JUDGMENT : THE HONOURABLE MR JUSTICE MITTING: EAT. 11th April 2003.

1. The appellant was employed by the respondent at its Ealing store from 8 November 1991 until 5 March 2001, initially as a counter assistant but from October 2000 as an assistant controller of the delicatessen counter. She was one of a team of 17 staff, headed by a controller, Mr Catanach. Above him was Mr Webber, a Customer Services Manager.

2. On Saturday 18 November 2000 the appellant left work an hour and a quarter early. On 20 November, Mr Webber asked her to explain why. She said that Mr Catanach had agreed she should leave an hour early to make up for an hour of extra duty on the previous day and she had not taken her full break time on that day. Mr Webber accepted the first explanation but not the second. On 21 November 2000 the applicant complained informally to Mr Longmuir, the Store Manager, that Mr Webber had been abrupt with her to the point of rudeness and furthermore favoured her fellow assistant controller, Anna Hellebrand. Mr Longmuir said that he would speak to Mr Webber, which he did three days later. On 30 November Mr Webber asked the appellant if she would work on Sundays. She refused, as was her right. She alleged that Mr Webber then said that he would remove her as an assistant controller. The Employment Tribunal, as it was entitled to do, decided that he did not. On 6 December the appellant wrote to Mr Longmuir complaining that Mr Webber had subjected her to public humiliation, bullying, harassment and inhuman and degrading treatment over a considerable period. Mr Longmuir received that letter on 10 December. He decided that because of the number of complaints he would not be able to investigate them fully until after the busy Christmas trading period had ended. On 11 December, Mr Longmuir showed Mr Webber the letter. Mr Webber denied the allegations made. On 13, 14 and 15 December several of the appellant's work colleagues made complaints to Mr Longmuir about her bullying, lack of respect and leadership and long absences from the delicatessen counter. On 15 December, in the afternoon, Mr Webber spoke to the appellant to try to get to the bottom of her complaints. She totally refuted them. He decided that he could not allow her to return to the delicatessen counter before he had investigated the complaints against her. He told her she was suspended from duties and would be put on the check-out the next day. She refused to go on to the till. He suspended her on full pay and required her to attend a meeting with Mr Mangat, the systems manager, on 18 December. She did so with a legal adviser, not permitted by the disciplinary procedure, so the meeting was re-arranged for 21 December.

3. On 19 December, Mr Longmuir discussed the appellant's grievance about Mr Webber with her and arranged to meet her again on 21 December. Meanwhile, statements were obtained from those of her colleagues who had complained about her and the complainants were interviewed by Mr Mangat. On 21 December the appellant met Mr Mangat, who decided that there were no grounds for her to be disciplined or dismissed, but proposed a counselling session on her communication skills with staff. On 22 December the appellant saw Mr Longmuir. By agreement, the meeting had been postponed by one day, to speak about her grievance about Mr Webber, and told him she wished him to investigate it. Later she provided a sick note for two weeks.

4. Mr Longmuir decided that it would be desirable that the appellant's complaint should be investigated by an outside manager and called in a Miss Brockway from another store. On 15 January 2001 Miss Brockway met the appellant and asked her what she wanted to occur as a result of her complaint. Miss Brockway was unable to get a clear answer. She interviewed 12 members of staff, most of them from the delicatessen counter, none of whom substantiated the appellant's complaints against Mr Webber. The Employment Tribunal found that her investigation had been thorough. On 7 February 2001 she wrote to the appellant informing her she could find no evidence to substantiate her complaints and would therefore be taking no action on them. On 3 March 2001 the appellant wrote to Mr Longmuir, tendering her resignation.

5. Before the Employment Tribunal, the appellant was assisted by her sister, a pupil barrister. She put her case high. She contended that the Employment Tribunal should find a conspiracy orchestrated by Mr Webber with the delicatessen counter staff which destroyed her trust and confidence in the respondents. She maintained that the prohibition against torture in the European Convention on Human Rights, Article 3, and against slavery in Article 4 had been infringed. More prosaically, she

complained that the respondent had discriminated against her on the grounds of her sex, in the different manner in which her complaints against Mr Webber and the staff complaints against her had been handled: hers, informally, and, theirs, under the formal disciplinary procedure; and she complained that she had been constructively and unfairly dismissed.

6. The Employment Tribunal rejected her Convention assertions as, "frankly ludicrous". It rejected her allegation that Mr Webber had threatened to demote her for refusing to work on Sundays. It accepted that the appellant's complaint against Mr Webber, should, under the grievance procedure, have been dealt with in the week following receipt by Mr Longmuir on 10 December 2000 of her letter of 6 December but concluded that the delay was both excusable and trivial.

7. The Employment Tribunal found no breach, let alone any serious breach of contract by the respondent, or conduct likely to destroy trust and confidence. It was satisfied that the reason for her resignation was her grievance against Mr Webber had not been upheld by Miss Brockway and that it was a "true" resignation.

8. As to the sex discrimination claim, the Tribunal accepted that there were differences between the treatment of the appellant and Mr Webber in the investigation of complaints against each of them but that they were all minor except for her suspension on full pay. The Tribunal were, however, satisfied that the reason for that difference was not on the ground of the appellant's sex but because she was within the disciplinary procedure and he was not. It also concluded that she suffered no detriment.

9. Mr Ward, for the appellant, submits, first, that the Employment Tribunal should have but did not consider the "last straw" principle which might have converted a trivial breach of the disciplinary procedure, identified by the Tribunal as delay in considering the appellant's complaints against Mr Webber, into the last of a series of acts which cumulatively destroyed trust and confidence between the appellant and the respondents. This submission is untenable in the light of the Tribunal's findings. Secondly, he submitted that the Tribunal had erred in law in finding no detriment in the appellant's suspension. This point is arguable but academic in view of the Tribunal's unchallenged finding that the reason for the difference in treatment of the appellant and Mr Webber was not her sex.

10. The real issue on the appeal, arises from the Tribunal's order that the appellant pay £5,000 towards the respondents' costs. Rule 14(1)(a) of the Employment Tribunals Rules 2001 provides:- *"Where, in the opinion of the Tribunal, a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived, the Tribunal shall consider making, and if it so decides, may make-*

(a) an order containing an award against that party in respect of the costs incurred by another party;"

Its discretion is subject to an upper limit of £10,000 stipulated in Rule 14(3).

11. The Employment Tribunal accurately set out the relevant provisions of Rule 4 in paragraph 11(9) of its decision. It noted at paragraph 11(10) that after the Tribunal had given its decision the respondents' representative handed to the Tribunal a letter dated 10 September 2001 written by the respondents' solicitors to the applicant, headed; *"Without prejudice save as to costs"*, in which an offer of £5,700 in full and final settlement was made. It noted that the letter specifically referred to the new Tribunal Rules in relation to costs. It observed that: *"This offer had been rejected by the Applicant out of hand. The Applicant had refused to enter into any meaningful negotiations and had refused to use the services of ACAS."*

12. The Tribunal accepted that the respondent had reasonably incurred costs of £18,000 in defending the proceedings. The Tribunal then went on to note and reject a submission by the appellant that no order for costs should be made because there had been no pre-hearing review, a ruling that is not the subject of appeal.

13. It then noted the appellant's second submission in paragraph 11(12) of the decision: *"The applicant's representative's second submission was that the rule in Calderbank v Calderbank did not apply to Employment Tribunal proceedings and that the Tribunal should not extend its ambit in the way that it had developed in High*

Court proceedings of a non-matrimonial nature. It was common ground that there appeared to be no specific authority on this particular point relating to Employment Tribunal proceedings."

Its conclusion was contained in paragraph 11(13) and reads:- *"So far as the Applicant's second submission is concerned, the Tribunal is satisfied that the ruling in Calderbank v Calderbank as extended in the High Court does apply to Tribunal proceedings. It appears to this Tribunal that a Respondent, faced with an Applicant who refuses to negotiate either through ACAS or directly and who rejects out of hand a substantial offer of settlement, should be able to protect its position by making a Calderbank offer which the Tribunal can consider after the full merits hearing. Further, the Tribunal is satisfied that the conduct of the Applicant or her representative in bringing the claim incorporating the Human Rights Act was not just misconceived but seriously misconceived and that the failure to accept the Calderbank offer was unreasonable conduct of the proceedings, particularly in the circumstances where the documentary evidence did not support the applicant's case."*

The Tribunal went on to note that it had, in large measure, not accepted her evidence.

14. The appellant appeals against that ruling on two grounds: first, an error in law in holding that the rule **Calderbank** applies to Employment Tribunal proceedings; secondly, an error in fact in that the appellant did not refuse to negotiate through ACAS.

15. In the view of this Tribunal, the Employment Tribunal's choice of language was unfortunate and open to misunderstanding. There is no question of any rule in **Calderbank v Calderbank** applying to proceedings before the Employment Tribunal. The principle in **Calderbank** is that a party to matrimonial proceedings against whom a money claim is made can protect his position as to costs by making an offer of settlement marked without prejudice save as to costs. The offer may not be referred to during the main hearing but may be once judgment is given: if the order made is less favourable than the offer the court may take the offer into account when considering the what if any order for costs to make. **Calderbank** does not apply without more to money claims in the High Court. Any offer of money must be accompanied by payment into court under CPR part 36.3 which procedure is not possible in the Employment Tribunal.

16. The Employment Tribunal's statement that the rule in **Calderbank v Calderbank**, as extended in the High Court does apply to Tribunal proceedings, was therefore doubly mistaken. There is no doubt, however, that an offer of the **Calderbank** type is a factor which the Employment Tribunal can take into account under Rule 14. Contrary to the submissions made to the Tribunal, this has, in fact, been considered by this Tribunal, a division presided over by his Honour Judge Hull, QC, on 22 June 1998: **Coleman v Seceurop (UK) Ltd** (EAT/483/98). In that case an applicant had recovered £2,222.88 in proceedings before the Employment Tribunal. Before the proceedings had begun the employers had made an offer of £6,000 marked without prejudice so far as the hearing was concerned but not as to costs. The Tribunal made an order for costs against the applicant of £500, finding that the applicant had acted unreasonably in refusing the employer's offer. The Appeal Tribunal noted, that the Employment Tribunal thought that that was a very generous offer and they thought that Mr Coleman had acted unreasonably in refusing it. It went on to say that***: "We cannot say that the award of £500 costs is something which is outside all reason, outside the discretion of the Tribunal."***

And went on to observe: *"It was within their jurisdiction to make such an award of costs, it may seem to an outsider hard on the Applicant that he should have to pay costs but then, on reflection, anyone considering an offer of £6,000 might say he was acting unreasonably to refuse it. That is what the Tribunal did say and we think they were entitled to say that."*

17. Further, in **Monaghan v Close Thornton Solicitors** [EAT/3/01] a judgment of the Employment Appeal Tribunal delivered on 20 February 2002, Lindsay P, observed in paragraph 25***: "We do not doubt that where a party has obstinately pressed for some unreasonably high award despite its excess being pointed out and despite a warning that costs might be asked against that party if it were persisted in, the Tribunal could in appropriate circumstances take the view that that party had conducted the proceedings unreasonably."***

The Appeal Tribunal went on to make observations about **Calderbank** offers, to which we will refer in a moment.

18. From those decisions and from a reading of the Rule itself, it does not follow that a failure by an appellant to beat a **Calderbank** offer, should, by itself, lead to an order for costs being made against the appellant. The Employment Tribunal must first conclude that the conduct of an appellant in rejecting the offer was unreasonable before the rejection becomes a relevant factor in the exercise of its discretion under Rule 14. We respectfully adopt and repeat the observations of Lindsay P in **Monaghan** when he observed that: *"Whilst we would not want to deter the making and the acceptance of sensible offers, if it became a practice such that an applicant who recovered no more than two thirds of the sum offered in a rejected Calderbank offer was, without more, then to be visited with the costs of the remedies hearing or some part of them, Calderbank offers would be so frequently used that one would soon be in a regime in which costs would not uncommonly be treated as they are in the High Court and other Courts. Yet it is plain that throughout the life of the Employment Tribunals the legislature has never so provided. It can only be that that was deliberate."*

19. This case was, however, far removed from the circumstances considered by the Appeal Tribunal in **Monaghan**. This appellant had claimed £22,000 and awards for injury to feelings and of aggravated damages. She had rejected a generous offer and had included in her claim a manifestly misconceived claim under Articles 3 and 4 of the European Convention on Human Rights. The Employment Tribunal, in fact, concluded that the rejection of the offer was unreasonable. Subject, therefore, to the alleged error of fact which we consider in a moment, that was a conclusion to which the Employment Tribunal was entitled to come.

20. The alleged error is the Employment Tribunal's conclusion that the appellant refused to negotiate, either through ACAS, or directly, with the respondent. It is said, and not contradicted by the Chairman, that he declined to look at a letter which made reference to ACAS, from the appellant to the respondents dated 21 October 2001 which we have in our bundle and which reads:-

"Without prejudice

Dear Sirs,

I refer to your correspondence of 21st September 2001. [We interpolate - the Calderbank offer]. Your letter is peppered with inaccuracies, both factual and legal, which has led you to arrive at a figure of settlement which is far lower than a tribunal would award in the circumstances, and as such, it is unacceptable.

Finally, for the record, ACAS were not told that I was not prepared to enter into any negotiation as you misstate in the first paragraph of your letter - the officer in question was instructed by yourselves to ask me what figure I was prepared to settle at, to which I responded by instructing her to refer you to my Schedule of Loss."

21. If the Employment Tribunal had seen this letter it would inevitably have concluded that the appellant's response to the respondents' enquiry about the terms on which she was willing to settle was to reiterate her full public claim, whether through ACAS or directly and to reject the respondents' offer when made without more. The letter displays exactly the intransigence which the Employment Tribunal was entitled to categorise as unreasonable and its production to the Employment Tribunal would not have assisted her. For those reasons, there being on a detailed analysis of the Employment Tribunal's reasoning no material error of law or fact, this part of the appeal like the remainder of the appeal is rejected.

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