the Principal Lecturer scale.

7. The corporate structure within which subsequent events took place was as follows. The University has a Faculty of Business, of which the Dean is Professor Miles, and he is responsible to the Vice Chancellor for it. The Faculty has over 200 academic and support staff, grouped into three Departments: the School of Education, the Law School, and the Business School. The Business School in turn comprises five schools covering the principal business functional areas: Accounting and Finance, Business Information Technology, Business Strategy and Development, Human Resource Management, and Marketing. At the material times, the Head of the School of Human Resource Management was Professor Edwards. The MA course in Personnel Management (MAPM), a one year post-graduate programme, fell within that school. Mrs Oldfield was in reality the Director of that course, although referred to at times as "Associate Course Director".

8. According to the further particulars of her complaint, Mrs Oldfield states that the incident which originated the process resulting in the termination of her employment was a verbal complaint made by her to the Dean on 10 December 1997, to the effect that she felt harassed by the management style of Professor Edwards. It is clear from the evidence before the Tribunal that by that date, there were difficulties in the relationship between Mrs Oldfield and Professor Edwards. Professor Miles testified that in November 1997, he had discussions with Professor Edwards regarding problems which had arisen in relation to the operation of the MAPM Course, and several complaints had been made by students about it. The Tribunal accepts that evidence, but states it as a matter of background, rather than acceptance that the complaints were well-founded. A difficulty for the Tribunal is that Professor Edwards did not give evidence before us. We are aware of what she stated in her written communications, and in the written records of meetings at which she was present. We do not consider it in fact to be relevant to adjudicate on the complaints she made about Mrs Oldfield, or the complaints made by Mrs Oldfield about Professor Edwards, and it would not be fair to do so in the absence of the testimony to us of Professor Edwards. The issue we have to determine is related to the procedure and steps adopted by the Respondent to deal with the relationship problems between these two people. What we set out about the allegations and counter allegations subsequently made must be seen in that context.

9. On the 19 December 1997, Mrs Oldfield had a meeting with Professor Miles in which

she set out her concerns. The outcome was an agreement that there be a meeting between those two people and Christine Edwards to attempt a conciliation.

10. The meeting between those three people occurred on the 9 January 1998. It lasted three hours. There was a note taker, Margaret Taylor. By a memorandum of the same date, Professor Miles set out his conclusions in four paragraphs. In her evidence, Mrs Oldfield commented that the conclusions were reached so rapidly, it was evident that little if any investigation was carried out into her complaint of harassment and bullying. The Tribunal finds it to be clear, as stated before that meeting, that what Professor Miles intended to do was to have a discussion with a view to reconciliation and reconstruction of the relation between Professor Edwards and Mrs Oldfield, as distinct from an adjudication of complaints made by either or both of those people. In his memorandum, he expressed a firm view that the evidence of bullying and harassment by Professor Edwards would fail to persuade a grievance hearing, and he strongly advised Mrs Oldfield to withdraw her accusation. He expressed the view that the actions taken by Professor Edwards to ensure the good conduct of the MA Course did not seem to him to have stepped outside the boundaries of managerial propriety. The substantial areas of disagreement seemed to him to be on a scale which allowed a fresh start with goodwill between the parties. He recommended the attempt at reconciliation, and allowed two weeks for it to produce an acceptable outcome, in which the management of the course could be properly and effectively conducted, but if that failed, he would discuss alternative ways forward at further meetings.

11. By a memorandum dated the 23 January, Mrs Oldfield informed Professor Miles that the position was still unresolved, it had added to her already high levels of stress and anxiety, resulting in a detrimental effect on her health, and she wished to discuss possible ways forward.

12. On the 30 January, a meeting between Mrs Oldfield and Professor Miles took place. Mrs Oldfield accepted that the position between herself and Professor Edwards was untenable. She suggested that she be transferred to another school within the business school so that she would no longer be subject to line management by Professor Edwards: specifically, she suggested transfer to the School of Business Strategy and Operations under the management of Dr Phillip Samouel.

13. By a memorandum dated the 5 February 1998, Professor Miles set out his considered views on the situation. He dealt with three aspects of the problem, and with the benefit of hindsight, they can be seen as defining the three subsequent, often conflicting, points of difficulty. Firstly, he expressed the view that whatever the rights and wrongs of the situation, the problems with the management of the course, including her relationship with her Head of school, being unresolved, clearly contributed to her acute feeling of stress and therefore it would be appropriate for her to relinquish the role of course director. She should remain on her present point on the Principal Lecturer scale until she resumed duties commensurate with a Principal Lecturer appointment. Those duties might in future be better located in pedagogic or research activity where she had a track record on which to build. Secondly, he reiterated his suggestion that it would be appropriate for her to withdraw any allegations of bullying or harassment on the part of Professor Edwards. He wrote:-

> "These are serious matters to raise and in my view they are not supported by the evidence which she set out in our conciliation meeting".

14. Thirdly, he rejected her request to move to another school. He believed that her disciplinary area was best accommodated and supported within the School of Human Resource Management; he did not wish a precedent to be set of resolving disputes by changes in the management report line; and because she had enjoyed good management relations with Professor Edwards in the past, he believed there was sufficient goodwill for a new start to be successfully achieved.

15. Mrs Oldfield believed that Professor Miles had at that point removed her from the course directorship. In a note she herself made of a discussion on the 9 February with Professor Edwards, she recorded that view.

16. There was a meeting on the 10 February between Professor Miles and Mrs Oldfield. At the outset, he confirmed that he had not removed the course directorship from her. He felt that it had been agreed at their last meeting that the decision arrived at was that it would be in her best interests for her to relinquish the directorship and her post would be held at the principal lectureship point, and he had not taken any disciplinary action at all. According to the note of that meeting, the outcome was that Professor Miles said he would not do anything about a transfer of school until after the 12 February, once he had had an opportunity to speak to Dr Samouel. Mrs Oldfield's final word was that she would relinquish the course directorship if she transferred schools but would want to keep it for a further year if she was to remain within the School of HRM. Professor Miles responded that he would need to talk to Professor Edwards about the future situation.

17. By a memorandum dated the 13 February, Professor Miles wrote to Mrs Oldfield that following a discussion with Dr Samouel, the latter was willing to have her transferred to his school:-

> ...."to enable a period of respite in which hopefully the relations between yourself and Professor Edwards will have the opportunity to mend. You would transfer to the School of Business Strategy and Operations until September 1999 at which point the situation would be re-appraised for the longer term. You stated at our last meeting that you would relinquish the post of course director of the full-time MA Personnel Management if it were possible for you to effect this transfer of school. The matter of your timetable for the next academic session would be negotiated between Dr Samouel and Professor Edwards with you being fully consulted in the process. I hope that we can bring these matters to a conclusion in the near future, and look forward to your views on my proposals".

18. On the 23 February, Professor Miles sent a fax to Mrs Oldfield which accompanied copies of his memoranda dated the 5 and 13 February, and the faxed message stated simply:-

> "These two memos need to be taken together. I still expect that your allegations in respect of bullying and harassment are withdrawn to enable us to conclude this matter".

19. By a memorandum dated the 2 March, Mrs Oldfield wrote to Professor Miles:-

> "In response to your memorandum of February 5th and 13th and our brief discussion on the 25 February, I confirm that I will not withdraw my allegations. I am, however, prepared to confirm that I will take no further action in terms of proceeding with an internal grievance procedure in order to protect the reputation of the business school. You will appreciate that in view of the difficult circumstances I have obtained the benefit of legal advice and would expect the University to meet the costs which I have incurred. I would be grateful for your confirmation of this by return. I have already advised you that the allegations made against me are without foundation. The recent problems identified by the students on the MAPM full-time course were due to circumstances outside my control while I was on sick leave last year. As you have been aware I have been suffering from stress, relinquishing the course directorship will not, in itself alleviate this situation. However, at your request, in order to resolve this matter, I am prepared to do so and accept my transfer to the School of Business Strategy and Operations provided that:
>
> (1) My salary as Principal Lecturer status will be preserved indefinitely and will not be subject to review in the future.
>
> (2) I receive your assurance that you will ensure that Christine Edwards will not make future negative statements about me.
>
> (3) The past few months have been a great strain on me and I am now hopeful that the issues which we have been discussing can now be put behind us so that I can continue to work in the interest of the University".

20. Although Mrs Oldfield wrote that memorandum on the 2 March, it was not received by Professor Miles until the 4 March. Meanwhile, he had written to her on the 4 March, on the basis that there had been an absence of response by her to his earlier proposals. He therefore wrote:-

> "I feel that it is necessary for me to bring matters to resolution. I have therefore determined that you will relinquish the role of course director of the MA Personnel Management with immediate effect. You will retain your present salary and position on the Principal Lecturer scale and resume progression when the commensurate responsibilities and duties are agreed. You will report to Dr Phillip Samouel from now until 1 September 1999, by when it is hoped that relations with Professor Edwards would have had the opportunity to repair and the future report line will be reconsidered.
>
> The allegations of bullying and harassment against Professor Edwards must be withdrawn or progressed. It is not reasonable to leave this matter outstanding and it will continue to impede good relations until it is resolved. I reiterate my opinion that on the evidence presented to me at the conciliation meeting there were no grounds for the allegation and it was unlikely that a grievance would be upheld. "

21. The position therefore reached was that Professor Miles, as he accepted in his evidence, was imposing the changes set out in his memorandum, and not responding to what she set out in her memorandum of the 2 March; and although he believed that according to what she previously said she would consent to a change in exchange for the transfer, he was thereby anticipating an absence of dispute, rather than proceeding on the basis that she was consenting to the changes. As to the issue of the allegations against Professor Edwards, he felt very strongly that by failing to either withdraw them or pursue them, Mrs Oldfield was denying Professor Edwards the opportunity of answering the case against her. He was not prepared to begin discussions regarding alternative duties for Mrs Oldfield until they had resolved the position regarding the allegations against Professor Edwards. Since no such resolution was concluded, no agreement was reached regarding alternative duties. On the salary, he subsequently changed his mind, and Mrs Oldfield in fact received an increment to her salary in September 1998 in the usual way.

22. Subsequently, during March, there were discussions involving Elizabeth Lanchbery, the Director of Personnel, and a NATFHE union representative, Chris Willis, who was advising and assisting Mrs Oldfield. Professor Miles thought that agreement had been reached, and he wrote to Mrs Oldfield on the 3 April on that basis, stating:-

> "I had hoped to have received a letter from you this week confirming that you would not pursue or repeat your allegations concerning Professor Edwards either inside or outside the University. I must repeat my advice to you that the restoration of good working relations is dependant on this commitment and that the University must reserve its position until the assurance has been given. I wish to confirm the substance of my memorandum of the 4 March 1998 and would emphasise in particular that in future you will report to Dr Samouel, as a member of the School of Business Strategy and Operations, and that you no longer have administrative responsibility for the MA Personnel Management Course. I share your concern about the impact of these protracted difficulties on your health, and I have asked the University's Occupational Health Service to contact you with a view to offering their help."

23. The position of Mrs Oldfield in response to that memorandum was that she had agreed to the action set out in her own memorandum of the 2 March, but she refused to sign a document stating that she would not repeat her allegations. She set out her position in a telephone conversation with Margaret Taylor of Personnel, which was summarised in an e-mail from Ms Taylor to Professor Miles. It is there recorded that Mrs Oldfield still feels the University should pay her legal fees, because every time she received a letter from Professor Miles, always on a Saturday, she had to seek legal advice.

24. On the 6 May, there was a meeting between Professor Miles, Mrs Oldfield, and Dr Samouel. Professor Miles reiterated his view that Mrs Oldfield should withdraw her allegations. He was not prepared to go forward, i.e. agree alternative duties for her, unless she either withdrew them or took them further through the formal process. Mrs Oldfield asked for a few days to consider what had been said. However, there was no change of position, and subsequently another meeting was convened, on the 15 June, between Mrs Oldfield, Mr Willis, and Felicity Wiltshire. Ms Wiltshire's

note of the meeting shows that by then, there was an opinion from Dr Andrew, after a referral by the Respondent of Mrs Oldfield for medical examination, that in the longer term, her health was likely to suffer unless the situation in the workplace was resolved. The note records that after a great deal of discussion, and a number of complaints raised by Mrs Oldfield, there was agreement that Mrs Oldfield would draft a letter in which she gave an undertaking not to pursue or repeat allegations re Christine Edwards, and in return the Dean would undertake to draw a line under the past and confirm his confidence in her teaching abilities. A number of other matters were canvassed, but we do not recite them, because by the 24 June, Mrs Oldfield had informed Ms Wiltshire that she had decided to go forward with a grievance.

25. The formal notice of grievance lodged by Mrs Oldfield on the 1 July, states:-

> "My employer has breached my contract of employment. I was summarily removed from my post as course director of the MA in Personnel Management (F - T & P - T). My employer did not consult with me, did not give me any notice, nor gave any explanation of this action."

26. At the grievance hearing held by Mrs Lanchbery were present Professor Miles, Mrs Wiltshire, Mrs Oldfield, Mr Wollmer, a Barrister/Friend of Mrs Oldfield, and Mrs Taylor, who was taking a note of the proceedings. In the bundle before the Tribunal, there were three versions of the hearing. There were two versions of the Respondent's notes, one of them marked as a draft. There was a shorter version, representing Mrs Oldfield's recollection, after the event. On the 16 July, Mrs Oldfield sent a memorandum to Mrs Lanchbery commenting on the Respondent's minutes, and she wrote: "Whilst I agree with the overall substance of the minutes, there are a number of important inaccuracies", and she then sets out four such examples. Under cross-examination, Mrs Oldfield agreed that the notes were reasonably accurate and that they were taken down in shorthand. She also alleged that they had been "doctored".

27. The Tribunal finds, on the Applicant's own evidence, that the notes are reasonably accurate. There was a particular issue on which the wording was considered by Mrs Oldfield to be important. At paragraph 61 (page 124 in the bundle) it is recorded that Mrs Lanchbery said the issue had to be resolved because if it was not it could potentially result in the termination of a contract and nobody would wish to move in that direction. If progress can be made then it is possible to rebuild the relationship but it would take time and so the immediate restoration of the course directorship is unlikely. In her memorandum of the 16 July, Mrs Oldfield contended that the term used was "sacked", not "result in termination of a contract". In her own version made on the 7 July, Mrs Oldfield records the use of the phrase "or you will be sacked". Mrs Lanchbery testified to us that she neither remembered using that word nor believed that she did, and she relied upon the version in the Respondent's notes. The Tribunal finds, on balance that Mrs Lanchbery did use the word "sacked". However, it is a conflict without any real significance. Even if the words used were as recorded in the Respondent's notes, they clearly amount to the same expression, and it is unmistakably clear. Mrs Lanchbery confirmed in her evidence that what she said was, if it is not resolved, we might have to move to termination of "your contract". The Tribunal notes that the phrase used in paragraph 61 of the notes is "termination of a contract".

28. The grievance hearing started at 10 a.m. It is recorded that Professor Edwards joined the meeting at 12 noon. She had been waiting in a nearby room for two or three hours. The purpose was to explore a conciliated outcome. Unfortunately, it is abundantly clear from the record that the seriousness of allegations and counter allegations escalated. A point was then reached (paragraph 105) when Professor Edwards had stated that she was unwilling to work with Mrs Oldfield unless the allegations were withdrawn unequivocally, and upon Mr Wollmer asking if that was the only bar, Professor Edwards replied that she did not think that Mrs Oldfield was competent to manage the course but that was a different matter. At paragraph 107, Mrs Oldfield is recorded as repeating that she wanted to return to work and draw a line under the matter, she understood Christine Edwards felt aggrieved but her reputation had been tainted by Christine Edwards saying that she was not competent. Christine Edwards is then recorded as denying that she had said Mrs Oldfield was not competent. However, she found it difficult to discuss issues with Mrs Oldfield because she would not acknowledge that there had been a series of complaints and unless she was able to they could not work together in the future. The Tribunal refers to these exchanges because Mrs Oldfield specifically referred to them both for the accusation against her of incompetence by Professor Edwards, and for Professor Edwards' denial that she made that allegation, within minutes of having done so. The Respondents comment, and the Tribunal accepts, that Professor Edwards was probably affected by having waited until noon to enter the meeting, and by the exchanges which took place in rapid succession, as recorded. Mrs Oldfield testified that she did not object to what was discussed at the meeting, and was "taken along by it".

29. On a fair and overall consideration of the record of the grievance hearing, it is apparent that there were serious and wide-ranging allegations on both sides. That said, the considerations of the continued employment of Mrs Oldlfield by the Respondent, her role and job title, her responsibilities, and her pursuit or withdrawal of the allegations against Professor Edwards, were all being linked together and overlapping with each other.

30. The actual decision made by Mrs Lanchbery was recorded in a letter from her to Mrs Oldfield dated the 10 July 1998. It was as follows:-

> "In respect of the grievance as stated on your grievance form, I considered that there was no breach of contract and that your change of duties was in accordance with the academic salary progression section of the terms and conditions. There was evidence of consultation with you by the Dean, and the terms and conditions do not require specific notice of change of duties to be given. There was an explanation of the reasons for the removal of your duties as a course director, and the reasons were confirmed in writing. It appeared to me that the main reason for the removal of duties was the complete breakdown of relationship between you and your Head of School, Professor Christine Edwards. I invited Christine Edwards to join the meeting to explore the possibilities for a reconciliation. Unfortunately, we were unable to effect this resolution. The Dean, Professor David Miles, proposed the following as a way forward; which would help to rebuild the relationship:

that you should withdraw your allegations about your Head of School;
you continue to be line managed by Phil Samouel within the School of Business Strategy and Operations;

you will continue to contribute to courses in HRM, with timetables set by Christine Edwards, discussed through Phil Samouel;

duties commensurate with those of a course director will be assigned to you, after consultation;

these arrangements will be reviewed in one year.

I urged you strongly to consider the Dean's proposal, as it was clear that the situation between yourself and Christine Edwards cannot continue as present".

31. By the time the grievance hearing took place, Mrs Oldfield had been provisionally accepted in the position of Management Development Consultant by Robson Rhodes, Chartered Accountants, in their City office. We accept the evidence of Mrs Oldfield that she had started looking for alternative employment after her meeting with Felicity Wiltshire and this was "back-up", if she was sacked, with the grievance hearing about to take place. She could not afford to be unemployed. Robson Rhodes wrote to Mrs Lanchbery on the 8 July asking for a reference. The reply was dated the 14 July, and was in brief and very factual terms. Robson Rhodes's Recruitment Consultant regarded that position as unsatisfactory, and consequently, Mrs Oldfield withdrew her application. Mrs Lanchbery communicated to Mrs Oldfield on the 15 July what she had done.

32. By a document dated the 17 July, Mrs Oldfield gave notice of appeal against the decision of Mrs Lanchbery. She was notified in writing on the 5 August that the appeal would be heard by the Vice Chancellor on the 9 September. Meanwhile, by a letter dated the 2 August to Mrs Lanchbery, Mrs Oldfield had summarised the history, quite briefly, as she saw it, and referred in particular to the allegation made against her by Professor Edwards that she was not competent to manage. She alleged that a breach of staff handbook procedures was involved. She stated that she continued to be willing to resolve the matter in the interests of the University.

33. At the hearing on the 9 September, the Vice Chancellor began by saying that he wished to conduct the hearing in two parts: firstly, the appeal against the original grievance, and secondly, a less formal discussion to decide the best way forward. That was the course adopted. The argument on the issue of breach of contract raised by the formal grievance was argued over a period of 45 minutes. The Vice Chancellor than adjourned for 10 minutes, and returned to express his decision upholding the finding of the 7 July, and dismissing the appeal. There then followed a lengthy discussion, over about two hours, about other aspects of the current situation, and its history, and the Vice Chancellor proposed a form of words which would constitute a statement to be put in the public domain, if Mrs Oldfield agreed. This outcome as recorded in a letter from Mr Scott to Mrs Oldfield dated the 9 September. The statement was as follows:-

"(i) Mrs Oldfield accepts the proposal made by the Dean that she should

continue to be managed by Dr Phil Samouel in the School of Business Strategy and Operations. She will continue to contribute to courses in human resources management, with timetables set by Professor Christine Edwards discussed through Dr Samouel. These arrangements will be reviewed in one year.

(ii) Mrs Oldfield has ceased to be course director for MAPM, but will be assigned commensurate duties appropriate for a Principal Lecturer by the Dean.

(iii) Mrs Oldfield has confirmed that she has made no formal allegations and is not pursuing any complaint against her Head of School relating to any matters up to the time of the hearing."

34. In her reply dated the 10 September, Mrs Oldfield re-stated her position that the University had acted in breach of contract. It remained the case that she was willing to seek a constructive solution. She had not put her difficulties with Professor Edwards in the public domain, and it was inappropriate that she should now be asked to make it public. She confirmed that she would not discuss the matter inside or outside the University, subject to making reference to these matters in any formal procedures. Subject to that point, she agreed paragraphs 1 and 2 of the proposed statement.

35. Mr Scott replied by a letter dated 11 September. He accepted that she was entitled to appeal to the governors but expressed the view that they were highly likely to support his interpretation of what was meant by "a post of responsibility", and therefore it would only put off the day when some solution would have to be found, and every delay made it more difficult to produce a positive solution. He reiterated that his proposal was not negotiable, and it was clear from her letter that she had rejected it. He then stated: "in my view it represented an excellent opportunity for you to withdraw from this unhappy business with your dignity intact and with a good prospect that professional relationships could be rebuilt. But your determination to pursue a matter that has already dragged on for many months (and on which the Dean has bent over backwards to produce a solution) suggests to me that, despite your words, you are not really prepared to draw a line under it." He then stated that if he did not hear from her by the following Monday, arrangements would be made to hear the appeal and matters would take their course.

36. In her reply dated 14 September, Mrs Oldfield stated that there were ten working days from 9 September before further formal steps needed to be taken, and it was unhelpful to have an artificial and unrealistic deadline imposed in which to respond to his proposals. However, in his reply dated 18 September, Mr Scott stated that arrangements would now be made to hear the appeal.

37. By this time, the course of events which took Mrs Oldfield to Surrey University were underway. She made an application to Surrey University on 8 September. That University sent a request for a reference to Dr Samouel, and he responded with a written reference dated 24 September. By a letter dated 1 October 1998, the University offered her an appointment as a full time University Lecturer at the Surrey European Management School of the University with effect from 11 January 1999 at

a salary of £33,000 per annum. The offer was subject to the receipt of references. On 27 October, Surrey University wrote to Mrs Oldfield confirming the offer of the appointment, and stating that it was with effect from1 February 1999.

38. The dates set out in the preceding paragraph are documented and therefore reasonably certain. On the evidence of Mrs Oldfield, we find that during that same period of time, there was a difficulty about the offer, because of an unfavourable verbal reference from somebody at Kingston. Mrs Oldfield contacted Mrs Lanchbery about it. In the discussions between them, Mrs Lanchbery made an offer of an enhanced redundancy package, suggesting it would be the best way forward for Mrs Oldfield. That offer was later withdrawn, because Mrs Lanchbery had a discussion with the Personnel Director at Surrey University, who informed her that Mrs Oldfield was not entitled to the redundancy package because of the job offer. By then, Mrs Lanchbery had put it to Mrs Oldfield, in a telephone conversation, that it would be best for Mrs Oldfield if she accepted the position at Surrey, because unless she resigned, she would be sacked and then it would be more difficult for her to find another post.

39. By 10 November, Mrs Oldfield had instructed Solicitors to advise her, Veale Wasbrough, and they wrote to the Respondent on 10 November, stating that an indication had been given to their client but a severance package would be offered to her and asking for details of it, stating that it was presumably in the interests of both parties that if there was to be an agreement it should be concluded reasonably quickly.

40. By an e-mail dated 12 November, Mrs Oldfield stated to Dr Samouel that she would like to take two weeks leave starting on 20 November, in order to take a break so that she could "prepare myself for the next stage". His reply, on 17 November, was that having spoken to the Dean and the Personnel Department, their shared view was that leave in the middle of the academic term was inappropriate. He understood her concerns regarding ill health and advised her to speak to the Occupational Health Department Specialist.

41. On the evidence of Mrs Oldfield, we find that the University medical officer advised her to resign and take sick leave in order to recover her health sufficiently to start the new post at Surrey, and she took that advice.

42. Mrs Oldfield tendered her resignation by a letter dated 20 November to Mrs Lanchbery. We must necessarily set it out in full:

> "I write to resign my position with the University because of the various breaches of contract by the University which have been subject to internal procedures. In view of those breaches, my position is that I have been constructively dismissed. Whilst not strictly obliged to give notice, I am doing so having obtained alternative employment which commences on 1 February. I will work that notice period subject to my holiday entitlement, although we may agree alternative arrangements. My resignation follows from my loss of confidence in the University following breaches of contract which I allege and the way in which my grievance has been handled. I refer in particular to the inordinate delay in arranging the appeal to the governors scheduled for 2 December. Clearly, there is now no practical purpose to be served in going ahead with the governors' appeal on 2 December. However, I

reserve my position fully with regard to the claims I have arising out of the circumstances".

43. Mrs Oldfield did not in fact work during her notice period: she was on sick leave from the date of her resignation until 29 January.

44. The Tribunal is unable to accept that the delay in organising the appeal before the governors was either a breach of contract, undue delay on the part of the Respondent, or a cause of the resignation. A letter dated 4 November from Surrey University Management School to Mrs Oldfield recorded that her start date had been agreed for 1 February, and that they were looking forward to meeting her on 2 December and at the school away day on 16 December. It is therefore clear that from that date, she could have no real interest in pursuing an appeal, and from 4 November, took no steps to co-operate in the fixing of a date.

45. In her evidence, Mrs Oldfield asserted that the post at Surrey University was financially disadvantageous to her: it was worth £10,000 per annum less, overall, than her earnings at Kingston. Under cross-examination, her evidence was that the basic salary was less, and given differences in terms and conditions, there was a reduction in net income of £10,000. It was put to her that there were additional benefits related to overseas trips. On these points, we accept the evidence of Mrs Oldfield. We also note that Mrs Lanchbery obtained information on the remuneration of Mrs Oldfield by writing to her opposite number at Surrey University on 30 November 1999. She received a reply dated 3 December 1999. Those documents were put into the bundle before the Tribunal at the last minute, and as a result, caused distress to Mrs Oldfield. She saw them as a grave breach of confidence. After the lunchtime adjournment on the second day of the hearing, when she had just seen the exchange of letters between Mrs Lanchbery and Surrey University, she stated that she was so upset that she could not carry on, but having been given a short time to compose herself, she was able to do so, because of the need to complete the hearing. The Tribunal noted that there had been no request for disclosure of documents related to the remuneration details, and it was not therefore a case where Mrs Lanchbery needed to obtain the evidence as she had because of any refusal by the Applicant of disclosure or any refusal by the Tribunal of a disclosure order. The Tribunal considered this behaviour by Mrs Lanchbery as underhand and to be corroboration of the evidence of Mrs Oldfield about her dealings with Mrs Lanchbery, and in particular, the allegation that Mrs Lanchbery told her to resign or be sacked.

46. As to the factual issue of the comparative remuneration, the Tribunal accepts the evidence of Mrs Oldfield and finds that she did in fact make a net annual loss by her change of post. We further find, accepting her evidence, that contractually, her post at Kingston was secure, whereas the move to the post at Surrey resulted in her necessarily commencing a six-month probationary period.

47. **THE SUBMISSIONS**

The parties made their submissions in writing between the end of the hearing before the Tribunal and the discussion in Chambers, and in each case there was a primary submission and secondary submission, so that each side had an opportunity to comment on the primary submissions of the other. The submissions are largely

factual. The criticism is made by Mr Kibling in his secondary submissions that Mrs Oldfield has raised a number of matters in her primary submissions which are factual, but not part of the evidence put forward to the Tribunal at the hearing. He specifically identifies those points. The Tribunal accepts that contention. It is very often a temptation for a litigant in person to merge the matters of fact raised in the evidence and the matters of fact which are, to them, part of their recollection of events.

48. The Tribunal has summarised the issues at the beginning of these reasons, and has set out its findings of fact, referring to some of the conflicts of evidence where it was appropriate to do so to explain our reasoning. We do not therefore consider it necessary to attempt to summarise the lengthy and detailed written submissions.

49. **THE RELEVANT LAW**

An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once: Lord Denning in **Western Excavating Ltd v Sharp** [1978] IRLR 27.

50. Conduct is repudiatory if, viewed objectively, it evinces an intention no longer to be bound by the contract. Neither the intentions of the party nor their reasonable belief that their conduct would not be accepted as repudiatory are determinative: **Lewis v Motorworld Garages Ltd** [1985] IRLR 465. In order to decide whether an employee has left in consequence of fundamental breach, the Tribunal must look to see whether the employer's repudiatory breach was the effective cause of the resignation. In a situation of potentially constructive dismissal, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of the contract of employment entitling the employee to put an end to it. Thus an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that he has found another job. Whilst the breach must be the effective cause of the resignation, it does not have to be the sole cause, and there can be a combination of causes provided the effective cause for the resignation is the breach: **Jones v F Sill & Son (Furnishers) Ltd** [1997] IRLR 493, at paragraphs 10 and 13.

51. Section 95 of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if (c) "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". In the case of **Waltons & Morse v Dorrington** [1997] IRLR 488, the Employment Appeal Tribunal said of that statutory provision (para.36): "it sees to us that that provision enables an employee to terminate his contract on notice, despite the fact that he is asserting that the employer has repudiated the contract of employment. Parliament has given statutory effect to the concern which is expressed in Harvey on Employment Law, that an employee is faced with a difficult choice of giving up his job of being unemployed, or waiving the breach". At paragraph 35 of the law report, they set out the passage in Harvey which they have in mind, as follows: "there is no fixed time

limit in which the employee must make up his mind. It depends upon all the circumstances including the employee's length of service, the nature of the breach and whether the employee has protested at the change. Their protest will not, however, prevent an inference that the employee has waived the breach, although exceptionally a clear reservation of a right might do so. Where the employee is faced with giving up his job and being unemployed or waiving breach, it is not surprising that the courts are sometimes reluctant to conclude that he has lost his right to treat himself as discharged by the employer merely by working at the job for a few months."

52. As we read those passages in the report of the judgement of the Employment Appeal Tribunal in Dorrington's case, that passage in Harvey is being approved as an accurate statement of the law. We direct ourselves that we must distinguish between the entitlement of an employee to treat himself as constructively dismissed by resigning on notice, on the one hand; and on the other hand, the effect of delaying the resignation itself, which may mean that the contract is affirmed and the right to accept the employer's repudiation as ending the contract is lost. The position as stated in the EAT decision in **WE Cox Toner (International) Ltd v Crook** [1981] IRLR 443 and 446, quoted in Dorrington's case is as follows: "If one party (the guilty party) commits a repudiatory breach of the contract, the other party (the innocent party) can choose one of two courses: he can affirm the contract and insist on its further performance, or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by an express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation.... if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs a contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation".

53. Section 98(1) of the Employment Rights Act 1996 provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and 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 holding the position which the employee held. Section 98(4) provides that where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

54. In this case, it is submitted by Mr Kibling that if the Applicant was constructively dismissed, the dismissal would be fair on the grounds of some other substantial reason such as to justify dismissal because the Applicant had created a situation which was

having a serious adverse impact on the management of the course, having regard to complaints by students, and which had led to a complete breakdown of the relationship of the Applicant and Christine Edwards.

55. **CONCLUSIONS OF THE TRIBUNAL**

The contractual provisions related to academic salary progression and promotion are before us in the bundle of documents. At section 2.5, paragraph 7, it is stated that "promotion to a principal lectureship will depend upon carrying out certain defined responsibilities over and above the normal senior lecturer's role. The responsibilities must be both substantial and complex, but may be carried out in a variety of settings". It then sets out the criteria for promotion. Given that the Applicant was promoted to "principal lecturer (associate course director, PMFP)", we turn to paragraph 10 (b): "if the responsibility for which promotion was given has been lost through no fault of the individual, i.e. there is no requirement for the post and no alternative available, the individual will normally retain the title but remain on the same incremental point and receive no further increments on the scale until suitable alternative responsibilities are given. During this period the normal annual increase will be given on the scale point. Every effort should be made to find suitable alternative responsibilities, which, when given, will allow the individual to resume normal incremental progression". We find that the responsibility for which promotion was given in this case was the associate course directorship. The grade of principal lecturer is clearly defined as separate from the responsibility concerned.

56. That view of the separate identity of the responsibility is confirmed by the following sub paragraph in paragraph 10, namely paragraph 10 (c): "an individual may relinquish the responsibility by mutual agreement with the Dean or may have the responsibility taken away by the Dean. In the event of the Dean taking such action the reason for taking away the responsibility must be one of the following:

(i) There is no requirement for the responsibility post and after seeking alternative responsibilities there is no alternative available, e.g. a course closes.

(ii) The individual is not carrying out the duties satisfactorily.

(iii) The individual has been the subject of disciplinary action short of dismissal which indicates unsuitability, by reason of conduct, for carrying out such responsibilities."

57. The provisions set out in the preceding paragraph must be read with, and in the light of, the following paragraph, namely paragraph 10 (d): "the Dean must formally interview the individual and fully explain the circumstances. If the problem relates to performance, opportunity must be given to improve performance before responsibility is taken away. The individual has the right to be represented at the interview by a trade union official other person. (e) the individual has the right to appeal against the loss of responsibility through the individual grievance procedure".

58. Mr Kibling, in his written submissions, contends that the Applicant agreed to the removal of her responsibilities for being the associates course director. In the

alternative, the Dean was entitled to insist on the Applicant relinquishing this responsibility.

59. As the Tribunal sees the course of events, the University always stood by the position that there was no breach of the contract of employment, and that was the decision made on 9 September by the Vice Chancellor. The Tribunal does not accept that the University was justified in adopting that position. Indeed, we find that the removal of the responsibility was imposed upon the Applicant, but at the same time, there was no basis for it within paragraph 10(c). In any event, the procedure set out in paragraph 10(d) was not followed.

60. We therefore conclude that the removal of her responsibility was a significant breach of the contract of employment. It involved the removal of substantial contractual duties. She was entitled to treat it as a repudiation, and resignation in consequence of it would be a constructive dismissal.

61. We do not agree that the Applicant affirmed the contract, by her conduct or by her delay, or by both. Up to September, she was pursuing the internal grievance procedure. As she did so, there was a gradually deteriorating background state of affairs relating to her relationship with Christine Edwards, and in particular there was the factor, important to her, and reasonably so in our opinion, that Christine Edwards questioned her competence. Furthermore, the Applicant was constantly being told that she had to withdraw her allegations although she was not formally pursuing them.

62. It was not until September that the Applicant applied for the post at Surrey University, and that was shortly after she received the Vice Chancellors' decision. We find that at that point, she had preserved her position about the breach of contract throughout the grievance procedure. We do not consider that pursuing a grievance procedure should be construed as affirming the contract of employment, where the grievance itself is a contention there has been a significant breach of contract related to the duties of the post.

63. We accept the evidence of the Applicant that the final straw in the course of events was the statement by Mrs Lanchbery that the Applicant should resign or be sacked. By then, the argument which had continually been put to her that she should either pursue or withdraw the allegations against Christine Edwards and become a "take it or leave it" package or position.

64. We find that the reason for dismissal was "some other substantial reason", because the University believed that there had been a breakdown of relationships, and that the Applicant was behaving unreasonably.

65. We find that the Respondent did not act reasonably in treating that reason as a sufficient reason for dismissal. What she had done was to pursue the grievance procedure, on the point of interpretation of her contract, as she was entitled to do. She was willing to record that she was not pursuing her complaints against Christine Edwards. The University's responsibility in that situation was to find her alternative responsibilities commensurate with her position as a principal lecturer. Instead, they adopted the "take it or leave it" attitude to which we have referred, and made her

whole position as a principal lecturer dependent upon her acceptance of that position: hence the "resign or be sacked" ultimatum.

66. In the circumstances in which the Applicant found herself, she was perfectly entitled to treat herself as constructively dismissed, by giving notice, and at the same time protect her future by seeking alternative employment. We accept that the effective cause of her resignation was the breach of contract by the Respondent and the outright repudiation of her contract by the ultimatum.

67. It follows from our findings that we do not accept that there was any undue delay in setting the appeal to the governors, nor do we accept that if there had been such undue delay, it had any bearing upon the resignation.

68. We do not accept that there was any contributory fault on the part of the Applicant. Given our findings, there is no basis for any such conclusion.

CHAIRMAN

Decision entered in Register
and copies sent to parties on
30 August 2000

for Secretary of the Tribunals