Appeal No. UKEAT/0241/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR D J JENKINS OBE

MR B M WARMAN

MS M MRUKE — APPELLANT

MRS S K KHAN (DEBARRED) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELAINE BANTON (of Counsel) Instructed by: Anti-trafficking and Labour Exploitation Unit Islington Law Centre 232 Hornsey Road London N7 7LL
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

A domestic worker (who came from Tanzania to work for her employer, spoke only Swahili, was illiterate and was paid a pittance) left her employment when an interpreter, representatives of an anti-trafficking charity and police came to her address, and she decided to go with them. She had not been paid the National Minimum Wage.

Some of her claims were upheld by the Employment Tribunal; others (such as race discrimination) were rejected, as was a claim that she had been unfairly (constructively) dismissed. This last was the only matter on which she had permission to appeal to a Full Hearing. The Employment Tribunal had found that there was a repudiatory breach in the employer failing to pay the National Minimum Wage, but said that the Claimant had not told the Employment Tribunal why she left her employment (there was no express statement of this in her witness statement, though it was well-drafted and lengthy; and it was not asserted she said anything in her evidence as to her reason(s) for going). Leaving her job had to be in response to the breach for there to be a dismissal. It was argued that this was perverse since it was obvious that breaches by the employer had caused her to go, and reliance was placed upon a description of her circumstances which the Claimant had made to a GP some days before her leaving, which had led to the visit to her address. Held: the Employment Tribunal had no direct evidence of the Claimant's reasons (inexplicably not set out in her witness statement) though she would be the only person who would know them. If the circumstances were such that a reason for her going must have been low pay, the decision would be in error: but the Employment Tribunal had rejected one possible reason which had nothing to do with pay (onerous hours), and listed six others which were thought by the charity to be reasons why she was leaving, only one of which the Employment Tribunal had found sustained on the facts, and only that one which directly related to her financial situation. It could not safely be inferred that at least a reason for her going was a lack of enough pay.

An argument that the Employment Tribunal had required the Claimant to have knowledge of the National Minimum Wage Act in order to act in response to the breach was not accepted, since the Employment Tribunal in context was simply noting that at the time she left the Claimant had no particular reason for thinking herself underpaid (she had, the Employment Tribunal found, received all the money she was entitled to have under the parsimonious terms of the contract made in Tanzania) and thus there was no reason in itself to think she was obviously leaving because of a failure to pay her enough. An argument that the Employment Tribunal focussed on "the reason" for leaving, rather than whether part of the reasons for leaving was the repudiatory breach, failed, since it contemplated at least some reasons being considered, and the problem the Employment Tribunal found here – having listened to the witnesses over a number of days – was that it simply did not know what any of them was.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. One of a number of issues which was considered by an Employment Tribunal at Watford (Employment Judge Southam, Mr Bone, and Mr Moynihan) was whether the Claimant had been constructively unfairly dismissed by her employer. She alleged that, as a migrant domestic worker, she had been exploited by her employer, and it was said on her behalf that a breach of contract by her employer was the reason why she left. The Tribunal rejected that claim for written Reasons given on 28 February 2013.

2. We need to begin our discussion of the legal issues on the appeal which arises from that conclusion, all other appeals having been dismissed, by reminding ourselves that, whatever our sympathies might be, for an Appellant to be successful they must identify an error of law. It is not enough for an Appeal Tribunal to imagine that it can analyse the apparent evidence in a way in which the Tribunal below did not unless it is satisfied that the Tribunal below made a mistake of law in its approach or was perverse in its conclusions.

The facts as found by the Tribunal

3. The facts as found were not typical of many cases in which migrant domestic workers not only allege but prove that they have been subject to the most appalling treatment, closely akin to slavery, by their employer. Nonetheless those findings reveal the way in which a worker can be severely disadvantaged by her circumstances as an inevitable consequence of the arrangements which have been made. Here the Tribunal, which considered the evidence for seven days and gave its Judgment shortly afterwards, thought that neither party's evidence was wholly reliable. It rejected the Claimant's case in a number of significant respects.

4. It found that the Claimant had entered a contract in Tanzania with the Respondent under which she would work as a domestic employee. The Claimant spoke only Swahili. She was illiterate. She came to the United Kingdom on 2 October 2006. She chose to sleep in the kitchen of a house in which her employer and for a while both of her two children, all three of whom were disabled, lived. She was not offered better sleeping accommodation even when the Respondent's daughter left. She had no day off in any week, though the Tribunal concluded that, contrary to her case, she worked only the equivalent of 42 hours per week. She had no social life, though she had some conversation with a neighbour across the garden fence, no doubt severely limited by her lack of English. The Tribunal found that, contrary to her case, she was able to eat as much as she wished, that she was free to visit local shops and did so, and that she had the key to the house. She had been left in charge of the property when her employer was away, which was for substantial periods of time. She was not, as she had asserted, required to care for the Respondent's children. She used the telephone, and was able to do so privately. Her passport was not inaccessibly locked away, though she had given it to her employer for safekeeping.

5. The contract she entered into in Tanzania provided for her to be paid a sum which may well have been generous in Tanzanian terms but represented a pittance when compared to the National Minimum Wage to be paid in the United Kingdom. It is plain that her working routine raised issues in respect of the **Working Time Regulations**.

6. She was registered with a doctor, not initially upon her arrival in the United Kingdom but in 2009, when on some 14 occasions she had treatment for a leg ulcer. On those occasions, however, it does not seem that there was any interpreter present.

7. When a scan revealed reasons for concern in the following year, she again saw a GP, a Dr. Musa. It was arranged that an interpreter would be present. The GP's note, made on 2 February 2010, recorded something of what the Claimant then said about her work and conditions. Dr. Musa described her work as "uncongenial". The note continued:

> **"Lives with her employer. Comes from Tanzania. Has [been] with her employer for 20 years. Came to UK 4 years ago. Has not been allowed out on her own. On minimal pay (states that it is £10/month. Money goes to her account in Tanzania. Married and has children in Tanzania. Parents died and was not allowed to visit for the funeral. Her employer has 2 disabled children. Denies any violence nor physical abuse... Her employer keeps her passport."**

8. The Tribunal did not accept a number of the assertions in that condensed text. It will be plain from what we have already said that in fact the Claimant was permitted to go out on her own. Her pay, as stated, represented the sum that she received in the United Kingdom, whereas further money was also paid in Tanzania to an account there, though there was no transparency about the payments. She was not forbidden to visit her parents for the funeral, but the Tribunal found that she could not afford to go.

9. Nonetheless that description of her circumstances led to that which the Tribunal described at paragraph 18.41 and 18.42 in these terms:

> **"18.41 In the meantime, however, on 11 February 2010, the charitable organisation Kalayaan had made arrangements for the claimant to be enabled to leave the respondent's home, if she wanted to. A party of people was assembled to visit the property. These consisted of Rhoda Mwanga, Marian Kilumanga of the Tanzanian Women's Association, Marcus Harry of Kalayaan and two police officers, DC Matthew Allwork and PC John O'Brien. They arrived at the property and spoke to the claimant and to the respondent. The claimant was asked if she wanted to leave the property and she agreed that she did want to leave. She, however, expressed some concern about the respondent and her children, as to who would be looking after them, if she left. The respondent produced the claimant's passport and visa. The claimant was invited to gather her belongings and she did so. Most of them were stored in the wooden outbuilding.**
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> **18.42 It is clear to us that the claimant was unaware, before she was placed into contact with Kalayaan, that she was entitled to be paid the National Minimum Wage, to itemised pay statements and to weekly rest. It is unclear because the matter was not put to her, whether she was aware of an entitlement to a particular quantity of paid annual leave."**

10. When the Claimant issued a claim, alleging that she had been constructively dismissed, she asserted (paragraph 23 of the ET1) that the treatment of her, as set out in the body of the claim, amounted to a fundamental breach of the contract of employment in respect of which she had no choice but to resign. That met the response from the Respondent that there had been no fundamental breach of contract, but if there had been that the Claimant had not resigned for that reason. The reason for leaving was thus in issue.

11. The Tribunal made a self-direction of law in respect of which there is no criticism. It set out familiar territory, but it is necessary for present purposes to mention some of it.

12. Section 95(1)(c) of the **Employment Rights Act 1996** provides that it is a dismissal where:

> **"...the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

Deriving from the Court of Appeal decision in **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27, it has become established that section 95(1)(c) will be satisfied where the employer is in repudiatory breach of contract and that repudiation has been accepted by the employee as relieving the employee of the burden of her pursuing her contractual obligations any further. At least where the breach is in the past, and she knows the facts which entitle her to accept the repudiation as ending the contract, she must not affirm the continued existence of the contract by word, deed or a long enough period of inaction.

13. The Tribunal directed itself correctly that "the employee must resign in response to the repudiatory breach": see **Norwest Holst Group Administration Ltd v Harrison** [1984] IRLR 419, a decision of the EAT (Bristow J presiding) in which it was held:

> **"It is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, that he merely leaves... It is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him".**

We would add, as a gloss, that if the circumstances indicate no ground for someone's leaving other than the breach of the relevant obligation, then it will be plain that leaving employment is in response to the breach even if that is not formally articulated by the Claimant.

14. In **Nottinghamshire County Council v Meikle** [2005] ICR 1 the Court of Appeal held that, once a repudiation of the contract is established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. Keene LJ made it clear that this must be "in response to the repudiation", but the Tribunal rightly reminded itself that

> **"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 is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer."**

15. The Tribunal applied that law to the facts it had found in paragraphs 49-52 under the heading "unfair dismissal". At 49 it identified the breaches on which the Claimant, who was represented by Counsel, Ms Banton, relied. There were two. The first was a failure on the Respondent's part to pay the National Minimum Wage. The second was the imposition of onerous working hours. A third reason which had been postulated was not pursued.

16. The first of these breaches was established, but not the second. The Tribunal found that the pay was below the National Minimum Wage. We note, and we think it is material, that it was very considerably below the National Minimum Wage. However, it did not find the allegation as to onerous working hours proved.

17. Having established that the employer was in breach, in what was inevitably a repudiatory respect, the Tribunal then said, at paragraphs 50-52:

> **"50. The question arises, at issue 14.3, however, why did the claimant resign? The tribunal simply have no evidence as to why she resigned. The claimant did not know that she was entitled to the National Minimum Wage when representatives of Kalayaan and the police arrived at the respondent's house on 11 February 2010. The claimant was asked if she wanted to leave and she replied that she did. She did not say why she wanted to leave and did not tell us why she, in effect, she terminated her employment [sic].**
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> **51. It seems to us, however, that representatives of Kalayaan made a number of questionable assumptions. These included an assumption that the claimant slept on a thin mattress on a concrete floor, that she was provided with little food, that her passport was forcibly withheld, that there were severe restrictions of her movements, that she was on minimal pay and not allowed to visit Tanzania for funerals. Only one of those matters was in fact borne out in accordance with our findings of fact, but Kalayaan made those assumptions when they asked the claimant if she wanted to leave. It is assumed on their part that those would be the claimant's reasons for leaving but that is not, it seems to us, the question we have to decide. We have to establish what was the reason the claimant had for terminating her employment. The claimant did not tell us and we simply do not know why she left.**
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> **52. Accordingly and dealing with the issues at paragraph 14.1-14.3 above, there was a fundamental breach of the claimant's contract as to pay in relation to the National Minimum Wage. It was a breach that was sufficient to repudiate the contract, but we are not satisfied that the claimant resigned in response to that breach particularly as the claimant did not know that she was entitled to the National Minimum Wage."**

For those reasons, therefore, the Tribunal rejected the claim of constructive dismissal.

The Argument

18. Ms Banton alone appeared before us. The Respondent did not file an Answer and has been debarred from further defending the appeal.

19. She submits that it was in effect obvious why the Claimant left. She argued in the Notice of Appeal that the findings of the Tribunal set out the basis for the termination of employment, and referred to matters which had not been put before the Tribunal for decision as fundamental breaches at paragraph 8 of the Notice of Appeal. The breach by failing to pay at least the National Minimum Wage was repudiatory.

20. None of this directly deals with the Tribunal's problem, which was that it thought that it had no evidence from the Claimant as to her actual reasons for leaving.

21. Nothing was said in the Notice of Appeal to suggest the Claimant said anything at all in evidence herself as to why it was that she left. We have carefully read the witness statement which she made to the Tribunal. It is comprehensively drafted over 27 pages and plainly drawn up by others, who had a facility with English, which she did not, such that it was translated to her for her approval. There is nothing in that witness statement which says in terms why the Claimant left, although it did say why she had stayed (paragraph 119):

> **"I had never thought of leaving before, if I had run away I knew no one, did not speak English and had no money. I thought that I had to stay with [the Respondent] because I had agreed to work for 4 years and she was the one who brought me to the UK."**

22. Those are powerful reasons, but incapable in themselves to show that the Claimant left her employment in response to the failure by the employer to pay her more money than she did, which was the only established breach. The Notice of Appeal then and therefore looked for evidence which was not given directly to the Tribunal by the Claimant herself. It relied upon the record of the conversation she had with Dr. Musa on 1 February 2010 set out above. It is said that those reasons were so clearly linked to the visit by Kalayaan and the police on 11 February that they were her reasons for wishing to go. It was said (paragraph 14) that the Claimant had stated to her GP, to the interpreter and to Marcus Harry of Kalayaan (the latter two giving evidence to the Tribunal) that her very low pay was one of the reasons for her terminating her employment. We have not, however, been asked on this appeal to look at any of the evidence they gave which recorded this evidence of hers, albeit at second hand

23. When the Claimant's appeal was rejected on the sift at this Tribunal, she sought orally through Ms Banton to persuade the court to grant permission, and successfully did so before

HHJ Clark. Though not in the Grounds of Appeal as they had been when rejected, she took the point that the Tribunal had committed two errors of law. The first was to regard knowledge of an entitlement to the National Minimum Wage as critical. That, she argued, was to demand far too much, in particular of someone who was illiterate and unversed in English law. Second, she argued that the decision in **Wright v North Ayrshire Council** [2013] UKEAT 0017/13/BI was pertinent. That decision repeated earlier law emphatically making the point that a Tribunal, when assessing whether a resignation was in response to a repudiatory breach of contract, is not looking to see whether the breach was the cause in the sense of its being the one and only or even principal cause of the resignation, and that it is sufficient in law for it to be no more than part of the reasons. Indeed the passage which the Tribunal itself relied on from **Meikle v Nottinghamshire County Council** was to the same effect.

24. Ms Banton's attack on the Judgment before us relied on the two matters we have just mentioned, and a third, which she spent most of her time developing in passionate and sustained submissions, to the effect that the Tribunal's decision was either perverse or that it simply failed to recognise that there was clear evidence, provided by both the circumstances and the context, that a reason for leaving employment must have been the low level of pay of the Claimant.

25. As to the first two points which surfaced before HHJ Clark, it all depends on how one reads the decision of the Tribunal. We do not read it as requiring a claimant to have knowledge of a statutory provision or to have that in mind at the time of leaving employment. We entirely agree with Ms Banton that, if that had been in the Tribunal's mind, it would have been an error of law. It would demand too much. The essence of the repudiatory contract is not so much the breach of statute (though that is what it is): it is the failure to pay sufficient. It would not

therefore matter, as we see it, if the evidence had been to the effect that the Claimant complained that she should have been paid more (or, putting it the other way round, was paid too little,). If she had done either, and the Tribunal had been satisfied, or if it should have been satisfied, that that was a reason for her departure, she would be entitled to regard herself as constructively dismissed and the Tribunal should have so found. We think, however, that the Tribunal here was making the evidential point, in line with its earlier findings such as that made at paragraph 19.24, to the effect that there was no shortfall in the amount to which the Claimant should have been paid according to the terms of the contract. That is to look purely, we would emphasise, at the contractual terms as they had been reached in Tanzania. The contractual effect was as nothing in the light of UK statutes. But the point that was being made was that the Claimant, in the eyes of the Tribunal, did not appreciate that she was being paid less than she was entitled to be paid. She did not therefore leave her work for that reason. As such, we think that the point was one to which the Tribunal was entitled to pay regard. It was not an error of law to express it as it did.

26. As to the second point, we have already expressed our view on the law. The question is whether the Tribunal here was looking for an effective cause or the only cause when it used the words:

> **"We have to establish what was the reason the Claimant had for terminating her employment".**

27. The Tribunal had earlier set out the law which guided it. That was clear. But it saw the law in the same way as do we. The point the Tribunal was addressing between paragraphs 49 and 52 was not that it had a number of reasons and could not be satisfied which was the predominant one, though all had some part to play. It was instead complaining of the absence

of ***any*** reason volunteered by the Claimant. Accordingly, we do not see here a search for one reason to the exclusion of others, which would have been impermissible.

28. We turn to the third point, which is where we think the centre of this case lies. In addition relying on the report of that which was said to the doctor Ms Banton referred to paragraph 115 of the witness statement of the Claimant, which we assume in the usual way was tendered in evidence. She spoke there of her conversation with the doctor, to say that the doctor had seemed very surprised that she had not received a salary for a long time. (We note that the evidence as to salary was that it was not paid in consistent amounts at consistent intervals but in blocks, bits and pieces, albeit the Tribunal's overall conclusion was that all that was due under the terms of the contract had actually been paid.)

29. The Claimant went on to say that it was the first time that she had been able to tell anyone who was not a friend or relative of her employer about her situation. She had decided to tell the doctor and the interpreter everything, and they agreed to help her. The submission was that the reasons for staying related to the absence of money. Therefore it is suggested that, first, the visit of Kalayaan and the police which removed the Claimant from her unhappy situation with the Respondent was inspired, indeed caused by, her complaint about salary; and second, that it had been an absence of salary which had caused her to stay in her employment and therefore, once she had a route out because she had found someone she could talk to, she was able to take advantage of it. Ms Banton rightly emphasised the context. She argued that the Tribunal had failed to pay proper regard to it. The context was one in which an employee, in the United Kingdom, had no means of talking to those outside the home. She had no English. She could not read. She had never been taught to. Although she was paid money at a rate which might be largesse in her own country, it amounted to nothing much in the

United Kingdom, and that lack of money severely constrained her freedom. In effect, she was trapped by her circumstances. In such a position, it is not surprising that the employee would wish to be relieved of the difficulties, drudgery and poor pay which were associated with her employment.

Consideration

30. We accept that evidence, particularly in an area such as this, must be seen in context. Very great difficulties are caused by lack of funds to which we hope tribunals would wish to pay serious regard. A lack of money seriously restricts freedom. Couple that, as Ms Banton points out, with a lack of language with which to communicate easily, and inability to read, and somebody in the Claimant's position might very well be restricted, not by lock or by key but by circumstances, to remaining where she is with the sense that there is no possible alternative.

31. Nonetheless, we have to ask here what may seem in these circumstances to be something of a sterile legal question. It is whether the Tribunal was entitled as a matter of law to think that it had no sufficient evidence as to the reason or reasons why the Claimant left her employment.

32. Without the Claimant giving those reasons, the Tribunal would have nothing to rely upon unless the reason could safely be inferred. There are many circumstances in which it can be. There may be contracts which are so egregiously performed by the employer that it is obvious that the reasons for an employee's leaving have everything to do with those conditions, which collectively amount to a fundamental breach of contract.

33. Here, however, the sole matter which was put forward for the Tribunal's consideration, following its conclusions on matters of fact, was a fundamental breach arising out of the

National Minimum Wage. Ms Banton drew our attention to the Tribunal's opening words at paragraph 32. There it had found five matters proved out of eight which had been set out in the list of issues. They related to failure to pay salary in accordance with the National Minimum Wage, failing to provide annual leave, failing to provide itemised pay statements, weekly rests and adequate living space. However, a note from Claimant's Counsel of 25 April 2014 asserts that the way in which the matter was put to the Tribunal in opening submissions was that she had suffered a constructive unfair dismissal by reason of a failure to pay the National Minimum Wage, made to work onerous hours, and a third matter which was no longer pressed. In her closing submission, this was added to, by complaints of appalling living conditions, manipulation, and breaches set out in relation to other claims (see paragraph 81).

34. The Tribunal, dealing with the question of pay, said (apparently accurately) that the Claimant did not say why she wanted to leave, nor did she tell the Tribunal why she effectively terminated her employment by leaving. That is not necessarily an answer to the case. If the circumstances were such that the termination must have been because of a repudiatory breach, then the Tribunal should, notwithstanding the lack of express reasons, have inferred that the Claimant's ending of her employment was in response to the breach.

35. The Tribunal dealt in paragraph 51 with the question whether it could draw an inference safely from the facts. In the second sentence, it set out six matters which Kalayaan had thought were in the Claimant's mind as reasons for leaving. Five of those it rejected as breaches on the facts. Accordingly the Tribunal was in a position where Ms Banton had asserted the imposition of onerous working hours, which the Tribunal had not found to be the case at least in terms of the number of hours, and Kalayaan had assumed that there were six possible reasons for going, five of which did not in its view amount to a breach. Further, the Claimant herself had had

every opportunity to say what her reason or reasons were, in her statement, or her oral evidence, or to others sufficiently clearly for them to give hearsay evidence of it. We can see that some of the possible reasons Kalayaan had in mind might be said to be related to a lack of money. Thus, if by the expression "not allowed to visit Tanzania for funerals" one were to read "could not visit Tanzania for funerals because of lack of pay", the link would be obvious. That is not quite how it is put in that particular case. But there is no obvious such relationship between possible breach and low pay if one considers the arrangements for sleeping, the food, the alleged sense of deliberate imprisonment by the forcible witholding of a passport, or the suggestion that there were severe restrictions on movement all of which the Tribunal had rejected. It was in that context, having set out six possible reasons (and one supposes a seventh, if one takes into account onerous working hours (see paragraph 49)), that the Tribunal was asking what was the reason. It had no reasons. The reason for the Claimant going could have been any of those which were not related to pay.

36. We would not have been surprised if the Tribunal here, having looked at all the facts, had come to the conclusion that the reason for the Claimant leaving was because of the failure to pay her more. But this Tribunal had seen the parties, and in particular the Claimant, over a considerable length of hearing. It was in a position to evaluate her and her evidence. As we point out, it had already rejected a number of the contentions she made. The making of false or exaggerated contentions brings with it in itself a question why false allegations or exaggerated allegations should be made. It might suggest some reason which was not stated or obvious for the Claimant being dissatisfied with her employment.

37. Though it would be tempting, out of sympathy with those who are in a position similar to the Claimant, to think it not only might but should have upheld the claim, this Tribunal

Judgment was careful. We have concluded that the Judge could not safely infer that a reason relating to a lack of pay was the reason, or one of the reasons, why the Claimant decided to leave her employment. We are surprised, as the Judge below must have been, that nothing was said in the witness statement as to her reasons for going, particularly since it had been raised as an issue by the Respondent. But it was not. It seems that no question was asked by any party. Ms Banton did not seek to ask the Claimant about it. In those circumstances, we have concluded that, as a matter of law, the Tribunal was entitled to come to the view that there was no evidence as to the actual reason. It simply did not know what it was. There was considerable evidence as to what might have been the reason, but some of that evidence was to the effect that reasons other than those related to pay could have been a reason for the Claimant deciding to go.

38. In those circumstances, despite the force of Ms Banton's address to us, we are obliged to reject the appeal.