Neutral Citation: [2017] NICA 17 | *Ref:* **WEI10237**

Judgment: approved by the Court for handing down | *Delivered:* **10/03/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

BETWEEN:

LINDSAY KNOX

Applicant/Respondent;

-and-

HENDERSON RETAIL LTD

Respondent/Appellant.

_____

Before Morgan LCJ, Weatherup LJ and Weir LJ

_____

WEIR LJ (delivering the judgment of the Court)

The Nature of the Appeal

[1] This is an appeal by the Respondent/Appellant ("the company") against the unanimous decision of an Industrial Tribunal that Ms Knox ("the claimant") was constructively dismissed by the company. The claimant appeared in person before the Tribunal but was represented in this court by Mr Michael Potter. The company was represented before the Tribunal and in this court by Mr Warnock. We are grateful to both counsel for their clear and succinct written and oral submissions.

The Factual Background to the claim

[2] The claimant was employed as a Manager in one of the company's stores from 23 July 2007 until she resigned on 1 April 2015. She alleged that on 2 and 23 August 2014 she had detected that a delivery driver for a bread company had stolen stock from her store. Her grievance letter, dated 1 October 2014, describes a sequence of events after she reported the alleged thefts and sets out her grievance in respect of M, her Area Manager. The claimant engaged with the company's grievance procedure but expressed dissatisfaction with the process. She attended a

meeting with the Labour Relations Agency on 31 March 2015, after which she discovered that M's office was to be permanently moved to the store she had been managing. The claimant asserted that if she agreed to return to work at the same store she would have contact with M and, therefore, that the company was not providing her with a safe place of work. The claimant described this as "the last straw" and she resigned by way of a letter dated 1 April 2015.

[3] The claimant's resignation letter is set out in full at paragraph 4(ii) of the Tribunal Decision. In summary, it states that after she had reported the alleged thefts and indicated she felt unable to work with the alleged thief who was still delivering to the store, M placed her under further pressure until she was too ill to work. She felt she had no choice but to resign as, after engaging with the grievance procedure, the company refused to provide a safe working environment by still requiring her to work in the same environment as the person whose actions caused her ill-health. The claimant's resignation letter says that during the grievance procedure the company dismissed her concerns and sought to force her to engage in mediation with the person in respect of whom she had raised her grievance. She felt that the company had failed in its duty of care to her, that its actions amounted to a breach of contract and that her health had suffered as a result.

[4] The claimant's grievance letter of 1 October 2014 had been addressed to the Group Human Resources Manager and is set out in full at paragraphs 4(iii) and 4(xix) of the Tribunal's decision. In it the claimant referred to the sequence of events after she had reported the alleged thefts to M and how she was subsequently treated by him. In summary, after reporting the alleged thefts on 23 August 2014 and not having receiving any reply from him by 25 August, the respondent informed H, the Fresh Food Manager, of the alleged thefts and kept M updated. She was then "astounded" to discover the same bread delivery driver had delivered to the store on 29 August and telephoned M to ask why this had happened. M stated he would call her back after he had spoken to H. Later that day, M informed the claimant that the same delivery driver would not be delivering to the store on 30 August or 1 September and in the meantime they would be working out what was going to happen. When asked what outcome she wanted, the claimant stated she did not want this delivery driver to deliver to the store again.

[5] However, when the claimant returned to work after being on leave from 1 September to 7 September, she was again "astounded" to find the same delivery driver was still delivering to the store and on 9 September 2014 she asked M why this was. He reviewed the CCTV footage and stated he would speak to H. The claimant told M how she felt at having to deal with someone whom she had caught and had to deal with personally for stealing from the store. She said that M suggested she swop shifts to avoid the delivery driver but she took issue with being asked to change her shift and the impact that would have on her family life to facilitate someone she considered she had detected stealing from the company in order that he could continue in his routine without hindrance. She expressed the

view that M's suggestion would leave the company "at risk of losing stock to the same thief".

[6] The grievance letter then complained that following her reporting of what she considered to be thefts, M's behaviour towards the claimant was oppressive and not conducive to a healthy working environment. She alleged that he applied extreme pressure, required the working of excessive hours, imposed unrealistic tasks, provided insufficient staff to support her, pressurised the claimant to apply to transfer to another store, failed to support her in her role as manager, attempted to fabricate derogatory evidence and committed fraud regarding date checks which he claimed to have carried out in relation to allegedly out of date chilled food.

[7] The grievance letter also referred to the claimant having attended an appointment with her doctor on 16 September 2014 after which she was unfit to return to work due to stress. The letter concluded by referring to the serious impact M's behaviour had had on her health and that the only suitable resolution would be for him to be moved to another area.

[8] Three occupational health reports were considered by the Tribunal between paragraphs 4(v) – 4(viii) of its decision.

(1) The report dated 2 October 2014 records that the claimant loved her work and attributed her absence from work to "not being able to take any more" from her line manager. Reference was made to the resulting impact on her health, including headaches, nausea, becoming very tearful, lying awake at night worrying about going to work and having to speak to her line manager on the phone or in the store. The report concluded that the claimant was unlikely to be fit to meet with management prior to her review appointment with Occupational Health in four weeks but it was recommended that management should meet and attempt to resolve the issues the respondent perceives led to her absence.

(2) The report dated 30 October 2014 contained the recommendation that management should arrange to meet with the claimant at the earliest opportunity in an attempt to have the issues addressed to all parties' satisfaction.

(3) The report dated 27 November 2014 referred to an improvement in the claimant's mood since an increase in her medication. The report writer opined that she should be fit to attempt a phased return to work but, to enable a sustained return and to prevent any further deterioration in her health or a protracted absence, it would be necessary for management to address the issues the claimant perceived had led to her absence. Rather than recommending a routine review, the report writer advised she would be happy to see the claimant again if she or management felt that was appropriate.

[9] On 6 October 2014, A, the Commercial Manager, was requested by the Human Resources Department to conduct a grievance investigation into the claimant's complaints against M. At the Stage 1 grievance meeting on 14 November 2014, A addressed the key points raised in the respondent's grievance letter. He carried out investigatory interviews of D, Commercial Analyst, P, the Assistant Store Manager, H and M. Paragraph 4(xiii) of the Tribunal's decision records that A described the CCTV evidence as inconclusive and that, in hindsight, he should himself have viewed same but he was not sure that this would have helped.

[10] The notes of the Investigation Meeting with H on 20 November 2014 record that H and T, the business development manager of the bread company in question, met with the claimant to review the CCTV footage and that T said he thought the delivery driver was "in the clear". H stated that the relationship between the driver and the store had "broken down" but T was going to talk to the driver about "how to move forward". Significantly, it is recorded that H went on to say, "… the problem we have as a business if we move the driver we remove the brand. It is as simple as that, [the bread company] do not have enough drivers to move from one area to another". When asked why a driver should be allowed to deliver if they were stealing stock, H referred to there not being enough evidence he was deliberately not giving credits. H said it was an error that T did not speak to him before the driver delivered to the store again. He stated that he explained this error to the respondent before she went on holiday and, by her return, the delivery driver was back. H said the respondent "was happy with this" and that she was adamant "she did not want the guy dismissed". However, paragraph 4(xv) of the Tribunal's decision records that, in her evidence before it regarding the viewing of the CCTV footage, the claimant denied saying that "she did not want the guy dismissed".

[11] In the notes of the Investigation Meeting with M on 24 November 2014, M referred to H and T having visited the store to view the CCTV footage and how they spoke to the claimant, after which, '… everything was fine, it was a misunderstanding.' When asked if the claimant was "happy", M said "yes", but then added, "I think she then changed her mind as now she was not happy with this". At paragraph 4(xvii) of the Tribunal's decision it is recorded that in her evidence before it, the claimant denied ever indicating that she was "happy". Even if the claimant's initial position regarding the CCTV footage was as alleged, the Tribunal was satisfied she did not maintain that position as reflected in the notes of the Investigation Meeting with M. Further, the Tribunal was satisfied the claimant genuinely believed that thefts had taken place on two occasions. In addition, the Tribunal was satisfied that an important consideration in both the investigation of the alleged thefts and A's investigation and as recorded in the notes of the Investigation Meeting with H, was that if the appellant moved the delivery driver, they removed the brand. The Tribunal concluded that A "clearly did not want to go more deeply into the issue of the alleged thefts" and he "chose not to view the CCTV footage, and to take the claimant's claims more seriously in relation to the alleged thefts". At paragraph 4(xx) of its decision, the Tribunal states A was clearly aware of

the impact for the company should the bread delivery driver be removed as he was informed of this during H's investigatory interview. Also, as a result of M's investigatory interview, the Tribunal said A was clearly aware the claimant was maintaining her original position that thefts had taken place.

[12] A Grievance Outcome Hearing took place on 5 December 2014 in relation to the allegations made by the respondent in her grievance letter of 1 October 2014. A Grievance Outcome letter dated 8 December 2014 addressed each of the claimant's undernoted allegations:

> "1. M had placed the concerns of a person who had been detected stealing the company's property above you, in suggesting that you change shift to avoid contact with the bread company's delivery driver, and in doing so was prepared to place the company at risk of further loss.
>
> 2. M had created an atmosphere and dynamic that asserts undue pressure on you to request a move from the [particular] store.
>
> 3. M has attempted to discredit you and may have committed a fraudulent act in his attempt.
>
> 4. M has failed in his duty of care to P and yourself in demanding you work unreasonable and unlawful hours.
>
> 5. M has failed to support you in your role as is his duty, ignoring requests for additional staff."

[13] The grievance outcome letter dated 8 December 2014 stated that there was no evidence to substantiate allegations 1 – 4. In respect of the 5th allegation, it was also stated there was no evidence to substantiate same. The letter went on to specifically refer to the claimant's allegation in relation to M telephoning her and speaking to her in a rude and abrupt manner regarding an e-mail he sent to all his stores. The letter stated that the issue had been investigated but no evidence was found to corroborate the claimant's version of events.

[14] In an e-mail dated 28 December 2014, set out in full at paragraph 4(xxiv) of the Tribunal's decision, the claimant stated she wished to escalate her grievance as she was not satisfied a thorough and impartial investigation had been conducted. In respect of the stage two grievance procedure G was required to review the stage one process. A stage two grievance hearing took place on 16 January 2015, the purpose of which was to address the respondent's concerns as set out in her e-mail. It was

not a rehearing of her original grievance but an opportunity for the claimant to present any new evidence to support the claims as per her escalated grievance.

[15] A stage two outcome meeting took place on 2 February 2015, the purpose of which was to provide the claimant with the findings following the second stage grievance hearing. The stage two outcome letter dated 6 February 2015, set out at paragraph 4(xxv) of the Tribunal's decision, contained the findings which had been verbally relayed to the claimant at the second stage outcome meeting on 2 February 2015. Those findings were listed under nine headings which referred to the following matters that had been raised by the claimant's e-mail dated 28 December 2014:

(1) Not everyone has been interviewed as part of the investigation and witnesses had been cherry- picked.

(2) Issue around the bread company's delivery driver.

(3) M spent two hours dominating you and bombarding you with a list of tasks to be completed, knowing that it couldn't be done without you working a nightshift.

(4) M told you to write a letter to move store.

(5) A is ill - equipped to carry out a grievance investigation.

(6) You brought up during the second stage grievance hearing that you had met with two other store managers who also had issues with M.

(7) You raised the issue of whistleblowing.

(8) Inconsistencies with notes.

(9) Issue around timescales for escalation.

[16] The findings contained in the stage two outcome letter in respect of the issue around the bread company's delivery driver, were as follows:

> "The investigation found that the delivery driver had made an error in relation to credits. A full investigation was carried out by H and T. A decision had been made that no action would be taken and that the driver would continue to deliver to the store. This decision was not taken by your Area Manager, M. It was documented during the investigatory interviews that you had told H that you did not want the driver dismissed and that you were happy with

> the outcome. You will appreciate that when conversations take place on a one to one basis, it makes it difficult to substantiate any allegations made."

[17] The stage two outcome letter concluded by setting out the options available to the claimant, being an open discussion with M facilitated through mediation or, alternatively, moving to stage three of the grievance procedure which involved referring the matter to the Labour Relations Agency where such option was described as "*a contingency for when open communication between an employee and management fails to identify and remove problems*". Paragraph 4 (xxvi) of the Tribunal decision states that G referred to the investigatory interviews in which the respondent allegedly told H she did not want the delivery driver dismissed and she was happy with the outcome but, as with A, this allegation, denied by the respondent in her evidence to the Tribunal, did not seem to have been weighed against M's interview notes for the stage one grievance which stated the respondent changed her mind and was not happy. Further, the Tribunal stated there was no evidence of how A or G weighed H's statement that removal of the delivery driver would mean the removal of the particular bread brand as the bread company did not have enough drivers to move them from one area to another. At paragraph 4(xxiii) of its decision, the Tribunal stated it was satisfied A's investigation did not adequately accommodate the claimant's concerns either in relation to the alleged thefts and the delivery driver concerned or in relation to M.

[18] At paragraph 4(xxvii) of its decision, the Tribunal found that the investigation was neither adequate, thorough enough, nor properly handled in that the claimant's claims were not taken sufficiently seriously. It found that concerns in respect of the company's business concerning retention of the particular bread brand and the delivery driver concerned had been placed above the interests of the claimant. In the Tribunal's view, it was significant that the alleged thefts formed the fountainhead from which the subsequent streams of difficulties arose leading, ultimately, to the claimant's resignation. The Tribunal stated it had no reason to question the credibility of the claimant's claims involving M. It referred to the evidence of the Occupational Health Reports which were available during the investigation and which also highlighted the very significant problem between M and the claimant.

[19] At paragraph 4(xxviii) of its decision, the Tribunal stated it was clear the claimant was in considerable financial difficulty in the early part of February 2015 and she was contemplating resignation as she could not see a future for herself in the company's business. The Tribunal went on to state that the claimant felt her concerns were not being adequately addressed and that the mediation process was entirely unsatisfactory in that it did not deal adequately with the ongoing problem in respect of M. Paragraph 4(xxix) of the Tribunal's decision sets out the e-mail dated 18 February 2015 which was sent to a senior member of the company by the claimant. In brief, the e-mail highlighted various matters relating to M's dealings with other staff members and it stated that no staff member felt confident enough to

report these matters. The claimant stated that her grievance against M and the subsequent deterioration in her health could have been avoided if the theft she had reported had been properly handled. She also referred to the personal and financial impact on her and her family.

[20] The senior member of the company replied by an e-mail dated 19 February 2015, essentially noting how the claimant felt her concerns had not been resolved. He also referred to the last stage of the grievance policy involving assistance from the Labour Relations Agency, indicating that he hoped she would participate in same so these matters could be resolved. At paragraph 4(xxx) of its decision, the Tribunal stated it was satisfied that the claimant was imploring the senior member to help her and that the nature of her e-mail to him again illustrated that the investigation process was neither adequate, thorough enough, nor properly handled, particularly in its assessment of her genuinely-held belief regarding the alleged thefts and the attitude M subsequently displayed towards her. The Tribunal re-iterated that it found the claimant to be a credible witness who was well motivated in her employment with the company.

[21] On 31 March 2015 the claimant did attend a meeting at the Labour Relations Agency but on the next day, 1 April 2015, discovered that M, with whom she found it impossible to work, was being provided with an office to be situated within her store. Her case to the Tribunal was that this was essentially "the last straw" and on that day she wrote tendering her resignation and explaining that she was doing so "in light of the fact that after having followed your grievance procedure you refused to provide me with a safe working environment contrary to the terms of my contract by attempting to have me work in the same environment as the person whose actions I believe caused me ill health".

[22] The written decision of the Tribunal is laid out in a manner that intersperses the evidence given with the findings of fact rather than, as would have been more helpful, by first setting out all the evidence and then all the findings of fact thereon. It may therefore be useful if, before going further, we here abstract and collect together the Tribunal's findings of fact from the various places in the decision where they are to be found though that will necessarily involve some repetition of earlier material:

- The Tribunal was satisfied that the claimant was a diligent and hardworking employee.

- The claimant presented as a credible witness before the Tribunal.

- The Tribunal was satisfied that the section of the claimant's grievance letter set out at 4(iii) of the decision was an accurate summary of the position.

- The Tribunal accepted that the claimant felt under extreme pressure and stress because of the treatment she received after reporting the alleged thefts.

She was unable to sleep, and felt depressed and sick at the thought of going into work. She was unfit to return to work due to stress.

- The Tribunal was satisfied that, whatever may have seemed to be her stance at one point, the claimant did not maintain the position that what happened involving the bread delivery man was a misunderstanding and that she genuinely believed that thefts had taken place on two occasions.

- The Tribunal was satisfied that the company was conscious that "if the company moved the driver it removed the brand" and that this was an important consideration in the investigation of the alleged thefts and A's investigation. He clearly did not want to go more deeply into the issue of the alleged thefts. He chose not to view the CCTV footage and to take the claimant's claims more seriously in relation to the alleged thefts.

- The Tribunal found that A was clearly aware from M that the claimant was, in terms, maintaining her original position that thefts had taken place.

- The Tribunal was satisfied that A's investigation did not adequately accommodate the claimant's concerns either in relation to the alleged thefts and the driver concerned or in relation to M. It was clear to the Tribunal that the claimant had obvious and genuine difficulties and concerns with M which, as the occupational health reports show, had a direct impact upon her health.

- With regard to the second stage investigation conducted by G the Tribunal found that the investigation was neither adequate, thorough enough nor properly handled in that the claimant's claims were not taken sufficiently seriously. It found that there was evidence that concerns in relation to the company's business involving the bread company had been placed above the interests of the claimant.

- The Tribunal had no reason to question the credibility of the claimant's claims involving M. There was also evidence in the form of occupational health reports available during the investigation which highlight a very significant problem between M and the claimant.

- The Tribunal was satisfied that when on 18 February 2015 she wrote to the senior person within the company she was "essentially imploring [him] to help her". It was further satisfied that the nature of that correspondence again illustrated that the investigation process was neither adequate, thorough enough nor properly handled, particularly in its assessment of the claimant's genuinely held belief regarding the alleged threats and the attitude to M displayed towards subsequently.

- The Tribunal re-iterated that it found the claimant to be a credible witness who was well motivated in her employment with the company noting the comment in the final occupational health report that "she remains very keen to return to work".

[23] The Tribunal then set out what may be fairly described as a concise statement of the applicable principles of the law of constructive dismissal with which for the purposes of this appeal neither party took any significant issue and therefore they need not be restated here.

[24] The Tribunal's decision then concluded as follows:

> "The Tribunal having carefully considered the evidence before it and having applied the relevant principles of law to the findings of fact, concludes as follows:
>
> The Tribunal is satisfied that the respondent breached the implied term of trust and confidence and the wider contractual duty to co-operate with the claimant. The claimant resigned in response to that breach. The Tribunal has already made factual findings in relation to the investigation as being neither adequate, thorough enough, or properly handled, particularly in its assessment of the claimant's genuinely held belief regarding the alleged thefts and the attitude of M displayed towards her subsequently. The Tribunal was satisfied that the claimant was a credible witness who was well motivated in her employment with the respondent. It is also clear to the Tribunal that from in or about 18 February 2015 the claimant was contemplating possible resignation due to the foregoing factors. This is reflected in her correspondence to [the senior member of the company] dated 18 February 2015. The Tribunal is further satisfied that the breach was fundamental and therefore sufficiently important to justify her resignation, or, alternatively the failure in the mediation process was the last in a series of incidents flowing from the alleged thefts (and compounded by the nature of the investigation), ultimately justifying the claimant leaving the respondent's employment. The occupational health reports also substantiate the claimant's claims as to the impact of the ongoing events upon her health. These reports also stress the need for the respondent to make attempts to resolve the issues. The Tribunal's finding is that the mediation process could have gone further to minimise any contact between M and the claimant and to

> safeguard the claimant's interests and her health in continued employment with the respondent. The Tribunal does not consider contributory conduct to be a factor in this case."

The Appeal to this Court

[25] The company's Notice of Appeal contained 13 grounds but the appellant's written and oral submissions were condensed into 3 broad grounds, namely that:

(a) The decision was perverse.

(b) There were material findings of fact either unsupported by or contrary to the evidence.

(c) There was *ex facie* an error of law, a misapplication of law or misdirection of law in relation to the application of the law of constructive dismissal and the law in relation to the drawing of adverse inferences.

[26] A major plank in Mr Warnock's submissions in support of these grounds derived from what he contended ought to have been the implications for the Tribunal's conduct of the hearing of the terms of a Case Management Discussion held on 19 February 2016 pursuant to Rule 10(1) of the Industrial Tribunal Rules of Procedure 2005 in which the employment judge made orders by consent. The following extracts from the record are material to Mr Warnock's submission:

> "**Issues**
>
> The *precise* legal and *main* factual issues in the case have been identified as follows (emphasis supplied):
>
> **Legal Issues**
>
> 1. Was the claimant dismissed by the respondent, and in particular:
>
> (a) Did the respondent conduct itself in a manner so as to destroy the implied term of mutual trust and confidence between itself and the claimant?
>
> (b) If the respondent did breach the implied term of trust and confidence, was the breach repudiatory so as to permit the claimant to resign and claim constructive dismissal?

(c) Did the claimant resign in response to that repudiatory breach?

2. In the alternative, if the Tribunal finds that the claimant was dismissed:

(a) Did the respondent have a potentially fair reason for the dismissal, namely some other substantial reason?

(b) Was the dismissal fair in all the circumstances?

3. What, if any remedy, is the claimant entitled to?

Factual Issues

4. Did the respondent properly investigate the claimant's grievance, including:

(a) allegations of undue pressure on the claimant to work extended shift patterns.

(b) allegations of bullying and harassment following a report of an alleged theft by the claimant.

(c) allegations that the concerns of a person who had been allegedly detected stealing were placed above those of the claimant?

5. Was the grievance investigation carried out in accordance with the respondent's procedures?

6. Did the respondent consider a store move for the claimant?

7. Did the respondent adequately seek to assist the claimant in getting back to work?

8. Was it reasonable for the respondent to offer and discuss mediation with the claimant and was the claimant's response to this offer/discussion reasonable?

9. Did the respondent investigate the cause of the claimant's work-related stress?"

[27] In Mr Warnock's submission:

(i) The terms of what the record describes as "the main factual issues" constrained the ability of the Tribunal to step outside those agreed issues so that it ought not to have conducted what he described as its own investigation of the claimant's grievance, a course which he characterised as an error of law or perverse.

(ii) He submitted that the fact that the Tribunal had drawn an adverse inference from the fact that M had not given evidence was to be similarly characterised as an error of law or perversity.

(iii) There was no evidence to support the Tribunal's conclusion that the company did not conduct an adequate investigation into the claimant's grievance.

(iv) There was no evidence to support the conclusion that the failure of the mediation process was the last in the series of incidents justifying the claimant's resignation.

(v) That the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have concluded that the claimant was constructively dismissed.

(vi) That the Tribunal had failed to give proper reasons for its decision.

[28] In response Mr Potter submitted:

(i) The complaint that the scope of the Tribunal's inquiry was circumscribed in the manner contended for is misconceived. It would not have been possible for the Tribunal to examine the adequacy of the grievance investigation without first examining the nature of the allegations giving rise to the grievance including those relating to the conduct of M towards the claimant after she had reported the alleged thefts by the bread delivery man.

(ii) The Tribunal did not say that it had drawn an adverse inference from the failure of M to give evidence. The position was simply that the claimant gave evidence about the behaviour of M which the Tribunal accepted and there was no evidence called to contradict her. Her evidence was further supported by the occupational health reports.

(iii) The Mahmud test required the Tribunal to examine the employer's conduct so as to decide whether it constituted a repudiatory breach of the contract of employment and that was what it had done.

Consideration

[29] Almost all the points made by Mr Warnock involve a direct or indirect challenge to the factual findings of the Tribunal. We therefore begin by reminding ourselves of the principles governing the role of this court when the factual findings of a Tribunal are criticised. These were conveniently drawn together by Coghlin LJ in Mihail v Lloyds Banking Group [2014] NICA 24 at para [27]:

> "This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable Tribunal, they must be accepted by this court (McConnell v Police Authority for Northern Ireland [1997] NI 253 per Carswell LCJ; Carlson Wagonlit Travel Limited v Connor [2007] NICA 55 per Girvan LJ at paragraph [25]). In Crofton v Yeboah [2002] IRLR 634 Mummery LJ said at paragraph [93] with reference to an appeal based upon the ground of perversity:
>
> > 'Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", British Telecommunications PLC v Sheridan [1990] IRLR 27 at para 34.'
>
> In Curley v Chief Constable of the PSNI [2009] NICA 8 this court observed at paragraph [14]:
>
> > "It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal the appellate court should not interfere with the decision even though they themselves might have preferred a different inference.'"

[30] Bearing in mind those constraints this court has examined the identified findings of fact and finds no basis for concluding that the Tribunal was not entitled to draw each of them from the oral evidence of the claimant as recorded in the decision and the documents before it as therein set out.

[31] This court does not accept that an adverse inference was drawn from the fact that M did not give evidence. The Tribunal received the claimant's evidence which it found to be credible and it is clear from para 4(x) of the decision that at the hearing there was a discussion with Mr Warnock as to whether M would be called and that Mr Warnock founded himself upon his submission (to which we will shortly turn) that the scope of the Tribunal's inquiry had been restricted by the terms of the agreed main factual issues in such a way that M's evidence was not required. That was a calculated judgment for Mr Warnock to make but its consequence was that, if he were wrong to suggest that the Tribunal could not properly examine the background to the grievance, his decision not to call M left the company in a position in which the claimant's evidence relating to M's behaviour towards her was uncontroverted by him.

[32] Dealing therefore with Mr Warnock's submission that the Tribunal was not entitled to look behind or beyond the grievance process at the matters which led to its initiation, this court does not accept that, whether as a matter of logic or of law, the Tribunal was so precluded. As to logic, the adequacy of the grievance process necessarily involved an examination of the alleged matters giving rise to the grievance. Otherwise the Tribunal would be deprived of the context required to enable it to assess the sufficiency of the grievance process including its conduct and outcome. As to the law, this court does not accept that the list of "main factual issues" narrowly confined the Tribunal to a consideration of those and nothing more. In Parekh v The London Borough of Brent [2012] EWCA Civ 1630 Mummery LJ at paragraph 31 described a list of issues as a "useful case management tool" and further said this:

> "… As the Employment Tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence …"

[33] We accordingly conclude that the Tribunal was entitled and indeed obliged to consider the factual antecedents of the grievance process. The exchange between the Tribunal and Mr Warnock alerted him to the fact that the Tribunal intended to take that course but he nonetheless chose in reliance on his "pleading" point not to call M. The Tribunal cannot in our judgment be criticised for then proceeding to decide the case on such evidence as the two parties had chosen to place before it.

[34] We do not accept that the Tribunal drew an adverse inference from the fact that M did not give evidence. It certainly does not say so in its decision and indeed Mr Warnock was less than confident in that assertion because at para 34 of his skeleton argument he says "it appears that the Tribunal *may* have drawn an adverse inference". As we have said in the preceding paragraph, what actually seems to have happened was that the Tribunal fairly alerted Mr Warnock to the fact that M seemed to have knowledge relating to a considerable period following the alleged incidents of theft and that on the claimant's evidence he was the key material factor in the circumstances leading to the claimant's resignation. It was then for Mr Warnock to decide whether or not to call M or to leave the claimant's evidence concerning him unchallenged other than in cross-examination. He chose the latter.

[35] It is submitted that there was no evidence to support the Tribunal's conclusions that the company did not conduct an adequate investigation or that the failure of the mediation process was the last in a series of incidents justifying the claimant's resignation. We do not agree. For example the evidence established to the satisfaction of the Tribunal that the company was more interested in maintaining its trade connection with the bread company than in properly investigating the applicant's allegations of theft and the subsequent victimisation by M, that where there was no independent evidence of the content of exchanges between the claimant and others the investigation simply rejected the claimant's allegations without attempting to discern where the truth lay, paid no or insufficient attention to the reports from occupational health about the effects upon the claimant's health and the need for action to be taken to resolve matters and made no effort to devise a method of minimising ongoing contact between the claimant and M so as to safeguard the claimant's interests and her health in continuing in the company's employment. In this court's view there was ample material upon which the Tribunal could be satisfied that the respondent breached the implied term of trust and confidence and its wider contractual duty to co-operate with the claimant and that the claimant resigned in response to that breach.

[36] Finally, it is suggested that the Tribunal failed to give proper reasons for its decision. The standard required of a Tribunal decision was helpfully summarised by Bingham LJ in Meek v City of Birmingham District Council (1987) IRLR 250 CA:

> "It has on a number of occasions been made plain that the decision of an (Employment) Tribunal is not required to be an elaborate formalistic product of refined legal draughtsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusions they do on those basic facts. The parties are entitled to be told why they have won and lost. There should be sufficient account of the facts and of the

> reasoning to enable the EAT … to see whether any question of law arises …"

[37] This court considers that the terms of the decision in this case amply satisfy those requirements. They make quite clear what evidence was given and documents considered, what facts were found and what legal principles were applied to those facts in order to reach the Tribunal's decision. No more was required.

[38] Accordingly, the company's appeal against the decision of the Tribunal is dismissed.