Appeal No. UKEAT/0156/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 November 2016

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR M ISHAQ APPELLANT

ROYAL MAIL GROUP LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALEXANDER MODGILL (of Counsel) Direct Public Access
For the Respondent	MR STEPHEN J PEACOCK (Solicitor) Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

The Claimant resigned by letter which relied on numerous reasons for his resignation including one which the Employment Tribunal found to constitute a fundamental and subsisting breach of contract. The Respondent contended that the real reason for his resignation was to avoid disciplinary proceedings in relation to a different matter and was not in response to the fundamental breach that he had established. The Employment Tribunal agreed with that contention and found that in those circumstances he could not claim constructive dismissal.

In the light of the way the case was put by the Respondent and on a proper reading of the Reasons, it was clear that the Employment Tribunal were not, as the Claimant maintained on appeal, setting up a false dichotomy between two different reasons for resigning (i.e. avoiding the disciplinary action and the fundamental breach of contract) but were finding, permissibly, that the true reason was to avoid disciplinary action and that the fundamental breach in fact had nothing to do with the resignation.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimant, Mr Ishaq, against a Judgment of the Sheffield Employment Tribunal (Employment Judge Brain sitting with Messrs Lewis and Priestley) dismissing a claim for unfair constructive dismissal. The Judgment was sent out on 3 November 2015, although the hearing had ended on 30 July 2015. At the hearing the Claimant represented himself.

2. The Claimant was a postman in employment from 5 January 2004. He resigned on 17 March 2014. He then brought a claim for disability discrimination by failure to make reasonable adjustments and unfair constructive dismissal. He was in the technical sense disabled by virtue of an injury to his great left toe that meant he could not walk long distances or over difficult terrain. The obvious reasonable adjustment for that condition was that he should be put on a particular postal route - number 322 - that was within his capabilities. The Employment Tribunal found that the Respondent was aware of this but that although he was sometimes rostered on route number 322 he was also rostered on other routes during the period September 2013 to March 2014 in breach of the duty to make reasonable adjustments. For that breach, the Employment Tribunal awarded him the sum of £10,000 to compensate him for some physical pain and suffering and for injury to his feelings by being discriminated against. No appeal is raised about any aspect of that decision.

3. On 1 March 2014 there was an incident involving a member of the public while the Claimant was on his round. The Claimant reported that he had been attacked by the customer, but in his report he did not mention that he himself had also kicked out at the customer. The Respondent sometime after 1 March obtained CCTV footage that apparently showed the

incident. The Employment Tribunal themselves looked at it and recorded that it showed the customer starting a scuffle but that it also showed the Claimant karate kicking the customer.

4. Having gone off sick after this incident, on 14 March 2014 the Claimant was invited to attend an interview to view that CCTV on 17 March 2014. He was told that the CCTV indicated both abusive behaviour by him and dishonesty. The Employment Tribunal found at paragraph 92 that the Respondent had good grounds for believing that the Claimant had not given a truthful account of the incident to his manager.

5. On 17 March 2014, the day that he was meant to be attending the interview to view the CCTV, the Claimant wrote his resignation letter. It is a well written, four-page typed letter raising a number of complaints about his treatment by his employer over the preceding months, and it states that he has decided to resign in consequence of those matters. Among the matters of complaint that he raised were the provision of unsuitable duties after 17 September 2013 and the fact that he had recently been accused of dishonesty and suspended as a consequence. The Employment Tribunal analysed the complaints set out in the letter and decided that the only matter on which the Claimant could rely as a subsisting repudiatory breach was the fact that his employers had put him back on a postal route, number 305, with effect from 6 January 2014. As I have already indicated, the Tribunal had earlier found that he ought to have been put on postal route 322, which was within his capabilities, having regard to the injury to his toe.

6. The law on constructive dismissal is well established, although it gives rise to a fair number of appeals, I have to say. The basic principles come from a case called **Western Excavation (ECC) Ltd v Sharp** [1978] IRLR 27 CA. They are set out at paragraph 8 of the Claimant's skeleton argument, where it is recorded that in order to bring a claim of constructive

A dismissal for the purposes of section 95 of the **Employment Rights Act 1996** a Claimant must prove: (1) that the employer acted in breach of his contract of employment; (2) that the breach of contract was sufficiently serious to justify resignation or that the breach was the last in a series of events which taken as a whole are sufficiently serious to justify resignation; (3) that he resigned as a direct result of the employer's breach and not for some other reason; and (4) that the Claimant did not waive the breach or affirm the contract. It is the third of these elements with which I am concerned, namely that the Claimant must have resigned as a direct result of the employer's breach and not for some other reason.

7. That issue of causation has been considered in the authorities, in particular in the Court of Appeal decision **Nottinghamshire County Council v Meikle** [2004] EWCA Civ 859. At paragraph 33 of that decision the Court of Appeal said this:

> **"33. It has been held by the EAT in *Jones v Sirl and Son (Furnishers) Ltd* [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It [is] suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by repudiation by one party which is accepted by the other: see the *Western Excavating* case. The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepting that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by [the employer]."**

There is then a case called **Abbycars (West Horndon) Ltd v Ford** UKEAT/0472/07 (Elias P sitting with lay members). In that case, Elias P quotes the passage from **Meikle** that I have just read, and then he goes on:

> **"34. … On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal. There must be a causal connection between the repudiation and the resignation; if they are unconnected acts then the employee is not accepting the repudiatory breach.**

> **35. It follows that once a repudiatory breach is established, if the employee leaves then even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. We respectfully agree with this reasoning. We think it would be invidious for tribunals to have to speculate what would have occurred had the employee been faced with the more limited grounds of legitimate complaint than he had perceived to be the case.**
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> **36. Moreover, if there is a repudiatory breach which entitles the employee to leave and claim constructive dismissal, we see no justification for allowing the employer to avoid that consequence merely because the employee also relies on other, perhaps unjustified or unsubstantiated, reasons. The employee ought not to be in a worse position as a result of relying on additional, albeit misconceived, grounds.**
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> **37. Accordingly, although it is true that the Tribunal did not in this case specifically engage with the question of whether there was a causal link between the repudiatory breach and the dismissal, that was no doubt because in the circumstances of this case this appeared not to be in dispute. It was never suggested that the employee did not resign because of the list of grievances that he set out in his letter. It follows from the reasoning in the *Meikle* case that if any of those matters constituted a repudiatory breach, the resignation would be enough to establish the constructive dismissal."**

8. I confess I had thought on re-reading the authorities this morning that there may be a case for saying that once a repudiatory breach is established and the employee has written a letter of resignation saying that he is resigning because of that breach, whether or not there are other matters relied on, that should be the end of the matter regardless of the employee's subjective intentions or motivations. However, I have been persuaded that that view is wrong. Elias P in the passages I have just read emphasises that there must be a causal connection between the breach of contract and the resignation, and in paragraph 35, when he talks about factors relied upon, that has to be seen in the context of the case he was dealing with, where, as I have read from paragraph 37, there was no dispute that the list of grievances set out in the letter was the genuine cause of the resignation. Further, I note the following statement from the decision of Langstaff P in **Wright v North Ayrshire Council** [2014] IRLR 4 EAT , where he says at paragraphs 11 and 12:

> **"11. *Jones* … itself is a case which unhappily lends itself to an interpretation of the words 'the effective cause' as if the search was for the principal or main cause rather than simply a breach which a response to which in part led to the resignation. In the judgment of the Appeal Tribunal delivered by Judge Colin Smith QC it is said at paragraph 10 that the industrial tribunal must look to see whether:**
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> > **'… the employer's repudiatory breach was the *effective cause* of the resignation. It is important, in our judgment, to appreciate that in such a situation of potentially constructive dismissal, particularly in today's labour market, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it. Thus an employee may leave both because of the fundamental and**

> **repudiatory breaches, and also because of the fact that he has found another job. In such a situation, which will not be uncommon, the industrial tribunal must [find] out what the effective cause of the resignation was, depending on the individual circumstances of any given case.'**
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> **12. Insofar as that passage suggests that the tribunal must choose between causes, both of which operate, in order to see which was the predominant one, it is in error. If it is saying that the evidence may leave the tribunal in a circumstance in which it is plain that the behaviour was not in response to a breach, even though that occurred and even though it was serious, but for some other unconnected reason to the exclusion of a response to the breach, then it would be correct. It is a pity that ambivalence has obscured the principle underlying the decision, which was clearly identified in *Meikle* and is therefore and in any event binding upon this tribunal."**

So, it seems to me, looking at all of those authorities, that it is open to a Respondent to seek to persuade an Employment Tribunal that a reason given in a letter of resignation, even though a sufficient reason for resigning in the sense of being a repudiatory breach, is not a genuine reason so as to give a right to claim constructive dismissal.

9. In this case, the Employment Tribunal directed itself on the law in relation to constructive dismissal at paragraphs 79 to 84. There is no criticism of the directions of law they gave themselves, although Mr Modgill, for the Claimant, says that they have directed themselves in relation to this area, i.e. causation, rather briefly. What they said at paragraph 81 was this:

> **"81. Once repudiation of the contract by the employer has been established, the proper approach is then to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to a fundamental breach by the employer. …"**

That, it seems to me, although brief, is a correct statement of the law. The Tribunal, having set out the law for themselves, then went through the breaches relied on in the resignation letter and, as I have already said, found that only one of those could be relied on as founding the basis for a constructive dismissal. That was dealt with at paragraph 88, where the Tribunal said this:

> **"88 … In our judgment, the unexplained decision of the respondent to put the claimant back on duty 305 with effect from 6 January 2014 was a continuing and fundamental breach of the implied term until the date of the claimant's resignation. The respondent knew full well that the claimant was unfit for those duties. …"**

10. Having found that there was one repudiatory breach mentioned in the letter of resignation, the Tribunal turned to the question of causation at paragraph 97:

> **"97. The key issue therefore is whether or not the claimant resigned by reason of the fundamental breaches that he has established or for some other reason. The respondent says that he resigned in order to avoid facing disciplinary action about the incident of 1 March 2014. We find that he did so and that the real reason for the resignation was not in response to the fundamental breach that he has established. Save for the issue of pressure to consider part time working or ill health retirement and the rostering on unsuitable routes prior to 14 October 2013 the fundamental breaches that he has established were continuing from 6 January 2014 (when he was rostered back to route 305). In these circumstances, the claimant would have us believe that it was simply a coincidence that he resigned in response upon the very day that he was due to view CCTV footage of the incident of 1 March 2014. That contention stretches the Tribunal's credulity to the limits. Therefore, although the claimant has established a fundamental breach of the implied term the operative cause of the resignation was not that breach but rather a desire to avoid the disciplinary issue that arose. It follows therefore that the constructive unfair dismissal complaint fails and stands dismissed."**

There is also a Reconsideration Decision, which was sent out on the same day as the Reasons for the Judgment (this was because the Judgment itself was issued on 3 August and Reasons were then requested, and they came at the same time as the Reconsideration Reasons). The Reconsideration Reasons deal at paragraphs 6 and 7 with the causation issue in slightly different words:

> **"6. In my judgment, the reconsideration application has no reasonable prospects of success. There is simply no prospect of the claimant establishing that the reason for his resignation was the fundamental breaches of contract on the part of the respondent which he established as opposed to his resigning in an effort to avoid the disciplinary action that was inevitably going to follow following the incident of 1 March 2014.**
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> **7. As we have said in our reasons, it is simply too much of a coincidence that the claimant decided to resign on the very same day upon which he was invited to review the CCTV footage and not before in circumstances where the fundamental breach had continued from the date of the Occupational Health physician's report of 17 September 2013."**

11. Mr Modgill for the Claimant says that the Employment Tribunal at paragraph 97 and in the Reconsideration Reasons was setting up a false dichotomy, that they were in effect looking for only one reason and that they ignored the possibility that there was more than one reason or were many reasons operating on the mind of the Claimant when he resigned. If that were the case, then his appeal would succeed. However, read in context, I am quite satisfied that that was not what the Employment Tribunal were doing. What they were doing was finding that the

A true - or, as they put it, "real" - reason for the resignation was to avoid the disciplinary hearing that was to take place that very day and that it had nothing to do with the other reasons put forward in the letter, in particular the failure to make adjustments and to put the Claimant on the postal route 322 rather than other routes. That is my clear reading of paragraph 97, and, as I have indicated, that is a legitimate line of reasoning for a Tribunal to follow.

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C 12. Mr Modgill also said that the Employment Tribunal had not given sufficiently explicit reasons for a finding in effect that his client had not told the truth about his reasons for resigning. In my view, it was not necessary to make an express finding of dishonesty in this context, and Employment Tribunals are obviously reluctant to make unnecessary findings of

D dishonesty. It was enough for the Tribunal to find that the reason put forward for the resignation in the letter was not a genuine reason and that there was in fact another reason, which was *the* reason for the resignation, namely in this case to avoid the disciplinary action.

E For that conclusion the Employment Tribunal gave sufficient reasons, in my view. I therefore dismiss the appeal in relation to paragraph 97.

F 13. There was also an appeal in relation to paragraph 103, which deals with what would have happened if the Claimant had attended the disciplinary interview, namely that he would have been liable to summary dismissal in any event. That appeal falls away with the dismissal of the appeal relating to paragraph 97. I therefore dismiss this appeal in total.

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