Appeal No. UKEAT/0186/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 October 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

RECEPTEK — APPELLANT

MR G N PEARCE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER HYAMS (of Counsel)
For the Respondent	MR NICHOLAS SIDDALL (of Counsel)

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

An operations manager in a small company was unhappy, for various matters which the Employment Tribunal thought were caused by the company. The proprietor called him to a meeting, at which he asked what the Claimant would take to go, and issued a veiled threat that if he did not agree to do so there might be disciplinary proceedings against him - for which, as the Employment Tribunal found, there would have been no reasonable and proper cause. An appeal on the basis that the Employment Judge had relied on the view/intention of the employer (which was to seek a parting of the ways) rather than anything the proprietor had actually done in the meeting, and had not analysed the facts by asking separately whether what had been done was likely seriously to damage or destroy the trust and confidence the employee had in the employer and whether there was reasonable and proper cause for it, was rejected on an holistic reading of the Written Reasons, as were grounds that the Employment Tribunal had taken into account matters it should not have done (it did not), had failed to say what its conclusion was on an issue in dispute (it did) and reached a Decision which was on one point perverse (withdrawn in argument). Appeal dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Employment Judge Sneath, sitting alone at Hull, found that the Claimant had been unfairly and constructively dismissed. He gave Reasons for that Decision, which were promulgated on 3 December 2013.

2. The Claimant was an Operations Manager, who was one of five employees in a small undertaking, of which the proprietor was a Mr Glass. He resigned from that employment on 17 August 2011.

3. The central dispute between the parties at the Tribunal was whether the facts were such that the Respondent employer had been in breach of the implied duty of trust and confidence towards Mr Pearce such that he could count himself dismissed within section 95(1)(c) of the **Employment Rights Act 1996** and claim compensation on the basis that that dismissal was unfair.

4. Whether there has been a breach of contract is a matter of fact. It is to be determined objectively by reference to the relevant circumstances. As a matter of fact, it will not be open to appeal unless it is perverse (a high hurdle) or unless, in the process of determining that fact, the Tribunal has adopted an approach which is wrong in law. Much in this appeal seems to me to depend on what I conclude the Employment Judge was actually saying in his Reasons as justifying his Decision. Accordingly, before turning to the Notice of Appeal and the argument, I shall set out the words which the Tribunal Judge used so far as relevant and what is to be made, on a fair reading of the Judgment taken as a whole, of the facts he found. His conclusion was set out in six paragraphs toward the end of the Decision.

5. What he had to consider was a case in which Mr Glass, the proprietor, had retreated a bit from active hands-on management because of the illness of his wife. Mr Pearce did not enjoy the best of relations with Mrs King, a fellow employee. In May 2011 the employer, without any reference or prior communication to the Claimant, appointed her husband, Simon King, as the General Manager, thereby above the Claimant. Some three weeks after that, and before Mr King began his appointment, the Claimant was knocked off his motorbike and injured, so badly that he was absent from work in the office for some six weeks. During that period he made some attempts to communicate with work, but had little response. When he returned to work on 21 July it was to discover that Mr King was sitting at his workstation and using his computer and that, in a finding which was disputed but which the Judge made (paragraph 17), that the Claimant no longer had access to folders on the PC he had previously been using.

6. Mrs King made complaints to him in August about losing orders, which she attributed to the Claimant, and for that and other reasons, unspecified, there was what the Claimant thought of as a hostile and unpleasant environment. The Tribunal said at paragraph 20:

> **"The Claimant was unhappy and Mr Glass was aware of it. He called a short meeting with the Claimant two days later on 12 August. He told him that there had been comments from other staff members about losing business and of their awareness that the Claimant intended to retire early. This was clearly a reference to what Mrs King had said to the Claimant on 10 August."**

7. The Judge found that Mr Glass was not simply responding to the Claimant's desire to leave. Though he disputed it, the Judge found that he asked the Claimant what he wanted to leave and in paragraph 25 the Judge, by using the expression "Mr Glass did not deny the Claimant's interpretation in his email reply of 15 August" appeared to be accepting that there was a threat of disciplinary proceedings if the employment were not terminated by agreement. Although, therefore, the Judgment is not crystal clear as to precisely what the Judge thought was or was not said during the course of a meeting, the principal points were that it was

indicated that the employer wished him to leave, though not necessarily immediately, and that if that could not be agreed, then there was a threat of disciplinary proceedings, which might obviously secure the same result, although Mr Hyams who appears for the company rightly points out that the evidence fell short of Mr Glass saying that it ***would*** secure that result.

8. On that view, therefore, it might be said that the Claimant had been asked to leave and threatened with unjustifiable discipline, unjustifiable because the Judge found as a matter of fact that (paragraph 32) the desire of Mr Glass to have the Claimant leave the business was one for which he did not have reasonable and proper cause. He said in paragraphs 30 to 32, which are central to Mr Hyams' submissions, as follows:

> **"30. I find that Mr Glass did want the Claimant out of the business but was trying to find an amicable solution that either involved paying the Claimant to go or giving him up to six months to find alternative employment.**
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> **31. Mr Glass' reasons for that were complaints by Mrs King and the personality clash with her that the Claimant admitted at the meeting on 16 August as well as concerns for the security of the business arising from the Claimant's unhappiness so that he might damage it.**
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> **32. I find also that Mr Glass did not have reasonable and proper cause for that view because the Respondent had failed to address with the Claimant the substance of any customer complaints. The Respondent had induced the Claimant's unhappiness by not consulting him over Mr King's appointment, by putting Mr King at the Claimant's computer and work station, by diminishing his role and responsibilities and by not fully engaging with him in the changes being made to jobs and work practices."**

9. The Tribunal, on the back of those findings of fact, from which I have selected those which seem to me of central importance, said in conclusion:

> **"51. Turning to a discussion of the issues and my findings, I have already held that Mr Glass wanted the Claimant to terminate his employment because he was unhappy and might put the business at risk. By his approach on 12 August Mr Glass evinced an intention no longer to be bound by the contract of employment. He preferred the Claimant to end the contract and was looking for an amicable solution that would bring about that result.**
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> **52. The Claimant correctly interpreted what Mr Glass wanted and reasonably inferred a veiled threat to use the disciplinary procedure if the Claimant stayed on in his current role.**
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> **53. Mr Glass had no reasonable and proper cause for that for the reasons set out above in paragraph 38.**
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> **54. The Claimant resigned in response to the breach. The events took place over a very small time frame and there was no evidence to indicate that the Claimant had any other reason for his decision to resign.**

> **55. Further, in my judgment, the damage was done in the meeting on 12 August. Thereafter the Respondent simply tried to avoid the consequence of a constructive unfair dismissal claim by telling the Claimant that his job was secure and offering him an alternative role.**
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> **56. Having indicated that he wanted [the] Claimant out on 12 August, it was too late on 16 August to say that his job was secure. It was Mr Glass' conduct on 12 August that gave rise to the breach. The Claimant was thus entitled either to accept the repudiation or affirm the contract. He chose the former."**

10. I read the Tribunal Judge there as having considered that the discussion on 12 August was central, that it was what he did, that is his conduct (see paragraph 56), that gave rise to the breach; that what was identified as being what he did showed the Claimant he had an intention no longer to be bound by the contract of employment (paragraph 51); that he wished the relationship of employer and employee to end; and that he issued the threat, veiled though it might have been, of discipline which would have been unjustified. The reasons why it was unjustified were summarised in paragraph 32, to which I shall come in dealing with the submissions made by Mr Hyams.

The Law

11. There is no criticism, save in one respect, of the law which the Judge set out, from which he came to his discussion of issues and findings. It is familiar territory. For there to be constructive dismissal there has to be a breach of the contract of employment between employer and employee. It has to be the employer's breach; it has to be sufficiently serious. The words "fundamental" or "repudiatory" have been used. Mr Hyams submits that there is a difference between the two: "fundamental" being a matter of objective evaluation, "repudiatory" being a matter of intent; though I have to say I see no real distinction, since if "repudiatory" does refer to intent as opposed to effect, it has to be ascertained objectively, as has any breach of contract.

12. Where the breach, as here, is said to be a breach of the implied term of trust and confidence, it is one the classic formulation of which is that the employer will not without

reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is here that a point of law is said to arise by Mr Hyams. He submitted that a careful textual analysis of **Malik and Mahmud v Bank of Credit and Commerce International** [1998] AC 20 showed different formulations of the implied term, sometimes using the word "calculated"; sometimes "calculated or" likely, sometimes "calculated and" likely. He argued that if "calculated" meant no more than "likely" it was unnecessary excess verbiage. And I took it that this argument was leading to his submission that what a party intended ("intended being one meaning of "calculated") was not in itself sufficient to establish that that party was in breach.

13. As to the submission generally I would simply say this. The classic formulation, as I have called it, arose first in **Woods v WM Car Services Peterbrough** [1981] ICR 666. The Appeal Cases report of the **Malik** Decision at [1998] AC 20 shows, page 23B-C, that their Lordships were told that it was common ground between the advocates that that term existed in the contracts of employment. The argument in that case was as to the occasion when it applied, as opposed to its formulation. Accordingly, not too much, in my view, should be read into small textual differences within the course of Lord Steyn's Judgment, and any difference between his Judgment and that of Lord Nicholls, who omitted the word "calculated". Further, as Mr Hyams recognised, Judges since that Decision have adopted repeatedly what I have termed the classic formulation, even if Mr Hyams was bold enough to submit that they might have been in error in doing so. It was, not least, adopted in the Court of Appeal when, in **Omilaju v Waltham Forest LBC** [2005] ICR 481, Dyson LJ, as he was, said at paragraph 14(2) what the term was, using exactly the words of the classic formulation. Mr Hyams felt able to submit that that did not pay proper regard to what the House of Lords had said in **Malik**.

However, I regard myself as bound by it. I would, in any event, have rejected Mr Hyams' approach to **Malik** for the reason I have given. And I note that in this Tribunal indeed, in the case of **Baldwin v Brighton and Hove City Council** [2007] ICR 680, the question of whether conduct had to be both "calculated and likely" or whether the test was "calculated or likely" came for specific decision before a Tribunal presided over by HHJ Peter Clark, and he concluded that the alternative formulation was to be adopted.

14. Ultimately, in my view, the point does not matter for present purposes. That is because if the word "calculated" did refer to intention, equating the expression "calculated or likely" to have the same effect as the words "purpose or effect" have in the tort of harassment, which is well known to employment lawyers, then because it refers to a breach of contract it would have to be established by objective evidence at the relevant time. Whether resting on purpose or on effect, calculation or likelihood, the matter of breach has to be judged by what happened, viewed objectively: that is, in this context, what the employer did or failed to do that he should have done, which of course includes what he actually said. This does not, in my view, agreeing on this point with Mr Hyams in one of his submissions, rest upon the undisclosed intention of the employer, which could not be inferred from the actual events and its own actions.

15. Accordingly, that being the only point of self-direction which Mr Hyams queried, it is sufficient to say that I would have rejected it if indeed it did have any significance, though as I have indicated, I do not really see any.

Grounds of Appeal

16. Three grounds are adopted. The first is that the Judge effectively asked himself the wrong question, not by the self-direction which he posed but by the way in which he applied the

law. In setting out what he did between paragraphs 30 and 32 he did not ask the questions which sequentially he might have posed. The first of those was whether there was conduct which was likely seriously to damage or destroy the relationship of trust and confidence; and the second was whether, if so, there was reasonable and proper cause for that conduct. Mr Hyams complains that both limbs should have been addressed; that in paragraphs 31 to 33, in particular, they had not been; that in any event there was bound to be reasonable and proper cause to have a meeting with an employee who was known to be unhappy at work, in order to explore the reasons for that unhappiness. In expressing, as the Tribunal did in the opening words of paragraph 32, that "Mr Glass did not have reasonable and proper cause for that view", the Tribunal were addressing reasonable and proper cause not for what the employer had done but what Mr Glass had thought. Merely thinking that the relationship should terminate was not conduct which was capable of being repudiatory. The conduct which was identified, that of holding the meeting, was undoubtedly conduct for which there was reasonable and proper cause on any view. The Judge had run together, impermissibly, what was in the mind of the employer with what the employer did and with whether either with reasonable and proper cause.

17. It was this ground which led Singh J, on a renewed application under Rule 3(10) for permission to proceed, to say (paragraph 6) that there was a germ of a pure point of law, the allegation being that the Judge failed to take into account the fact that an employer who perceives an employee to be unhappy will not necessarily breach the implied term of trust and confidence by introducing the topic of that employee's continued employment.

18. I do not accept that this ground should succeed in this case. I agree with Mr Hyams that there will frequently be reasonable and proper cause for an employer to discuss with an employee who appears to be unhappy what are the causes of and the consequences of that

unhappiness. All depends upon the context and how the matter is dealt with. Here it may have been better had the Tribunal said more than it did. But what it did say was (paragraph 22) to identify what had been a central dispute of fact between the parties as to what had been said by Mr Glass as to leaving during the meeting; by paragraph 25 to reject Mr Glass's view that he was simply responding to the Claimant's desire to leave; and it went on apparently to find that that there had been a threat of disciplinary proceedings, though "veiled", which if it had occurred would have had no justification then known to M Glass.

19. In paragraphs 30 to 32 it is true, and I agree with Mr Hyams, the Judge did not separately address the conduct of the employer and the question of reasonable and proper cause. But this is to ignore what is said at paragraphs 51 to 56 where the process of reasoning is precisely to look, in summary, at what Mr Glass had done (paragraphs 51 and 52), then to examine whether there was reasonable and proper cause for it (paragraph 53) and then to ask the next and necessary question in a case of constructive dismissal, which was whether the Claimant resigned at least in part because of it. The fact that it was Mr Glass's behaviour and not merely what he had in the back of his mind is contained in paragraph 6. Accordingly I read the conclusion here as being a conclusion of fact. The Tribunal was plainly entitled to come to that conclusion. It had been remitted after a previous outing before the Employment Tribunal (see **Mr Pearce v Receptek** UKEAT/0553/12/LA 3 May 2013) during which this Tribunal had identified two possibilities as to the way in which the events of 12 August might be interpreted.

20. Accordingly, as it seems to me, contrary to the Notice of Appeal, the Judge did ask the right questions and he gave them factual answers. It was not formulaically approached, but it did not necessarily need to be (see **Hilton v Shiner Ltd** [2001] IRLR 727, paragraph 22).

21. Although the Tribunal could have said more about what precisely occurred during the meeting of 12 August, I have to remember that it heard and saw the two principal witnesses. It was familiar with the facts and details in a way in which an appellate Tribunal can never be. It is for that reason that the impact, the nuances, the effect of what occurred is one for the Tribunal to judge, and it is not an error of law for it to fail to spell out in as much detail as it might have done the findings it makes, providing it sufficiently indicates to the parties why one has succeeded and the other has lost. That is what, in my judgment, this Tribunal did on this issue.

22. The second ground was that, even if the Judge could properly be said to have applied the right test, he erred by taking into account one or more irrelevant factors. This ground seeks to argue that the conclusion as to whether there was reasonable and proper cause was reached in part by the Tribunal taking into account matters which it should not have done. They are set out at paragraph 32. It was argued that, in looking at the events of 12 August, Mr Glass had been discussing the loss of business with the Claimant, as Mrs King had complained to him about it.

23. Insofar as Mrs King was concerned, the two matters set out at paragraph 31 as reasons for Mr Glass's belief that the Claimant should go were complaints by Mrs King and a personality clash with her. Neither of these, said Mr Hyams with some force, were matters which could be laid at the door of the employer. What one employee says to another is not necessarily the employer's responsibility. The Judge took this wrongly into account. An employer could not, he submitted, be in breach of the implied term merely by having in its employment an employee who resigns, as a result of a personality clash or who complains about what another employee has or has not done.

24. I have to relate this submission to the Judgment. The Judge's Reasons for deciding that there was no reasonable and proper cause were set out at paragraph 32. They must, as Mr Siddall, who appears for Mr Pearce submits, relate back to paragraph 30, that is to the reason why Mr Glass wanted the Claimant to leave. He was expressing (32) that the complaints made by customers could not be said to have justification, without at any rate the employer attempting to address their substance with the Claimant.

25. The passage which followed, blaming the Respondent for inducing the Claimant's unhappiness, was in Mr Hyams' submission misplaced. But in the course of the hearing it became apparent to me that each of the matters which the Judge set out was justified on the evidence. Thus it was a matter of fact, beyond disagreement, that the Claimant had not been consulted over Mr King's appointment. Mr Hyams made the point that there was no duty on the employer to consult him. But what the Tribunal were saying here was factually correct. There was no consultation. The putting of Mr King at the Claimant's computer and workstation was something factually which happened. The diminishing role and responsibilities of the Claimant was for a while the subject of dissension before me, before it became accepted that the act of the employer in requiring the matters set out at paragraph 18 to be done was a change in the Claimant's terms and, when coupled with the responsibilities, as set out in his job description in the first of several paragraphs saying what the Claimant had to do, could legitimately, at least on one view, be said to be a diminution of his roles and responsibilities. The "not fully engaging with the Claimant" was subject to no particular criticism before me and followed from the Tribunal's earlier findings of fact.

26. The Tribunal concluded from that matter, which was in dispute, that the Respondent had induced the Claimant's unhappiness. But this is not part of the central reasoning, as to whether

or not there had been a breach of the implied term at the meeting of 12 August, though it is important context. This is not, as Mr Siddall emphasised, a case in which there was a number of events of which that of 12 August was the "last straw". Rather the events 12 August were central, with these matters setting the context within which it occurred.

27. The actual complaint, therefore, in the ground of appeal at ground 2 must be rejected. The conclusion, in essence, was one of fact within the legitimate fact-finding capability of the Tribunal.

28. The third ground asserts a failure to resolve one or more important conflicts of evidence. Here the argument is that in paragraph 17 the Tribunal concluded that the Claimant no longer had access to his computer and workstation after Mr King was placed at it. This was, submitted Mr Hyams, a finding which needed to be set out in greater detail. Initially his complaint was that there had been a failure here to resolve what was an important conflict. It was an important conflict because it was part and parcel of a chain of events, the cumulative effect of which gave rise to the entitlement, if there was one, in the Claimant to resign. There had been a dispute between Mr Glass on the evidence and the Claimant as to whether or not the Claimant actually did have access to the files to which paragraph 17 refers. See, for the Claimant's argument, page 2 of his witness statement, paragraphs 12 and 13.

29. Mr Hyams argues that it has been plain ever since at least **Levy v Marrable & Co Ltd** [1984] ICR 583 EAT that, where there has been a conflict of evidence at a hearing before an Employment Tribunal on a significant issue of fact, then the Tribunal's finding, that is their acceptance or rejection of that evidence, must be made plain one way or the other (see page 587D-E). The difficulty with this argument is that there was actually a conclusion. What was

missing was any detailed reasoning to explain why the Tribunal preferred the evidence on this issue of the Claimant over that of Mr Glass.

30. I have no doubt that if this issue were a central issue, truly so called, it would have been necessary for the Tribunal to say, albeit briefly, why one party had won and the other lost on the matter. However, I cannot see that it was a central issue. Mr Hyams put it as one of several central issues, which seemed to me to diminish the importance of "centrality". The true principle, as it seems to me, is that where there is a central issue (and there are very rarely more than one or two issues of fact in a case which can properly be called central) a Tribunal needs to say something about why it has come to the conclusion it has on that particular issue. That may be inferred generally from the Tribunal's Judgment. It may be specifically set out. But it needs to be said one way or the other. In a case such as this, however, the central issue was what happened on 12 August. The relevance to that of whether the Claimant did or did not have access to folders on the PC to which he had previously had access is not, in my view, either significant or central. It is relevant context but no more than that. It would be a sad day if Employment Judges felt obliged by Decisions of appellate Tribunals to say exhaustively in respect of every matter that might be said to be in issue between the parties why they had found each and every fact to be as such. This would run a significant risk that, in dealing with the detail, the Tribunal would lose sight of the meaning of the whole. It would fly in the face of recent exhortations from appellate Courts to write Judgments which are as short and concise as circumstances permit. What is necessary is the central reasoning. Conclusions on matters of fact such as this might be necessary, but no more than that is in my view legally required. **Marrable** asked for just that and did not require more.

31. Accordingly I reject the third ground, as I have the first two. A fourth ground, that of perversity, by reference to the closing sentence of paragraph 18, was ventilated in argument but then, on reflection, pursued no further by Mr Hyams, so I need not deal with that. Despite, therefore, the interest and erudition with which the appeal has been advanced by Mr Hyams on behalf of the Respondent, it must be and is dismissed.