

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**  
**HHJ PETER CLARK**  
**UKEAT/0459/07/DM**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/02/2009

**Before :**

**LORD JUSTICE MUMMERY**  
**LORD JUSTICE RIMER**  
and  
**LORD JUSTICE SULLIVAN**

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**Between :**

**WOODHOUSE SCHOOL**  
**- and -**  
**MARTIN WEBSTER**

**Appellant**

**Respondent**

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**MR MICHAEL NORMAN** (instructed by **Messrs Dutton Gregory**) for the Appellant  
**MR STEPHEN WHALE** (instructed by **Messrs Stokes Partnership**) for the Respondent

Hearing date: 14<sup>th</sup> January 2009  
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**Judgment**

## **Lord Justice Mummery :**

### **The appeal**

1. This appeal is based on criticisms of the employment tribunal's (ET) performance of its fact-finding role. Was its finding of constructive dismissal perverse? Was its procedure unfair? Sir John Chadwick gave permission to appeal on these points on 1 August 2008.
2. Woodhouse School (the School) appeals from the order of the Employment Appeal Tribunal (EAT) dated 24 April 2008. The EAT dismissed the School's appeal from the judgment of the ET sent to the parties on 18 June 2007. In a majority decision the ET held that the School constructively unfairly dismissed the complainant, Mr Martin Webster. He worked for the School from 9 November 2004 until his resignation on 1 September 2006 with effect from 15 September 2006. Mr Webster was the Head of Care and the Registered Manager of the School, which is jointly owned by Mr Pat Moore and his wife and cares for severely disturbed girls aged between 9 and 18.
3. The case in the ET turned on disputed evidence of the circumstances in which Mr Webster handed in his resignation. The School's appeal turns on whether the ET erred in law in holding that Mr Moore had constructively dismissed Mr Webster.

### **Resignation or dismissal?**

4. Mr Webster's case was that he resigned after a meeting at the School on 11 August 2006. At the meeting Mr Moore told him to dismiss one of the staff, Ms Rowan Ward, because of her profound bilateral deafness. Mr Webster was unwilling to do what he was told. Rather than do something unlawful, he left his post at the School.
5. Mr Webster had recruited Ms Ward as a member of staff in June 2006. She started a 6 month probationary period on 12 June. At that time Mr Moore was not fully involved in the running of the School, as he was recovering from a cancer operation. He put Mr Webster in charge. On learning of Ms Ward's appointment Mr Moore became concerned. She has been deaf since birth and wears hearing aids. Her deafness does not interfere with her work. Mr Moore's concern was that a disability claim might be made against the School exposing it to uncapped liability for compensation. The majority in the ET concluded that Mr Moore did not want to employ a deaf person at the School and that it very much doubted whether Ms Ward would have been appointed if Mr Moore had been involved.
6. In the period leading up to the critical meeting on 11 August 2006 discussions about the employment of Ms Ward took place on about three occasions. The meeting on 11 August was attended by Mr and Mrs Moore, Mr Webster and a person with human resources experience, Ms Sheena Murphy-Collett, who was retained by the School to give it advice. Mr Webster attempted to tape the meeting, but his efforts were only partially successful. His tape covered only the first 15 minutes. The ET listened to the taped discussion during which Mr Moore was heard to say about Ms Ward, in a way to which the majority in the ET attached considerable significance-

“Basically we were going to discuss the implications of having her on board and employing her and how we go about not employing her really.”

7. The majority concluded that those words were on their face strong evidence that Mr Moore was asking Mr Webster how to dismiss Ms Ward. The words were followed by Ms Murphy-Collett’s remarks about employment rights- the qualifying period for unfair dismissal, discrimination law, the obligation to make reasonable adjustments and entitlement to dismiss if reasonable adjustments cannot be made.
8. The majority in the ET accepted Mr Webster’s evidence that he attempted to tape the discussion because he thought that he was going to be given an instruction to terminate Ms Ward’s employment. He thought that, if he was so instructed and followed the instruction, he would end up on the receiving end of an employment tribunal application by her.
9. There was no tape of the rest of the discussion at the meeting, as Mr Webster was not very good at operating the equipment. Mr Webster’s evidence was that later in the meeting Mr Moore expressly instructed him to terminate Ms Ward’s employment at the School. That would be done by Mr Webster writing to her one month before her temporary 6 month contract finished, simply saying that her services were no longer needed. Mr Moore denied giving any such instruction.
10. At the meeting a series of performance matters were also raised. They related to issues arising during Mr Moore’s absence through illness. The majority in the ET held that the discussion was conducted in a “thoroughly supportive way.”
11. Mr Moore was later told by another member of the staff, Emma English, that Mr Webster was going to resign, because he had been told to terminate Ms Ward’s employment. Mr Moore denied that the Emma English conversation had taken place. None of the members of the ET believed him on that point. The ET unanimously found that Mr Moore did not inform Mr Webster that he was mistaken about an instruction by him to terminate Ms Ward’s employment.
12. Mr Webster resigned by letter dated 1 September 2006. In December 2006 he began proceedings against the School for constructive dismissal.

### **ET’s judgment**

13. In the ET the School conceded that, if the central assertion made by Mr Webster as to Mr Moore’s instruction to him on 11 August 2006 was established, his claim for unfair dismissal must succeed. An instruction by Mr Moore to Mr Webster to terminate Ms Ward’s employment because of her disability would be a breach of the implied term of mutual trust and confidence. Mr Webster’s resignation was within a reasonable period of the alleged instruction.
14. The case for constructive dismissal turned on disputed evidence about the reason for Mr Webster’s resignation. It is common ground that the burden was on Mr Webster to prove that Mr Moore’s instruction was the reason for his resignation and that it was a repudiatory breach of contract by the School. When faced with the conflict of

evidence about the reason for Mr Webster's resignation, the ET's function was to make the relevant findings of fact.

15. According to the ET1 and Mr Webster's supporting statement the reason for his resignation was a fundamental breach of the terms of his employment in Mr Moore's unlawful instruction at the meeting on 11 August to terminate Ms Ward's employment because she suffered from hearing difficulties.
16. The School's response and Mr Moore's witness statement denied that Mr Moore or anyone else had at any time instructed Mr Webster to terminate Ms Ward's employment. The evidence of Mrs Moore and Ms Murphy-Collett about whether the alleged express instruction was given supported Mr Moore. The School's positive case on the reason for the resignation, which was put to Mr Webster in cross examination and disputed by him, was that he resigned because he felt that he was unable to fulfil the role to which he had been appointed and was facing increasing criticism and concern about his performance.
17. The ET identified the sharp conflict of evidence right at the beginning of its judgment:

“1. ....[Mr Webster] says the reason he resigned was because he was instructed to dismiss Rowan Ward because of her profound bilateral deafness. Mr Moore, who was alleged to have given the instruction, denies this and says Mr Webster resigned for other reasons connected with his performance.”
18. On this crucial question-why did Mr Webster resign? - the ET was divided.
19. One of the lay members, Ms Clarke, thought that there was no constructive dismissal. She accepted Mr Moore's denial of the alleged instruction, though she did not believe his denial of the Emma English conversation. All the members of the ET thought that Ms Murphy-Collett was a credible witness. Although Ms Clarke did not think that Mr Webster was deliberately untruthful, she thought that he had no proper reason to believe that the instruction was given. Her view was that Mr Webster used his unreasonable belief that he had been given an instruction to dismiss to make out that he had been constructively dismissed. He resigned because of a failure to perform his duties to a satisfactory level and was worried that he would not be able to improve to a satisfactory standard.
20. The majority took a different view of the evidence and summarised it in the following key paragraphs of the ET's judgment.

“41. Mr Jacombs and I think that the truth of the matter is that at no point in the meeting did Mr Moore say specific words to the effect:-

‘I want you to give notice at the beginning of November to dismiss Rowan Ward and bring her employment to an end at the beginning of December.’

However, the combination of the three earlier discussions, the clear (and recorded) statement about “how we go about not employing her really” and then discussion about the mechanics of terminating her

employment were as clear an instruction as could have been given without express words. Mr Webster correctly understood what Mr Moore was meaning by his words. Sheena Murphy-Collet appeared a credible witness. In the transcripts which we have heard she appears primarily concerned with offering advice rather than with listening and we are prepared to allow the charitable explanation that she simply failed to pick up on what to us was blindingly obvious.

42. After that meeting Mr Webster considered his position. Ultimately he decided he could not dismiss Rowan Ward and he said he would resign. He told Emma English, Ange Clark and Sandra Vincent, separately, of his intention. He told them of the reason. We heard evidence from Emma English. This information emerged in answer to my questions to her. She also told us that she had discussed this with Mr Moore and had done so prior to Mr Webster's resignation. Mr Moore indicates that she is mistaken. There is no reason for her to invent this and having heard her give evidence, which she did directly and without hesitation, we believe her. Ms Clarke also believes that Emma English's evidence is credible and to be relied upon and thinks Mr Moore is mistaken in denying that this conversation occurred, by reason of his illness.

43. Given that all three of us think that that conversation occurred, to Mr Jacombs and me it is remarkable that Mr Moore did not speak with Mr Webster about it prior to the resignation on 01<sup>st</sup> September 2006."

21. The majority added that it was even more extraordinary that Mr Moore did not go to Mr Webster and tell him that he had misunderstood him when the thrust of his evidence was that he wanted to keep Mr Webster on board, despite the performance problems there had been.
22. In the absence of a self misdirection on the law, a perverse finding of fact on the available evidence or a procedural irregularity resulting in injustice, there is no appeal to this court against the majority finding that, on the facts, Mr Webster was constructively dismissed.

### **EAT judgment**

23. At the ex parte preliminary hearing on 28 November 2007 the EAT made the following order-

“4. The Employment Tribunal be asked to answer...the following questions namely:

- a) Please see paragraph 41 of the written reasons. What was the basis for the majority Employment Tribunal finding that at no point in the meeting did Mr Moore say to Mr Webster specific words to the effect that :-

“I want you to give notice at the beginning of November to dismiss Rowan Ward and bring her employment to an end at the beginning of December.”

- b) Did either party make submissions to the Employment Tribunal based on these facts or the possibility that Mr Moore did say it?”
24. The ET was requested to give its answers by reference to its notes of evidence. The Chairman was invited to produce his notes of evidence of Mr Webster, Mr and Mrs Moore and Mrs Murphy-Collett about the meeting held on 11 August.
25. Although I do not think that it affects the outcome of this appeal, the procedure followed by the EAT in putting questions to the ET and the response of the ET chairman in this case calls for a firm reminder of the importance of taking care to observe the limits of the exceptional **Burns/ Barke** procedure, as it has come to be called following the decision of the EAT in **Burns v. Royal Mail Group plc (formerly Consignia plc)** [2004] ICR 1103 and the decision of this court in **Barke v. SEETEC Business Technology Centre Ltd** [2005] ICR 1373. There is a valuable discussion of these decisions in Green & Heppinstall’s Manual of Employment Appeals, paragraphs 8.174 – 8.203.
26. The procedure is available where the EAT considers that there is possibly an inadequacy in the ET’s reasons for its decision. The EAT may, before it finally decides the appeal, refer specific questions to the ET at the preliminary hearing of the appeal, requesting it to clarify or supplement its reasons where no reasons were given or where the reasons given were inadequate. The purpose of the procedure is to give the ET the opportunity of fulfilling its duty to provide adequate reasons for its decision without the inconvenience that might be involved in the EAT allowing a reasons challenge to the ET decision under appeal and having to remit the case to the ET for a further hearing. Under the procedure developed by the EAT and this court the ET can be asked before the hearing of the appeal to supply, if it is possible to do so, the reasons for which the request is made.
27. It is not, however, desirable for the ET to do more than answer the request. The ET should not, for example, advance arguments in defence of its decision and against the grounds of appeal. It must not engage, or appear to be engaged, in advocacy rather than adjudication. My concern about the use of the **Burns/Barke** procedure in this case is twofold.
28. First, it is necessary for the EAT to identify correctly the point on which the ET’s reasons may be inadequate. This was not done here. The EAT’s questions were directed to the reasons for the finding that no express instruction was given by Mr Moore. On that issue the ET gave reasons, in particular its reliance on the evidence of Ms Murphy-Colett, which all the members accepted as credible. If there were grounds for considering that the reasons of the ET were inadequate (which I doubt), it would have been more to the point to ask for additional reasons for the finding of an implicit instruction to dismiss.
29. Secondly, having been asked questions by the EAT, the well intentioned ET chairman went further than the questions required and than was justified under the **Burns/Barke** procedure. He supplied all his notes, including notes of the

deliberations of the ET. These were neither requested nor necessary. He also gave reasons for not interfering with the ET's findings e.g. additional comments about the ET's view of Ms Murphy-Collett; there being no substitute for seeing the witnesses, evaluating their evidence and the way it is given; and the comment that Mr Webster had exaggerated his case, though he had no need to do so, as it was entirely clear to the ET that Mr Moore had made it clear beyond misunderstanding to Mr Webster that he was instructed to dismiss Rowan Ward. It is natural for the chairman to defend the decision of the ET challenged in the appeal, but that is neither the function of the ET nor the purpose of the **Burns/ Barke** procedure.

30. The outcome of the appeal to the EAT was that it was unable to find any error of law in the ET's decision. It rejected the School's two arguments for overturning the decision of the majority. The majority's findings were not perverse, as there was evidence that Mr Moore intended to give an instruction to dismiss Ms Ward, because she was disabled and Mr Webster's understanding of what Mr Moore meant was reasonable. As for the point that the ET had not given the School an opportunity to make submissions on the possible key finding of an implied instruction to dismiss, the EAT concluded that the majority would not have reached a different view of the case, even if the potential finding had been canvassed with counsel for the School at the hearing.

### **School's submissions on appeal**

31. In his skilful presentation of the School's appeal Mr Norman argued that the judgments of both the ET and the EAT were wrong in law.
32. First, there was procedural unfairness. The ET acted in breach of the rules of natural justice. Having rejected the key factual foundation of Mr Webster's case about Mr Moore's express instruction, the ET then proceeded to construct a different case for him. It founded its decision in his favour on a different version of the facts than he had alleged. The finding of an implicit instruction to dismiss Rowan Ward had not been asserted in the ET1 or by Mr Webster in his evidence to the ET. Nor was it the subject of any evidence or of submissions by counsel. It was not "fair play" for the ET to decide the case against the School on a point which Mr Webster had not raised or argued without giving the School an opportunity to address it in evidence or in argument. It was, he submitted, "grotesquely unfair" and an error of law on the part of the ET.
33. The burden was squarely on Mr Webster to prove what he alleged. He alleged that Mr Moore had expressly given him an instruction which would have been a repudiatory breach of contract. He failed to prove that allegation. The ET did not accept Mr Webster's evidence about the alleged instruction. The finding of an implicit instruction was not foreshadowed by the evidence of any witness or addressed in any of the submissions. Mr Norman described the ET's finding as "dramatically different" from the version put forward by Mr Webster. Had it been canvassed by the ET with the parties there was a possibility that it would not have made the finding.
34. Mr Norman's second point was that the finding of the majority was plainly wrong. It was perverse and wrong in law, as there was no evidence for it from any witness. Mr Webster himself only gave evidence of the express terms in which he was told to terminate Ms Ward's employment. There was no finding that Mr Moore actually gave

any such instruction. The finding was of something different: what Mr Moore intended to say, without expressly saying so, and what Mr Webster had understood him to be instructing him to do. That was in contradiction to his pleaded case and his supporting evidence.

### **Discussion and conclusion**

35. Mr Norman accepted that, in principle, it is open to an ET, as the fact finding body, to take a view of the evidence that does not precisely coincide with the position contended for by either side and to make a finding for which neither side contended: see **Judge v. Crown Leisure** [2005] IRLR 823, a case in which the effect of the ET's finding was that the claimant failed to prove his case. It was distinguished by Mr Norman on the basis that in this case the finding for which neither side contended was used to grant a remedy to the claimant without an opportunity for the School to address that case. See also, on this aspect of fact finding in the ET, **Kuzel v. Roche Products Ltd** [2008] IRLR 530, another case which Mr Norman said was distinguishable.
36. The teaching of experience is that in an adversarial contest neither side necessarily has a monopoly of the whole truth. An impartial tribunal may discern from the evidence, as it unfolds in the course of the hearing, that the truth on a particular issue probably lies somewhere between the positions of the parties. The adversarial nature of the proceedings tends to polarise the positions taken up by the parties in a way that may distort or disguise the truth.
37. Of course, the ET should decide the case only on the basis of the evidence before it, applying the balance of probabilities as the standard of proof. Where there are conflicts of evidence it will be necessary for the ET to make findings on the credibility of the witnesses it has seen and heard. The ET may, of course, make inferences of fact from undisputed primary facts or from primary facts which it finds have been established. If the ET inclines to an interpretation of the evidence that differs from that contended for by either side, it is normally good practice for the ET to raise that with the parties at, or even after, the hearing in case the parties wish to consider calling further evidence or making further submissions.
38. There is, in general, no procedural unfairness or injustice in the ET making findings based on evidence before the ET, if the parties have had a fair opportunity to address submissions to the tribunal on the substance of the evidence and if there is no real possibility that further submissions would have made any difference to the outcome.
39. In deciding whether there was any procedural injustice or perversity in this case it should also be borne in mind that the case was not only about whether Mr Moore had given an express instruction to Mr Webster on 11 August. That would be too narrow a definition of the issues before the ET. The evidence about the express instruction at the meeting on 11 August was set in the broader context of a dispute about the reason for Mr Webster's resignation. In my judgment, it was open to the ET to accept, on the balance of probabilities, that Mr Webster's reason for his resignation was that Mr Moore was instructing him to dismiss Ms Ward, even though what was actually said by Mr Moore in the course of the meeting was not precisely as Mr Webster recalled in his evidence. Oral evidence of discussions does not have to satisfy standards of

perfection, only to be more probably true, in all the circumstances, than the evidence given on the other side.

40. In the absence of a tape recording of that part of the discussion in which the alleged express instruction was given and in the face of the credible evidence of Ms Murphy-Collett that no express instruction was given, Mr Webster's evidence on this important point was not accepted by the ET. It does not follow, however, from the decision of the ET to reject Mr Webster's evidence about the express instruction that the majority in the ET erred in law in finding constructive dismissal. The evidence supporting Mr Webster's case for constructive dismissal did not rest solely on the express instruction of 11 August isolated from all the surrounding circumstances. There was other evidence relevant to the constructive dismissal issue and it was accepted by the majority in the ET.
41. In paragraphs 41 to 43 of its judgment the ET referred to the combination of other facts leading to a conclusion of constructive dismissal that they described as "blindingly obvious": the three earlier informal discussions arising from Mr Moore's worries about Ms Ward's appointment; Mr Moore's clear statement on the tape about "how we go about not employing her really"; the ensuing discussion with Ms Murphy-Collett about the mechanics of terminating her employment; and the fact that, although Mr Moore was subsequently informed about Mr Webster's decision to resign because he decided that he could not dismiss Ms Ward, he did not speak to Mr Webster about it.
42. In my judgment, the combination of these other facts entitled the majority in the ET to reject the performance issues as the reason for Mr Webster's resignation and to draw legitimate inferences that the reason for Mr Webster's resignation was the fact that Mr Moore had communicated to Mr Webster, other than by express words of instruction, his position regarding the dismissal of Ms Ward. The majority in the ET found that Mr Webster's understanding of Mr Moore's position on this point was correct. If it was a misunderstanding, that was known to Mr Moore, but he did nothing to correct it when he could have done so.
43. As for the complaint of procedural unfairness, it is not that the School was deprived of the opportunity to challenge Mr Webster's evidence. It was challenged successfully on the express instruction point. The complaint is about what was inferred by the majority in the ET from the direct evidence of the surrounding circumstances. The School had ample opportunity to challenge that evidence. Like the EAT I am not persuaded by Mr Norman that there was a real possibility that the majority in the ET would have been persuaded to reach a different interpretation of the totality of the evidence, on which they based and were entitled to base their conclusion of constructive dismissal, and hold instead that the performance issues discussed at the meeting were the reason for Mr Webster's resignation.

## **Result**

44. I would dismiss the appeal. There is no error of law in the decision of the ET. The EAT was right to dismiss the School's appeal.

**Lord Justice Rimer:**

45. I have had the advantage of reading Mummery LJ's judgment in draft and gratefully adopt his account of the background to this appeal. I am, with respect, unable to agree with his conclusion that the employment tribunal's majority decision should be allowed to stand. I agree with Mr Norman that Mr Webster failed to prove the only case he sought to make and that there was no evidence justifying the majority's decision that he had proved a different case he had not sought to make.

46. Mr Webster's pleaded case was that:

“On or about 11 August 2006 the respondent instructed the claimant to terminate the employment of an employee, named Rowan Ward because she suffered from a disability, namely hearing difficulties.”

Without more, that would have entitled him to prove at the hearing that the instruction was given to him either expressly or impliedly. If he was going to prove that it was given impliedly, he would have to prove facts justifying such a conclusion.

47. There was, however, more, in the shape of Mr Webster's witness statement of 5 June 2007. That made it clear that the only case he was making was that Mr Moore gave him an *express* instruction to dismiss Ms Ward and did so at the meeting of 11 August 2006. He said:

“5.2 At the meeting of August 11<sup>th</sup>, Sheena Murphy-Collett was introduced to me and the meeting commenced with the discussion regarding Rowan [Ms Ward]. I have produced a transcript of part of that discussion from the audio device itself. I only have about fifteen minutes of it because the device switched off, having reached the end of a folder. *Later in the discussion, I was very clearly told to terminate Rowan's employment with Woodhouse.*

5.3 *That would be done by me (as instructed by Pat [Mr Moore]) writing to Rowan one month before her six months temporary contract finished, simply saying that her services were no longer needed.* This was totally contrary to the real situation, as Rowan was most certainly needed, both numerically in terms of staff numbers and also because of her good work performance. *At the same time I was instructed to advertise for two additional staff members.* One of these was needed through natural wastage, but the other would replace Rowan.

5.4 *The meeting then turned to other matters, namely recent concerns about aspects of my performance ....*

5.5 *The instruction that had been given to me regarding Rowan was solely on the grounds that as a disabled person, in the eyes of Pat and Chris [Mr and Mrs Moore] she represented a threat to them. ...*

5.6 I knew I was going to be unable to carry out Pat's instruction to terminate Rowan's employment. ...” (Emphasis supplied)

48. There is no doubt that by that statement Mr Webster was advancing a case based exclusively on the assertion that Mr Moore gave him an express instruction at a point in the meeting following the opening part of it that he had tape recorded. That was the

only case he sought to make and that was the only case that the School had to meet. At the hearing, Mr Webster adopted his witness statement as his evidence in chief and was cross-examined by Mr Norman. We have the Chairman's notes of the cross-examination. Mr Webster said in the course of it that the dismissal instruction was given about five to ten minutes after the point at which the tape ran out. To the question whether he asked for the instruction to be clarified, he replied that he did. According to the note, he said:

“I was to write to her 1 month before her 6 month contract ended to say her services were not needed, ‘superfluous’ was the word. It sounded an odd word to me.”

49. Later in the cross-examination, Mr Webster was again challenged as to whether he had been given instructions to terminate Ms Ward's employment and he replied “Yes”. Following the cross-examination, the Chairman asked him questions on the same topic and he repeated that he had been asked “to write to her to [sic] 1 month before the end of her 6 months. There was no qualification of that instruction.”
50. None of the tribunal members believed Mr Webster's evidence that Mr Moore had given him any such express instruction: and although the majority of the tribunal still upheld his case, they did not do so on the basis that he had been given an express instruction in terms different from the instruction he sought to prove. They rejected his case that Mr Moore had given him *any* express instruction to dismiss Ms Ward but made a finding that Mr Moore had *impliedly* instructed him to do so. The basis of their conclusion was explained in paragraph 41 of the reasons, which Mummery LJ has set out and I will not repeat.
51. In my judgment, the reasoning in that paragraph provided no justification for the finding that Mr Moore had impliedly given Mr Webster a dismissal instruction. The earlier discussions referred to were the subject of findings in paragraph 18 of the tribunal's reasons, where they found that they were discussions in which Mr Moore conveyed to Mr Webster that he was worried that Ms Ward would bring a disability discrimination against the School that would represent financial ruin for it. There was no evidence, let alone a finding, that during those discussions Mr Moore instructed Mr Webster to dismiss Ms Ward or uttered words that impliedly so instructed him or indicated that he might in future so instruct him. The discussions provided no support for the tribunal's conclusion in paragraph 41.
52. The second matter the tribunal relied upon was Mr Moore's remark, proved by Mr Webster's recording of the first part of the meeting, that “Basically we were going to discuss the implications of having her on board and employing her and how we go about not employing her.” The tribunal's findings in relation to that were in paragraphs 29 and 30. They had listened to the tape, said that there was a count of five between the “we” and the “go” and (in paragraph 30) that the words were “very strong evidence that Mr Moore was asking how to dismiss Rowan Ward.” So they were. That is what the words say and there is no dispute that the possibility of her dismissal and its potential consequences were then discussed. That was one of the reasons why the meeting had been called and why Ms Murphy-Collet had been asked to attend. But the words provide no support for the conclusion that Mr Moore was at that point instructing Mr Webster to dismiss Ms Ward, or even that he intended to instruct him to do so.

53. The third matter relied upon is that there followed at the meeting a discussion about the mechanics of terminating Ms Ward's employment, which the majority regarded "as clear an instruction as could have been given without express words." But the difficulty with that is that the majority nowhere make it good. The discussion was about whether and how Ms Ward could be dismissed without expensive repercussions in the shape of tribunal proceedings. Ms Murphy-Collett's advice was that a dismissal that amounted to disability discrimination would entitle Ms Ward to make a claim even though she might not have been employed for at least 12 months; and that if reasonable adjustments could be made for her, there would be no justification for a dismissal. The tribunal's finding was that she was advising Mr Moore that there was a problem in dismissing Ms Ward but that if he thought he could not make reasonable adjustments, he would be entitled to dismiss her. In answer to a question from Mr Moore, Ms Murphy-Collett explained that the outcome of a tribunal claim would be uncertain. The tribunal made no finding that the outcome of the discussion was that Mr Moore there and then -- despite Ms Murphy-Collett's cautionary advice -- *decided* to dismiss Ms Ward. Bearing in mind his concern that a disability discrimination claim by her could cripple the School, it might be thought astonishing if, having received that advice, Mr Moore had made such a rapid decision. Absent such a finding, there was no basis for the majority's point that the "discussion about the mechanics of terminating [Ms Ward's] employment" amounted to a clear implied instruction to Mr Webster to dismiss her.
54. Paragraph 41 therefore provides a groundless justification of the finding the majority there made. That finding, if justifiable, required the majority first to make primary findings of the words and/or gestures (if any) from which they inferred that such an instruction to dismiss was impliedly given. The Chairman's notes of evidence record none and the majority identified none. Ms Murphy-Collett, who was at the meeting, was a credible witness whose evidence the tribunal accepted and who denied that any such instruction was given; Mr Webster had made no suggestion that his instruction was an *implied* one; and the minority member of the tribunal did not find that any implied instruction was given. Yet to the majority, who were not at the meeting, its giving was "blindingly obvious". So obvious that it was unnecessary to explain its factual basis.
55. The only other piece of evidence upon which the majority placed reliance for the finding was that Ms English told Mr Moore that Mr Webster intended to resign because of his instruction to dismiss Ms Ward and that Mr Moore did not speak to Mr Webster about it prior to his resignation. The tribunal's finding was that the only reason Mr Moore did not tell Mr Webster that he had misunderstood him was because he had understood him correctly. The tribunal, in paragraph 44, said that the whole thrust of Mr Moore's evidence was that he wanted to keep Mr Webster on board despite his complaints about his performance in his role (most of the meeting of 11 August 2006 had been devoted to discussions about difficulties with Mr Webster's conduct of his job). The tribunal did not, however, say whether they accepted that evidence. If they did, it makes little sense that Mr Moore did not speak to Mr Webster prior to his resignation and try to talk him out of it. If they did not, at least one explanation for Mr Moore's omission to talk to Mr Webster might be that he did not want to interrupt the flow of a welcome resignation. This part of the evidence provided no corroboration for the majority's finding as to the giving of the implied instruction at the August meeting.

56. Mummery LJ has referred to the Chairman's response to the inquiry asked of him by the appeal tribunal. I agree with what Mummery LJ has said about the procedure for requesting further explanations from an employment tribunal and about the Chairman's response in the present case. I add only that the Chairman's uninvited, and inappropriate, defence of the majority decision tends to undermine rather than to fortify it. I quote what he said:

“It seemed to us that the position was that the Claimant was to some extent overstating his case. While we did not accept the evidence of Sheena Murphy-Collett, we did not believe her to be deliberately lying to us. Rather, it seemed to us that she somewhat naively accepted what she was told by Mr Moore, both before and after the discussion, and allowed some of the conversation to wash over her. Either she was not paying attention, or she allowed the wool to be pulled over her eyes by Mr Moore. It seemed to us that had there been express words as set out by Mr Webster, then Mrs Murphy-Collett could not have done other than hear them, and we think she would have told us the truth about that if those words had been said by Mr Moore. However, we did not think Mr Moore was telling us the truth either. We think he gave specific direction to Mr Webster to dismiss Mrs Ward. It was on the lines of ‘who will rid me of this turbulent priest.’ We bore in mind in particular the way the words that were recorded were said by Mr Moore, set out in paragraph 28 of our decision. We have referred to that in paragraph 29 – the way those words were said made it quite clear that Mr Moore called the meeting precisely so as to instruct Mr Webster to dismiss Mrs Moore [sic: means Ms Ward]. We think he was subtle enough not to use those express words, but clearly set out his intention and instruction to Mr Webster to do so.”

57. That statement again reflects the finding that no express dismissal instruction was given, but that a clear implied one was given that Ms Murphy-Collett had somehow missed. There is still no reference to a single primary finding of any utterance and/or gesture at the meeting by which such implied message could be regarded as having been conveyed. Why is the Chairman unable to refer to any? The answer must be because he cannot. The best fortification he felt able to advance was to assert that the manner in which Mr Moore uttered the recorded words (“Basically we were going to discuss the implications of having [Ms Ward] on board and employing her and how we go about not employing her really”) made it “quite clear to us that Mr Moore called the meeting precisely so as to instruct Mr Webster to dismiss Ms Ward.” But those words do *not* convey that he intended so to instruct Mr Webster. I find it impossible to understand, and the Chairman does not explain, how the manner of their utterance could have conveyed all that; and it is to be noted that this particular suggestion formed no part of the majority's interpretation of such manner in paragraph 30 of their reasons.
58. The Chairman's further suggestion in support of the majority's decision was that Mr Moore gave a “specific direction” analogous to Henry II's alleged remark reflecting his frustration with the Archbishop. The Chairman's appeal to that piece of Angevin history (pre-dating the limit of legal memory) is, with respect, unhelpful. Having rejected Mr Webster's evidence as to Mr Moore's express instruction, what could the Chairman have meant by saying that he had nevertheless given a “specific direction” analogous to Henry's alleged remark? Once again, it is not explained.

59. In my judgment, therefore, this is a case in which, having rejected Mr Webster's only case, the majority found he had proved another case that was inconsistent with it; and, moreover, one that was unsupported by any evidence. The majority's attempt to support it by reference to the inadequate matters they mention (including the points made in the Chairman's letter) invites the inevitable inference that there was nothing better. Their decision was perverse.
60. Mr Norman expressly disclaimed any suggestion that it is not open to a tribunal to make a finding of fact that does not precisely match the factual case that either side has sought to make. He was right to do so and it is no part of my reasoning to suggest anything different. Of course it is open to courts and tribunals to make findings which do not match the cases respectively made to them by the warring parties. They do it all the time. But it is still essential that any such findings are supported by evidence, since it is only upon evidence that courts and tribunals can make their findings. The majority's decision was not supported by evidence. Mr Webster may have believed at the point of his resignation that Mr Moore had instructed him as he asserted. But if he was wrong about that, then Mr Moore had done nothing to justify his resignation and his claim of constructive unfair dismissal deserved to fail.
61. My conclusion makes it strictly unnecessary to consider Mr Norman's alternative argument, namely that having made a finding of fact that enabled the case to succeed on a basis that the School had not foreseen, prepared for, led evidence on, cross-examined on or argued, the most basic principles of justice required the tribunal to give the parties the opportunity to make further representations on the proposed conclusion before the School's fate was sealed by the tribunal's order. I certainly do not suggest that in every case in which a tribunal makes a finding of fact which does not match either of the opposing cases justice will always require that the parties be given the opportunity of making further representations. But I have no doubt that, in the unusual circumstances of the tribunal's proposed disposition of this case, justice *did* demand the giving of such an opportunity. The School is entitled to say that the majority's reasoning found no primary facts justifying the finding of the implied instruction; and the tribunal should have recognised that fairness demanded that the School should be entitled to make representations on the new case that the majority was disposed to find proved.
62. Since, however, I consider that the majority's decision was fundamentally flawed and that the appeal should succeed on the basis I have earlier indicated, I need not consider this alternative ground of appeal further. I would allow the appeal, set aside the orders of both tribunals below and dismiss Mr Webster's claim.

**Lord Justice Sullivan:**

63. I have had the advantage of reading the draft judgments of Mummery L J. and Rimer L J. I agree with Mummery LJ, that the appeal should be dismissed for the reasons given in his judgment. The issue before the ET was not whether any specific form of words was used by Mr Moore, but whether Mr Webster resigned because he had been instructed by Mr Moore to dismiss Ms Ward because she was deaf, or whether, as contended by Mr Moore, Mr Webster resigned because of the concerns about his management style that had been expressed by Mr Moore.

64. In the Particulars of Complaint in his ET1 Mr Webster merely said that on or about 11<sup>th</sup> August 2006 Mr Moore had “instructed” him to terminate Ms Ward’s employment. No particulars were given as to the manner in which the instruction was given.
65. Lord Justice Rimer has set out the relevant parts of Mr Webster’s supporting witness statement and I will not repeat them. I respectfully disagree with his view that the witness statement made it clear that the only case that Mr Webster was making was that Mr Moore had, at the meeting on 11<sup>th</sup> August 2006, given him an express instruction to dismiss Ms Ward. The witness statement is dated 5<sup>th</sup> June 2007, nearly ten months after the meeting. There was no transcript of that part of the meeting during which, according to Mr Webster, he was “very clearly told to terminate [Ms Ward’s] employment with Woodhouse”. Unsurprisingly, in these circumstances Mr Webster was not purporting to remember the precise form of words used by Mr Moore. In paragraph 5.3 of his witness statement, and in his oral evidence, Mr Webster said that he had been “instructed” to write to Ms Ward one month before her temporary contract ended to say that her services were not needed, but he did not say how that instruction had been given to him.
66. The witness statement is not a lawyer’s pleading. The relevant extracts are an employee’s attempt to describe, in his own words, some time after the event, an exchange between himself and his employer. In ordinary language, the methods by which an employee can be “very clearly told” to do something by his employer are not confined to an express instruction: “Do X”. Depending on the circumstances, no words at all may be required, and a nod, a wink or some other conduct may suffice to make the employer’s instruction sufficiently clear to the employee.
67. When words are used by the employer, as they were in the discussion on 11<sup>th</sup> August 2006, the context in which the words are spoken, and the manner in which they are spoken, may well be of greater significance than the particular words themselves, when the ET is resolving conflicting evidence as to what, if anything, the employer was telling the employee to do.
68. The ET had the considerable advantage of hearing oral evidence on this issue from both the employer and the employee. All three members of the ET accepted that, whatever the precise words used by Mr Moore during the discussion on 11<sup>th</sup> August 2006, Mr Webster had left the meeting believing that he had been instructed to dismiss Ms Ward. Ms Clarke’s minority view was that this belief of Mr Webster was unreasonable because the statements at the meeting had been “ambiguous”. The majority disagreed, and concluded that Mr Webster’s belief was justified because he had “correctly understood exactly what Mr Moore was meaning by his words”.
69. For the reasons given by Mummery L.J. that conclusion was reasonably open to the majority of the ET and it was not a departure, much less was it a substantial departure, from Mr Webster’s claim that he did not resign because of concerns about his management style, but because he had been “clearly told” by Mr Moore to dismiss Ms Ward.
70. It was not necessary for the majority of the ET to reach a conclusion as to precisely what was said by Mr Moore. Neither he, nor Mr Webster, nor Ms Murphy-Collett could remember. It was sufficient for the majority to be satisfied that, whatever it was

that was said by Mr Moore at the meeting on 11<sup>th</sup> August 2006 following the three earlier discussions, he made it clear to Mr Webster that he was to dismiss Ms Ward. He did so because, as the majority of the ET found, he did not wish to employ a deaf person.

71. For these reasons, which merely echo those of Mummery L J, I would dismiss this appeal.