EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12 October 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MR CRAIG WRIGHT — APPELLANT

SILVERLINE CARE CALEDONIA LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

Miss D Wilson
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For the Respondent

Mr R Rees
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SUMMARY

REMEDY ; MITIGATION OF LOSS

The claimant was constructively unfairly dismissed by the respondent as a result of a breach of the implied term of trust and confidence during a management restructuring. The employment tribunal decided not to make any compensatory award on the baiss that the claimant had failed to mitigate his loss, having declined an offer of re-employment.

The employment tribunal's judgement twice stated incorrectly the test for mitigation of loss and used the correct test interchangeably with those incorrect statements. The applicable test is not whether an employee's conduct in refusing re-employment was reasonable, but whether the employer had shown that the employee's conduct was unreasonable. A failure ot acknowledge that the onus if prrof was on the wrongdoer coupled with a focus on the employee's actions without contemplating that more than one course could reasonably have been taken illustrated that the tribunal had failed to follow the principles enunciated in *Wilding v British Telecommunications plc 2002 I079,* recently re-affirmed in *Cooper Contracting Limited v Lindsey* UKEAT/0184/15.

It was counter intuitive to regard an employee who was constructively unfairly dismissed as unreasonable in refusing to allow the employer to make amends by re-employing him when the law does not allow such a wrongdoer to " cure" a repudiatory breach when the employee is deciding whether to affirm or go (*Bournemouth University v Buckland [2010] ICR 908).* However, the present case did not require a decision in principle on whether such an outcome was perverse.

Appeal allowed and case remitted to a fresh tribunal on the issue of remedy.

THE HONOURABLE LADY WISE

1. On 3 February 2016 the employment tribunal found that on 2 March 2015 the claimant had been constructively unfairly dismissed by the respondent as a result of a breach of the implied term of trust and confidence but decided not to make any compensatory award. The reason for the decision on remedy was that the tribunal decided that the claimant had failed to mitigate his loss. He had declined an offer of re-employment made by the respondent after his resignation.

2. The claimant contends that the Employment Judge erred in her approach to mitigation of loss. I shall refer to the parties as claimant and respondent as they were in the tribunal below. Miss Wilson, Solicitor, represented the claimant at the tribunal and before me and Mr Rees represented the respondent on both occasions.

3. While the circumstances in which the relationship of trust and confidence between the parties broke down are not all relevant to the subject matter of this appeal, it may be useful to summarise the key events that led to the claimant's constructive unfair dismissal. The respondent is a limited company engaged in operating five residential care homes in Scotland. Two of those homes Cochrane Care Home ("Cochrane") and Ranfurly Care Home ("Ranfurly") are situated next to each other on the same site in Johnstone. At the material time the claimant was registered with the Care Inspectorate as Manager of Cochrane and a colleague Ms Margaret Rooney was manager of Ranfurly. From May 2010 the claimant had been employed by the respondent's predecessor owner Southern Cross Health Care Limited but he transferred, by operation of TUPE, first to a company Danshell Care Homes, and subsequently to the respondent.

From 16 July 2012 the claimant was Acting Area Manager for what are now the respondents Scottish care homes albeit that to preserve matters in the event of a TUPE transfer he retained the post of Registered Manager of Cochrane. He was off work with a stress related illness between March and June 2014. Thereafter he returned to work as Manager of Cochrane with some informal oversight of Ms Rooney at Ranfurly, not as Acting Area Manager, although he continued to be paid the higher salary (£52,500 per annum) rather than the £41,000 per annum that went with his official post. The respondent was aware that this was an issue that would require to be resolved sensitively.

4. On 22 January 2015 a meeting took place between the claimant, Margaret Rooney and Mrs Yvonne Gosset, the respondent's Chief Operating Officer. At the conclusion of the meeting which had focussed on the management of Cochrane and Ranfurly the claimant and Margaret Rooney understood that the two homes would be managed separately, which was their proposal, but Mrs Gosset's understanding was that the meeting had been consultative only and that Senior Management would decide the issue.

5. On 6 February 2015 Mrs Gosset met with the claimant in the presence of an HR employee. She told him that the decision had been made to have one manager responsible for both Cochrane and Ranfurly and that he would spend time in each home but with some additional support. The claimant explained that he thought this would be difficult but he did not tell Yvonne Gosset how unhappy he was with the plan. At the conclusion of the meeting a letter was given to the claimant confirming that the Area Manager position would become redundant and that he would revert to being Care Home Manager for Cochrane and Ranfurly on a new salary of £47,000 per annum. During a telephone call on 13 February 2015 the claimant again raised with Mrs Gosset his concerns about the proposed management structure at Cochrane and Ranfurly. On 26 February 2015 Mrs Gosset wrote to the claimant asking

him to confirm his acceptance of the changes to his terms and conditions of employment relevant to the role of Home Manager of Cochrane and Ranfurly with effect from 1 March 2015.

6. The claimant was not comfortable with taking formal responsibility for the two homes. He considered that his concerns had been ignored and that decisions had been made without adequate consideration and consultation. He decided to resign and conveyed his decision in a letter to Mrs Gosset sent by email on 2 March 2015. On 4 March he wrote a grievance letter and on 6 March 2015 Mrs Gosset wrote to him stating amongst other things that he could reconsider his decision to resign but that if not retracted, his wishes would be respected and the termination of his employment processed.

7. A grievance hearing was arranged and took place on 20 March 2015. It was chaired by the respondent's Finance Director Emily Trace. After the hearing Ms Trace made further investigations. The Respondent continued to pay the claimant his salary while the grievance process was going on and he did not reject or return it.

8. Ms Trace upheld the claimant's grievance, particularly in relation to the failure to consult on and manage the procedure necessary for the claimant to take on the dual role. She proposed a resolution, namely that the two homes, Cochrane and Ranfurly continue to be run as separate units with a Manager located in each home. The claimant would run Cochrane on his previous salary of £41,000.

9. By letter of 30 April 2015 the claimant's RCN representative rejected the proposed resolution involving a return to work on the claimant's behalf. He stated, amongst other things, that:

> **"Craig felt unfairly treated and I indicated that Craig felt that his trust and confidence in the employment relationship had gone and remained extremely anxious about any return to work having felt under undue pressure within an unreasonable time frame to accept changes which Craig considered unreasonable."**

On the facts found the Employment Tribunal concluded that the claimant had been dismissed in terms of section 95(1)(c) ERA 1996. The background was one of confusion about the claimant's role. The respondent's own paper work was contradictory on whether he was the manager of Cochrane or of both Cochrane and Ranfurly. The Employment Judge concluded that the correct position at the material time was that he was the Manager of Cochrane and provided oversight in management support to Margaret Rooney at Ranfurly on an informal basis when required. The discussions about a possible management restructure had to be viewed in that context.

10. The Employment Judge found that the following failures amounted cumulatively to a breach of the implied term of trust and confidence:

- Insufficient notice or consultation between 6 February and 26 February 2015

- Failure to put in place changes to the job descriptions of the claimant, the Deputy Managers and other affected staff prior to changing the claimant's Terms and Conditions with effect from 1 March 2015.

- Failure to specify the key functions and administrative systems of how the homes would run in practice from 1 March onwards.

- Sending the claimant the letter of 26 February which he was not expecting to get.

11. This combination of circumstances amounted to a breach by the respondent of the implied term of trust in confidence entitling the claimant to resign immediately. The Employment Judge was satisfied that the claimant resigned in response to the breach and not for some other reason and that he did not delay in doing so.

12. As indicated, the issue of contention in this appeal is that of remedy, there being no appeal by the respondent against the finding of constructive unfair dismissal. The basic award is not the subject of any challenge, only the compensatory award.

Section 123(1) of the ERA 1996 provides that the amount of any compensatory award:

> **"shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to the action taken by the employer".**

On mitigation of loss section 123(4) provides:

> **"In ascertaining the loss referred in subsection (1) The Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of …. Scotland".**

First ground of appeal – mitigation of loss

13. The appellant contends that the Employment Tribunal misdirected itself on the law relating to mitigation of loss and so erred. Paragraph 65 of the judgment having reproduced the relevant part of section 123(4) the Employment Tribunal states:

> **"the test is whether an employee's conduct in refusing an offer of re-employment was reasonable on the facts of the case."**

On any view that is not the correct legal test and the respondent agrees that the written reasons contain a "slip" or "slips" in this respect but contend that on a fair reading of the remedy section as a whole it is clear that the Employment Judge was aware of and applied the correct test namely whether the claimant acted unreasonably in refusing the offer.

14. The leading authority in relation to mitigation of loss in the employment context is **Wilding v British Telecommunications PLC 2002 ICR 1079**. The court there confirmed a number of principles. First the onus is on a wrongdoer to show that the claimant failed to mitigate their loss by unreasonably refusing an offer of re-employment. Further it is not enough for the wrongdoer to show that it would have been reasonable to take the proposed steps. It was necessary to show that it was unreasonable of the innocent party not to take them. Only where the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to the duty to mitigate will the defence succeed and a tribunal must not be too stringent in its expectations of the injured party.

15. In a recent decision of the then EAT President Langstaff J, **Cupar Contracting Limited v Lindsey UKEAT/0184/15** the Wilding principles were restated with a warning of the considerable dangers in an approach that suggests that the duty to mitigate is to take all these little steps to lessen the loss. There is a difference between acting reasonably and not

acting unreasonably – the claimant does not have to show that what he did was reasonable. The central cause is the act of the wrongdoer and the claimant is not to be put on trial.

16. Before me Miss Wilson for the appellant argued that in first suggesting that the test was the reasonableness of the employee and then identifying unreasonable behaviour the employment tribunal did not show an understanding of the test for mitigation of loss. There were at least two passages in the reasons where the employment judge had so erred and this could not therefore be characterised as an opening slip. The first error was at the important stage of the test being set out for the reasons that follow it. Then there was a failure to recognise the important distinction in the test between reasonable and unreasonable behaviour. It was wrong to emphasise (at paragraph 67) that there was no suggestion that the respondent's conduct had been deliberate or malicious when carrying out the assessment of whether it was unreasonable for the claimant to refuse the offer of re-employment. Further, in referring to the tone of the claimant's grievance letter (paragraph 68) and relying on that in concluding that the claimant had not conveyed that the relationship was incapable of repair, the tribunal had failed to recognise that the claimant, having resigned from his employment, was simply being polite and professional. The respondents were in repudiatory breach and the claimant had responded by resigning. All the indications were that the claimant considered that the relationship had broken down beyond repair. The resignation had been final. More importantly the tribunal had placed too little emphasis on the claimant's position. It was said that he had not explained in any detail why he considered that his trust and confidence had gone and it would be unreasonable to go back but he had given full reasons both at the time and in evidence. The tribunal had accordingly placed too high a standard on the claimant, contrary to **Wilding.**

17. In response Mr Rees for the respondent pointed out that while the test for mitigation of loss was twice incorrectly stated, the Employment Judge's conclusion, at paragraph 70, applied the correct test namely that the claimant unreasonably refused the offer of re-employment and so failed to mitigate his loss. The reasoning of the Employment Judge was not so confused that the decision could not stand. Accordingly any errors in expression made no difference. It was argued that there were a number of relevant findings by which the respondent discharged the burden of proof in relation to the failure to mitigate. In particular the Employment tribunal found:

- that the claimant was being offered exactly what he wanted namely Manager of Cochrane at a salary of £41,000
- that the claimant's strongly preferred management structure had been implemented
- that the failure to consult was a mistake by the respondent not a malicious or even deliberate act
- that the claimant's grievance letter did not indicate that he considered the relationship incapable of repair
- that the claimant continued to accept payment of salary from the respondent until the end, and
- that the claimant having been offered the role he had argued for could have moved seamlessly from the end of the grievance process back to work.

18. Mr Rees submitted that these findings were a sufficient basis for the tribunal's conclusion. The reasons given by the tribunal should be considered broadly, as a whole, to ascertain the true reasoning and should not be construed "as if they were a statute or a deed – **Piggot Brothers & Co Ltd v Jackson 1991 IRLR 309** at paragraph 29. Mr Rees placed

reliance also on the words of Elias J, as he then was, in **Asleb v Brady 2006 IRLR 576** who stated:

> **"Infelicitous or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law".**

19. It seems to me that the starting point in considering whether the employment judge erred is her enunciation of the test for the mitigation of loss. Paragraph 65 of the judgement contains the following clear statement:

> **"The test is whether an employee's conduct in refusing an offer of re- employment was reasonable on the facts of the case".**

It is conceded on behalf of the respondent that the test is there incorrectly stated. The issue in this first ground of appeal is therefore whether that incorrect statement of the legal test was a mere slip and that taken as a whole the reasons show that the employment tribunal properly directed itself on the law or on the other hand amounted to a material error in law such that the decision cannot stand. There are in turn two strands to this. First as already stated is whether the error was an isolated slip in an otherwise soundly reasoned decision and secondly the question of whether the tribunal effectively reversed the onus by placing too high a standard on the claimant. I have decided that the error in the employment judge's statement of the legal test was not an isolated slip. It is repeated at paragraph 66 where it is stated that:

> **"The test for whether the claimant's refusal of re-employment was reasonablerequires the tribunal to look at all the circumstances of the case …"**

20. While there is subsequently a reference to the claimant having unreasonably refused the offer of re-employment at paragraph 70, the use of the two terms interchangeably is indicative of a failure to understand and have regard to the distinction drawn by Lord Justice Potter in **Wilding v British Telecommunications PLC 2002 CR 1079** where he opined that:

"It is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party the wrongdoer has no right to determine his choice. It is where and only where the wrongdoer can show affirmatively that the other party has acted unreasonably in his duty to mitigate that the defence will succeed".

21. In this case the employment judge did not start by identifying the correct test and so was apparently not alert to this distinction. The particular circumstances of this case are illustrative of why the distinction is important. Where the employer's conduct has been such as to breach the contract with the employee to the extent that the employee is entitled to resign with immediate effect it may be reasonable for the employee to refuse to go back however unintentional the breach and however much the offer of re-employment appears to satisfy his previously stated objectives. It may equally be reasonable for such an employee to accept the offer and return to employment with the same employers if he is able to move on from what occurred. He will only be acting unreasonably if on the facts found he could be expected to adopt only the second of those two possible courses. As Langstaff J pointed out in **Cooper Contracting Limited v Lindsey** the danger in an approach that suggests that the employee must take all reasonable steps to lessen the loss is that it may lead to a conclusion that if a respondent can show one reasonable step that was not taken then the respondent will succeed. Such an approach is wrong.

22. In my view the Employment Tribunal, in adopting a starting point of considering whether the employee's conduct was reasonable, failed to take account of the distinction pointed out in Wilding and so erred. That first error was compounded by the absence of any reference to the question of onus. There is no acknowledgement or even reference in the Employment Tribunal's reasons that the onus is on the wrongdoer to show that the claimant failed to mitigate loss. The question of onus can of course be decisive. Again as Mr Justice Langstaff put it recently in **Cooper Contracting Limited v Lindsey** the task of ascertaining whether loss has been mitigated:

> **" … is not some broad assessment on which the burden of proof is neutral".**

23. It seems to me that the Employment Judge in this case did exactly what Mr Justice Langstaff has cautioned against. She looked at the circumstances either as if it was incumbent on the claimant to prove he had mitigated his loss or at best neutrally as if no burden of proof was applicable. If the burden of proof is on the wrongdoer one would want to examine closely how it could be insufficient for an employee to explain that he rejected the offer of re-employment because:

> **" … the damage was done. My trust and confidence was completely gone. It was unreasonable to go back".**

24. It was for the respondent to show that, notwithstanding the repudiatory breach leading to resignation, it was somehow unreasonable for the party who was well entitled to leave to refuse to return.

I conclude that the Employment Tribunal in this case failed to properly direct itself on the relevant law with the result that the reasons given on the issue of a compensatory award are unsound and cannot stand.

Ground 2 – perversity

25. While it is not strictly necessary to decide this ground in light of my decision that the first ground of appeal is well founded, I will comment upon it, at least to the extent that it has influenced my decision on the specific order that I will make.

26. Miss Wilson for the claimant accepted that the test for perversity is a very high one as set out in the **Yeboah v Crofton [2002] IRLR 634**. However she argued that the decision here was perverse. The breach was not anticipatory or threatened. It was a completed breach. On the authority of **Bournemouth University v Buckland [2010] ICR 908** paragraphs 42, 43 and 52 it is clear that it is entirely the wronged party's choice to accept or reject the offer to make amends. While the situation might be different where the repudiatory breach was say a financial one, for example an employer paying only half salary to his employee by mistake and immediately rectifying that once it was brought to their attention, in this case the relationship was so badly damaged that it was the employee's right to insist that it was irreparable.

27. Mr Rees responded that the argument on perversity came nowhere near the high hurdle facing the claimant. The ongoing payment of salary and the grievance procedure which took place while that salary was still being paid both militated against any initial reaction that the outcome could be regarded as perverse.

28. Neither party was able to cite any authority or even examples of situations where the implied term of trust and confidence had been breached such that an employee resigned and was found to have been constructively unfairly dismissed but was then held to have unreasonably refused an offer of re-employment.

While on the one hand the ultimate outcome in this case is counter intuitive the circumstances were peculiar in that the claimant continued to be paid following his resignation and the grievance procedure was undertaken on one view as if the employment relationship was ongoing.

29. In its decision the employment tribunal points out at paragraph 71 that the case of **Bournemouth University v Buckland** related to whether a repudiatory breach of contract could be cured and not the question of assessment of loss. While that is correct the words of Lord Justice Jacob in that case do support the counter intuitive nature of a result that would indirectly allow an employer in repudiatory breach to insist on a return to employment. He stated:

> **" … a repudiatory breach of contract once it has happened cannot be "cured" by the contract breaker. Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it I see no reason for the law to take away the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends to persuade the wronged party to affirm the contract but the option ought to be the entirely the wrong party's choice".**

It is difficult to see how an employee who has decided not to affirm can be regarded as unreasonable in refusing to allow the wrongdoer to make amends if an employee who has not yet decided whether to affirm is at liberty to refuse any such offer. To the extent that the employment tribunal failed to consider and address that conundrum its decision is again lacking. However I cannot rule out that a fresh tribunal properly directing itself on the law relating to mitigation of loss and mindful also of the need to treat an employee who has

already resigned no less favourably than one who is still deciding whether to "affirm and go", could reach the same conclusion on the issue of a compensatory award. The outcome may depend on a closer analysis of the period between 2 March and 30 April 2015.

30. Accordingly I have decided that, in allowing this appeal, the best course is to give a fresh tribunal the opportunity to consider the amount, if any, of a compensatory award for the claimant. That tribunal will have the benefit of digesting all that has occurred in this case to date and then deciding what further evidence and submissions it considers appropriate before determining the matter. In these circumstances I will refrain at this stage from offering a view as an issue of principle on whether it is necessarily perverse for a tribunal to find that a claimant was unfairly constructively dismissed due to the employer's conduct leading to a breach of the implied term trust and confidence while at the same time finding that the same claimant had failed to mitigate his loss by refusing an offer to be re-employed by the wrongdoer.

31. In conclusion, I will allow the appeal and remit the case to a fresh tribunal to determine the issue of a compensatory award for the claimant. I will order the respondent to reimburse the claimant in respect of the fees (£1,600) payable to the employment appeal tribunal.