Appeal No. UKEAT/0485/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 June 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR A HARRIS

MR T STANWORTH

MR C RIDGE APPELLANT

HM LAND REGISTRY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CLIVE RIDGE (The Appellant in Person)
For the Respondent	MR JONATHAN BERTRAM (of Counsel) Instructed by: Flint Bishop Solicitors St Michael's Court St. Michael's Lane Derby Derbyshire DE1 3HQ

SUMMARY

PRACTICE AND PROCEDURE

Estoppel or abuse of process

Contract of employment

Appeal allowed and claims remitted for re-hearing before a freshly constituted Employment Tribunal because (1) the Employment Tribunal made, on the first day of the hearing, a ruling on issue estoppel which was incorrect in law and which foreclosed part of the Claimant's case; (2) the Employment Tribunal gave no adequate reasons for a finding that it was an abuse of the process for the Claimant to raise other aspects of his case; and (3) the Employment Tribunal, when denying the Claimant's contract claim on the basis that it was extinguished by an overpayment to him, gave no adequate reasons for its finding that there was an overpayment.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Clive Ridge ("the Claimant") against a Judgment of the Employment Tribunal, sitting in Exeter (Employment Judge Major presiding) dated 22 June 2012. The Claimant had brought claims against HM Land Registry ("the Respondent") of unfair dismissal, disability discrimination and breach of contract. By its Judgment the Employment Tribunal dismissed those claims.

The Background Facts

2. The Claimant was employed by the Respondent as a Software Engineer from 14 August 2001 until his dismissal, which took effect on 25 October 2010. It was common ground that from 2007 onwards, he had disabilities for the purposes of the **Equality Act 2010**. These disabilities were depression and cellulitis.

3. In the latter years of his service the Claimant had substantial periods of absence. The precise amounts do not matter: in broad terms, in the last four years of his service, he had over 350 days of sickness absence on about 50 separate occasions. Most of the absences were related to depression; and some of them were lengthy.

4. The Respondent had a policy and procedure for managing absence – abbreviated in this Judgment to "MAP". A new policy came into force in 2008 but the Claimant was always managed under the former policy, for there was a specific provision in the new policy that existing sickness absence cases would be managed under the former policy. In this Judgment, therefore, references are to the former policy. A distinction was always made between short-term and long-term absence: the Claimant was managed under the short-term absence policy.

5. For practical purposes the story begins in 2007. The Claimant was off work with depression for a substantial time during this year, though always with breaks when he returned to work. On 14 June 2007 there was a Managing Attendance interview. The Respondent referred the Claimant to its Occupational Health service for advice. On 18 October 2007 a further meeting was held. The Claimant was issued with a formal letter. It said that the sickness absence record of 182 days in the last 12 months was unacceptable and that there would be an informal trial over six months during which an improvement must be secured. The letter warned the Claimant that if the record did not improve, or if there were any indications that an improvement could not be sustained, an immediate three-month formal period would be imposed, unsuccessful completion of which might lead to termination of employment.

6. In April 2008 there was a further meeting. The Claimant had continued to have significant absence from work. The informal trial was extended for a further three months. One would therefore have expected a further decision in about July. There was no such decision. It was the Respondent's case, accepted by the Employment Tribunal in circumstances which we will explain in a moment, that the MAP was suspended because the Claimant had begun Employment Tribunal proceedings and taken out grievances which they wished to be resolved. The Respondent did not expressly inform the Claimant that the MAP was suspended, although this was recorded in a reference to Occupational Health which he signed.

7. In 2009 the Respondent resumed use of the MAP. A meeting took place on 13 May. Between 18 July 2008 and 13 May 2009 the Respondent had taken a further 15.8 weeks of sick leave in 11 spells. He was told that he was subject to a formal trial period of four months, during which he would not be expected to exceed 20 days of sickness absence. He was warned

that if absence was unacceptable, or there were indication that an improvement could not be sustained, termination of employment would be considered.

8. During this four-month period the Claimant incurred 20 days of absence over five spells. On 21 September the trial period was extended by a further four months, during which he was not expected to exceed ten days' absence over two spells. Further improvement thereafter would be sought. The same warning was given. There was a further review in 2010. With effect from 21 January the formal trial was again extended, with an expectation that in the next four months there would be no more than six days of absence and no more than two spells. During this period the Claimant had 16 days of absence in four spells.

9. The Respondent then convened a formal Managing Attendance meeting on 17 June 2010, presided over by Miss Adams, described as "deciding officer". She received both oral and written arguments from the Claimant. She concluded that dismissal was the appropriate outcome. She informed the Claimant of this outcome by letter dated 21 July 2010, but dismissal was suspended pending his appeal. His appeal was subsequently dismissed. The Claimant was paid in lieu of notice. His employment terminated on 25 October 2010.

Earlier ET Judgments

10. In order to understand what follows, it is important to describe two earlier claims which the Claimant had brought before the Exeter Employment Tribunal, both heard by Employment Judge Hollow.

11. The first ("Hollow One") raised allegations of disability discrimination, including direct discrimination, harassment and failure to make reasonable adjustments. It concerned the period

from 2007 to 2008. The Claimant's arguments included a contention that it was wrong to impose a six-month informal trial period in 2007. Judgment was given on 26 February 2009. The Claimant was successful only in respect of one allegation of harassment. The Claimant's complaints concerning the six-month monitoring period were rejected (see paragraph 27 of the Reasons).

12. The second ("Hollow Two") raised an allegation of victimisation – specifically, that placing the Claimant on a formal trial period in May 2009 was an act of victimisation. The Claimant argued in that case specifically that (i) that the MAP had been discontinued, not merely suspended in 2008, and therefore (ii) the process should have been started afresh in 2009 and therefore (iii) it was less favourable treatment by reason of his protected act to place him on a formal trial period. Judgment was given on 1 March 2010. The claim was rejected. Specifically the Hollow Two Employment Tribunal found that (i) the MAP had been suspended, not discontinued in 2008 (see paragraphs 14 and 23 of its Reasons), (ii) it was not necessary to start the process afresh in May 2009 (see paragraph 24 of its Reasons) and (iii) this was not less favourable treatment by reason of his protected act (see paragraphs 26-29).

The Issues before the ET

13. The issues for the current Employment Tribunal were defined at a case management discussion held by Employment Judge Carstairs on 14 December 2011.

14. Once these issues had been defined the Respondent took a point that some of them were covered by the earlier Employment Tribunal proceedings, relying on the doctrines of issue estoppel and abuse of process. In two respects the Claimant conceded that his claim was caught by issue estoppel. In other respects he did not make concessions.

15. This matter was considered by the Employment Tribunal on the first day of the hearing. The Employment Tribunal took a decision as regards issue estoppel: we will come to this in a moment. The Employment Tribunal did not take a decision as regards abuse of process: it proceeded to hear evidence and argument except in respect of that which it regarded as already decided under the doctrine of issue estoppel.

16. The reason for dismissal had been given by the Respondent as capability. The Employment Tribunal discussed this with the parties and informed the parties that it was minded to find the reason to be "some other substantial reason": see section 98(2) of the **Employment Rights Act 1996**.

17. At the end of submissions the Claimant withdrew some claims. The Employment Tribunal received written and oral submissions and reserved its Judgment.

18. On the question of unfair dismissal, the Employment Tribunal found that there was some other substantial reason for dismissal – namely sickness absences. It rejected various procedural points which the Claimant put forward. The flavour of its Reasons appears from two passages:

> **"The contentions put forward by the claimant on procedure have never considered the essential starting point of whether any departure from the guide was unfair. The claimant perhaps as a result of his illness does not see that and departure did not disadvantage him but served to benefit him. For example the claimant complains about his final written warning being extended three times. But for that and other concessions along the path of managing the absence the decision to dismiss the claimant strictly following the guide would almost certainly have occurred sooner. The tribunal finds that all the departures from the exact sequence set out by the guide were made with the best of intentions and the claimant's well being in mind. The tribunal is entirely satisfied that those making the decisions were solely concerned with reducing the claimant's absences, getting him back to work at a satisfactory level, and consequently making the claimant content in the work place. The Tribunal finds that there was no failure on the part of the respondent in terms of the procedures followed."**
>
> **...**

> **The Tribunal has considered pursuant to** *Farrant v the Woodroffe School* **[1998] IRLR 176 the essential question of whether the respondent acted reasonably in dismissing the claimant. If anything the claimant has raised could be described as an error it is only relevant to the question but is not conclusive. The Tribunal has only to look at the claimant's schedule of absences (p360) to conclude the respondent acted reasonably. The level was unsustainable in running the section."**

19. On the question of disability discrimination, the Claimant had evidently made a concession that if the unfair dismissal claim failed, the separate claim under the **Equality Act** would also fail. The Employment Tribunal said, nevertheless, that it had considered the matter independently and the claim failed. The Employment Tribunal, in the light of the Claimant's indication, did not give any separate detailed reasons.

20. The Employment Tribunal was then left with a breach of contract claim, which it decided against the Claimant on the basis that, although the Respondent was in breach of contract by failing to pay him a sum for loss of pension benefits during his notice period, there was a set-off for overpayment of salary.

The Appeal

21. As we turn to consider the various grounds of appeal, we emphasise that the Employment Appeal Tribunal hears appeals only on points of law: see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this, the Employment Appeal Tribunal is concerned to see whether the Employment Tribunal has applied correct legal principles, complied with its duty to give reasons, and reached findings and conclusions which are supportable: that is to say, not perverse, if the correct legal principles are applied.

22. We will first say a word about grounds 1, 5, and 8, which have a common theme. We will take the remaining grounds in the order which the Claimant has taken them in his Skeleton Argument.

Concise Statement of the Law (Grounds 1, 5 and 8)

23. Three grounds of appeal (grounds 1, 5 and 8) concern the omission of the Employment Tribunal to set out a concise statement of the law. Ground 1 concerns the law applicable to breach of contract including set-off. Ground 5 concerns issue estoppel. Ground 8 concerns abuse of process.

24. The same point could be made concerning every aspect of the Employment Tribunal's reasoning. There is no concise statement of the law relating to disability discrimination, and such statement of the law of unfair dismissal as can be found in the Reasons comes in the context of dealing with particular cases and submissions.

25. The Reasons should have contained a concise statement of the applicable law. The **Employment Tribunal Rules of Procedure 2004** required it: see Rule 30(6)(d). The **Employment Tribunal Rules of Procedure 2013**, now applicable to Employment Tribunals, still require that in the case of a Judgment, the Reasons should "concisely identify the relevant law": see Rule 62(5).

26. Even before the 2004 Rules, the law set minimum standards for the reasons which an Employment Tribunal must produce. Thus, in **Meek v City of Birmingham DC** [1987] IRLR 250 Bingham LJ stated that, although Tribunals are not required to create an elaborate formalistic product of refined legal draftsmanship", their Reasons should:

> **"...contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises..."**

27. Failure to meet the requirement of providing a concise statement of the law is an error of law: see **Greenwood v NWF Retail Ltd** [2011] ICR 896 at paragraphs 49-63, especially paragraph 51. It is, at the very least, a procedural irregularity. But failure to provide such a statement does not necessarily mean that an appeal must be allowed. Even if Rule 30(6)(d) has not been adhered to, there may be substantial compliance with the duty to give reasons, and the **Meek** test continues to be of fundamental importance in deciding this: see **Greenwood** at paragraphs 62-63. So we would not allow the appeal merely because of the lack of a concise statement of the law if it is otherwise apparent from the Employment Tribunal's reasoning what law it applied and how it applied it to the facts in reaching its conclusion. Nor would we allow the appeal if, on the findings of the Employment Tribunal, a conclusion was inevitable upon the correct application of the law: see most recently **Jafri v Lincoln College** [2014] ICR 920 at paragraphs 21-23 and 45, followed in **Burrell v Micheldever Tyre Services Ltd** [2014] ICR 935 at paragraph 19. Mr Bertram on behalf of the Respondent submitted that the Employment Tribunal's Reasons in respect of each ground of appeal could be upheld in one or both of these ways. With those questions in mind we will now turn to the remaining grounds of appeal.

Issue Estoppel (Grounds 7 and 8)

28. Two grounds in the Notice of Appeal concern the Employment Tribunal's decision on the question of issue estoppel. The Claimant's case on this point may be summarized in three propositions. We will take them in turn.

29. The Claimant's first proposition is that he wished to challenge the validity of the warning, described in this Judgment as a final written warning, issued in May 2009. The issue had been set out in the case management order:

> **"3.2.2 The extension of the first written warning was never reviewed so that the claimant was never told whether or not he had achieved the terms of the first written warning."**

Moreover he had put in his Skeleton Argument as follows:

> **"It is submitted that the issue of a formal trial period, with no review of the previous warning extension and no demonstrable fairness with regard to the ACAS Code of Practice, invalidates all subsequent actions under the MAP. Consequently the warning, associated with the formal trial period, which influenced dismissal was not valid."**

30. This proposition we accept. Subject to the question whether the argument was foreclosed by issue estoppel or abuse of process, the Claimant was entitled to argue the propriety of the final written warning.

31. The Claimant's second proposition is that the Employment Tribunal decided he could not argue about the propriety of the final written warning by reason of issue estoppel.

32. The Claimant had put forward this point in his Notice of Appeal and Skeleton Argument. However, as we pre-read the papers for the hearing, we could not understand why the Claimant was saying that the Employment Tribunal had decided he could not argue these points. It appeared to us that the Employment Tribunal's Decision was more focussed, and was to be found in paragraph 5 of its Reasons. Paragraph 5 appears to say that the Claimant could not challenge three specific points:

(a) The fact that the MAP was suspended (as opposed to discontinued) between 18 July 2008 and 13 May 2009 (paragraph 5.1 of its Reasons)

(b) That it was not a breach of the MAP to suspend its operation between 18 July 2008 and 13 May 2009 (paragraph 5.2 of its Reasons)

(c) That it was not a breach of the MAP to impose a monitoring period of six months on 18 October 2007 (paragraph 5.5 of its Reasons)

33. The first and second of these points were plainly decided by the Hollow Two Employment Tribunal. The final point, which relates specifically to the length of the monitoring period imposed, appears to us to have been decided by the Hollow One Employment Tribunal.

34. When we asked the Claimant why he thought the Employment Tribunal had prohibited him to make his points about the May 2009 final written warning he referred to paragraph 5.2 of the Employment Tribunal's Reasons. He told us that paragraph 5.2 did not accord with what the Employment Judge had announced on the first day of the hearing. He said that the Employment Judge had announced that he could not argue that imposition of the final written warning was improper.

35. When Mr Bertram understood the point the Claimant was making he told us that paragraph 5.2 of the Employment Tribunal's Reasons indeed seemed to differ from what the Employment Tribunal had announced on the first day of the hearing. He, Mr Bertram, had submitted that by reason of issue estoppel and/or abuse of process the Claimant was not permitted to assert three particular matters, one of which was that the imposition of his final written warning was improper; this had been set out in his written submissions; and his recollection was that the Employment Tribunal said it was these three matters which could not be argued.

36. It is remarkable, and in our experience very unusual, to find two parties, one an intelligent layman and the other specialist junior Counsel, agreeing with each other against the reasons of the Employment Tribunal about what was announced by the Employment Tribunal by way of ruling on the first day of the hearing. What the Claimant and Mr Bertram say derives

strong support from Mr Bertram's contemporaneous written submission (the parties being of the opinion that the Employment Tribunal stated that it accepted this written submission).

37. In most cases where there is a divergence between what the parties say occurred at the hearing and what the Employment Tribunal has recorded we would make an enquiry of the Employment Tribunal before reaching a conclusion. In this case however a substantial period has elapsed since Employment Tribunal hearing and we know that the Employment Judge, a fee-paid Judge who was a respected local solicitor, has since died. While we could enquire of the members we think it unlikely that they would have a clear recollection of an abstruse point two years ago; and we found what the Claimant and Mr Bertram said to be compelling. We think it is right to accept what they said to us. We therefore accept that the Claimant was told that he could not argue that the imposition of his final written warning was improper; and this was by reason of issue estoppel.

38. The Claimant's third proposition is that the Employment Tribunal erred in law in its determination of this issue. He says that the propriety of the final written warning was not an issue which it was necessary for the Hollow Two Employment Tribunal to decide; therefore the doctrine of issue estoppel was not applicable. He says in any event that it is impossible to see what law the Employment Tribunal applied or how it applied it.

39. Mr Bertram accepted that the Employment Tribunal did not set out the law or say how it applied it. He argued that the Employment Tribunal showed, in paragraph 9 of its Reasons, that despite anything it may have announced on the first day, it had actually considered the question of the 2009 warning and reached a proper conclusion upon it.

40. We have reached the conclusion that the Employment Tribunal's Judgment cannot stand. Our reasons are as follows.

41. Firstly, and most fundamentally, we do not think that the Hollow Two Employment Tribunal's Reasons gave rise to an issue estoppel relating to the final warning in May 2009 for the purposes of the unfair dismissal and disability discrimination claims which the Claimant was now bringing.

42. The doctrine of issue estoppel applies where "a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one party seeks to re-open that issue". See **Arnold v National Westminster Bank plc** [1991] 2 AC 93 at 105E.

43. Hollow Two had determined, as a matter of fact, that the process had been suspended rather than terminated in 2008. It had found that it was not "less favourable treatment" for the purposes of a victimisation claim to start the process again in 2009 – in other words it found that the Claimant would have been treated the same way whether or not he had previously asserted disability discrimination. These were the issues the Hollow Two Employment Tribunal determined.

44. But the claims which the Claimant now brought were significantly different. He wished to argue that the imposition of the final written warning without reviewing what went before and (he would say) in an unfair manner contributed to the overall conclusion that the dismissal was unfair or amounted to unfavourable treatment for the purposes of a claim of discrimination arising from disability. These were not the issues for the Hollow Two Employment Tribunal.

45. In the result we are satisfied that the Employment Tribunal foreclosed on the first day of the hearing an important issue which the Claimant was entitled to argue. It seems as though, by the time it came to prepare its reserved Judgment, the Employment Tribunal may have forgotten what its ruling had been on the first day. Certainly as regards unfair dismissal it seems to have given consideration to the final warning. But (as the parties told us and we accept) the case had been argued on the basis of the ruling on the first day. The Employment Tribunal, having ruled on issue estoppel, was required to adhere to its ruling and give reasons for it; or at the very least, if it had changed its mind, to inform the parties clearly that this was the position, give them an opportunity to address about its change of mind and the consequences and explain the position in its Reasons.

46. In summary, therefore, we accept that the Employment Tribunal erred in law in its ruling on the question of issue estoppel. The effect was to foreclose a significant element of the case which the Claimant wished to argue. The appeal must be allowed and the matter remitted for re-hearing by a freshly constituted Employment Tribunal. We do not think it is possible to be selective about the grounds which are remitted. The May 2009 final written warning was an integral part of the process and we do not think it possible to save the Employment Tribunal's Reasons on any aspect of those questions.

47. Since the case must be re-heard in any event, we can deal with the remaining grounds more briefly.

Failure to determine an issue (Ground 12)

48. Ground 12 concerns extensions which were made to trial period commencing on 21 September 2009 and 22 January 2010. These extensions were an issue: see paragraph 3.2.3

of the case management order. The Claimant submits that it was not dealt with. We disagree. It was acknowledged as an issue in paragraph 9 of the Employment Tribunal's Reasons and sufficiently addressed in the concluding section of that paragraph. However, since the matter is being remitted for re-hearing by a freshly constituted Employment Tribunal the issue will again be open.

Abuse of Process

49. As we have seen the Employment Tribunal held that the Claimant could not argue that the length of the monitoring period imposed in October 2007 was contrary to the MAP. That issue had already been decided. But it was not the only point the Claimant wished to make about the decision in October 2007. He wished to argue the wider point that he should never have received the first written warning at all. This was issue 3.1 and issue 3.2.1 defined by the case management order. The Respondent, however, argued that the wider point too was not open to the Claimant by reasons of the doctrines of issue estoppel and abuse of process.

50. The Employment Tribunal decided that it would be an abuse of process to argue the wider point. It said the following:

> **"4. The Tribunal has considered whether permitting the claimant to relitigate these matters now over 3 years after the decision amounts to an abuse of process as set out in** *Henderson v Henderson* **para 7 Foster, Court of Appeal. The Tribunal very much takes into account that this is not a case where an allegation could have been made and was not one where the allegation was made and for reasons best known to himself the claimant withdrew that element from the Tribunal not seeking a ruling. It would be inappropriate in 2012 to allow these matters to be raised again and in the Tribunal's view it would amount to an abuse of process so that the claimant cannot go behind the warning and monitoring period."**

51. The Claimant's argument on this part of the case can be summarized as follows. It is true that in Hollow One he had questioned the validity of the first written warning issued in October 2007. He intended to put his claim as a claim of disability-related discrimination. However, between submitting the ET1 and the hearing of the Claimant the House of Lords

decided **Malcolm v London Borough of Lewisham** [2008] 1 AC 1399 (25 June 2008). This rendered it impossible for him to put forward what had previously been understood to be a disability-related claim. So he withdrew it for good reason. This being so, on a broad merits-based Judgment (see **Johnson v Gore Wood and Co** [2002] 2 AC 1) it was not an abuse of the process of the court for him to relitigate the issue in the current proceedings. The Employment Tribunal did not deal with his argument, and it is impossible to see what law it applied and why it rejected his argument.

52. On behalf of the Respondent Mr Bertram argues that the Employment Tribunal sufficiently addressed the question of abuse of process and that in any event the Employment Tribunal went on to make findings which were not open to challenge.

53. In our judgement the Employment Tribunal did not address the abuse of process question adequately. The Claimant asserted that he had withdrawn his claim of disability-related discrimination for good reason, making reference to **Malcolm**. This assertion cannot be dismissed out of hand: **Malcolm** indeed made a disability-related claim difficult to sustain until section 15 of the **Equality Act 2010** reformed the law. The Employment Tribunal was not bound to accept the Claimant's assertion; but it was not sufficient to say that he withdrew the claim "for reasons best known to himself" when he had specifically put this reason forward. The Employment Tribunal was bound, at minimum, to say what it made of the reason given and why (in the light of that conclusion) it was an abuse of process. The Employment Tribunal did not give adequate reasons.

54. We appreciate that the Employment Tribunal went on to make findings concerning what occurred in 2007; but it made these findings as part of a determination of the Claimant's claim which was flawed for reasons we have already given.

55. On remission it is open to the Respondent to argue abuse of process grounds again. We should not, however, wish to give any encouragement to the Respondent to do so. These grounds added a layer of complexity to what should have been a relatively straightforward claim. We acknowledge that some points had been definitively determined at the Hollow One Employment Tribunal or the Hollow Two Employment Tribunal. On the other hand, the process as a whole was relevant to the Claimant's claim of unfair dismissal and perhaps also to his claim of disability discrimination. There was no question of these claims in themselves being an abuse of process. We very much doubt whether it was helpful to attempt to isolate certain aspects of the Claimant's argument and label them as an abuse of process.

Reason for Dismissal

56. The Respondent had put forward capability as the reason for dismissal. The Employment Tribunal eventually found that the reason for dismissal was "some other substantial reason", namely sickness absences.

57. The Claimant's ground 14, added by amendment at the Preliminary Hearing, is that the Employment Tribunal denied him the opportunity to address the reason for dismissal. The ground says that the Claimant:

> **"...has no recollection either of the Respondent putting forward some other substantial reason or of the Tribunal conveying its decision that this was the reason for dismissal. "**

58. This is, with respect to the Claimant, untenable. It is plain, and indeed the Claimant says in his Skeleton Argument, that the Employment Tribunal raised the matter prior to submissions.

He plainly had an opportunity to address the Employment Tribunal on this question. Indeed, in his closing submissions, he addressed the Employment Tribunal on the basis that the reason for dismissal was some other substantial reason.

59. Before us the Claimant put it rather differently. He said he would have cross-examined witnesses differently if he had realised that some other substantial reason would be the Employment Tribunal's finding. He says he withdrew some aspects of his case because the Employment Tribunal found this to be the reason.

60. On this part of the case Mr Bertram submits that the Employment Tribunal was entitled to label the dismissal "some other substantial reason"; and that the Claimant was not in any way disadvantaged by this course. Alternatively he relies on a cross-appeal and seeks to substitute a finding that the reason was related to capability.

61. Again, because the matter is being remitted in any event, we can deal with this ground of appeal quite briefly. It can be a difficult question whether to classify a dismissal following repeated periods of absence as a capability dismissal or a "some other substantial reason" dismissal. The **Employment Rights Act 1996** contains a definition of "capability": it means "capability assessed by reference to skill, aptitude, health or any other physical or mental quality." If these considerations are to the forefront of the employer's mind when dismissing an employee, then the reason for dismissal will relate to the capability of the employee for performing work of the kind which he was employed by the employer to do: see section 98(2)(a). But it is not unusual, particularly in cases of repeated short-term absence for a variety of reasons, for the recurring absences themselves to be the reason for dismissal, the

operation of an attendance policy having been triggered: see **Wilson v Post Office** [2000] IRLR 834. In that case the better label may be "some other substantial reason".

62. In this case the Employment Tribunal afforded an opportunity to the parties to address it on this question and decided that the reason for dismissal was properly classified as "some other substantial reason". We do not accept that this was procedurally unfair or caused any practical difficulty for the parties. We do not accept that the Claimant would have cross-examined witnesses differently nor do we accept that he made any concession or refrained from putting forward argument because of the classification. We should say, however, that we do not regard the Claimant as having withdrawn any claim for the purposes of Rule 20 of the **Employment Tribunal Rules of Procedure 2004**.

63. It follows that we would not have allowed the appeal on this ground. But we also make it clear that it is for the Employment Tribunal on remission to consider the case afresh and reach its own determination as to the reason for dismissal, having given both parties an opportunity to address it. It seems to us (though this is a matter for the Employment Tribunal to consider) that in this case it is largely a question of labelling.

Grounds 10 and 13

64. Under these grounds the Claimant criticised the Employment Tribunal for giving insufficient reasons in respect of an issue relating to occupational health advice (ground 10) and for failing to understand what he would describe as a critical feature of the Respondent's new policy (ground 13). We consider that the Employment Tribunal's Reasons were sufficient, and we are not persuaded that the Employment Tribunal failed to understand the features of the policies concerned. But these are matters which are open for argument on the remitted hearing.

Breach of Contract (Grounds 2 and 3)

65. The Employment Tribunal found that the Claimant had a valid claim for breach of contract because the Respondent had not paid him a figure for loss of pension rights during his notice period. This figure appears to have been agreed in the net sum of £1170.29.

66. The Respondent had raised a counterclaim in its amended ET3 for an amount of overpaid wages which would exceed the sum of £1170.29. However the counterclaim was not brought within the time limit and the Employment Tribunal found that it would have been reasonably practicable to do so. Hence the Employment Tribunal found the counterclaim to be out of time. There is no cross-appeal against this finding.

67. The Employment Tribunal allowed the Respondent's claim to recover overpayment of wages to be introduced as a set-off to the Claimant's breach of contract claim. The Claimant challenges this conclusion on three grounds.

68. Firstly he argues that in principle the Employment Tribunal had no jurisdiction to deal with any question of set-off. He says that a set-off is available only where rules of procedure of the court in which the Claimant brings his action allow a set-off to be pleaded: see *Halsbury's Laws 5th Edition*, paragraph 667. It would, he submits, render the time limit for bringing a counterclaim nugatory if a set-off could be relied upon. Parliament could not have intended that a claim for set-off be made in these circumstances.

69. We reject this argument. The power to confer jurisdiction for breach of contract on Employment Tribunals is now found in section 3 of the **Employment Tribunals Act 1996**. The jurisdiction is exercisable by Employment Tribunals concurrently with any court in England and Wales or in Scotland which has jurisdiction to hear and determine an action in respect of the claim (see section 3(4)). Jurisdiction is conferred upon Employment Tribunals in England and Wales by the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**.

70. The purpose of these provisions was to allow certain contract claims to be litigated in the Employment Tribunal as a matter of practical convenience. In our judgment it is plain that Parliament intended the law of contract to work in the same way before an Employment Tribunal as it works before the civil courts. There is nothing in the 1994 Order, or in any Employment Tribunal Rules of Procedure, which restricts the grounds of defence: in our judgment any defence, including a set-off, which would be available in the civil courts is available in the Employment Tribunal. To our mind clear words would be required to deprive an employer of a defence which would be available in the civil courts. Nothing in the legislation suggests that this was the intention of Parliament.

71. We therefore conclude that an employer is not required to bring an employer's contract claim in order to resist payment of an employee's contract claim on grounds of set-off.

72. Secondly, the Claimant argues that the Respondent's claim was not capable of being set off. He submits that a claim is only capable of being set off if it is either liquidated or ascertainable with certainty and due and payable. He submits that if the employee disputes a debt the employer cannot set it off.

73. We reject this submission. "Ascertainable with certainty" does not mean undisputed. If there is a dispute the court or Employment Tribunal may ascertain the amount of a debt. It has long been the law that a debt may be raised by way of set-off if it is sufficiently closely connected with the claim so that it would be unjust to require the defendant to pay the claim without deduction. Here the claims were closely connected claims arising out of the Claimant's employment and outstanding at the time his dismissal took effect. In principle there could be a set-off.

74. Thirdly, the Claimant argues that the Employment Tribunal did not make any finding that the Respondent's claim to recovery of the overpayment was in fact a good claim. We were taken to the way in which this arose at the hearing. On behalf of the Respondent a witness, Miss Bowdery, was permitted to rely on a supplemental witness statement. The witness statement gave the figure of the overpayment, but also made it plain that the Claimant had not accepted that the overpayment was due. There appears to have been no cross-examination on this question either way, perhaps because of the manner in which the figures were adduced at the Employment Tribunal.

75. The Employment Tribunal made no finding concerning Miss Bowdery's evidence. Nothing in its written reasons indicates why it made no finding. There seem to us to be two possibilities. Either the Employment Tribunal thought the figure was admitted, in which case we think it was wrong. Or the Employment Tribunal intended to make a finding and omitted to do so. Either way the result is unsatisfactory: it is impossible to be sure how the Employment Tribunal decided the point. The appeal is accordingly allowed on this ground also; and the issue will be remitted for determination by the freshly constituted Tribunal.