Appeal No. UKEAT/0489/13/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 May 2014

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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SILICONE ALTIMEX LTD — APPELLANT

MR D MARCH — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR DOMINIC BAYNE<br>(of Counsel)<br>Instructed by:<br>Freeth Cartwright LLP<br>Cumberland Court<br>80 Mount Street<br>Nottingham<br>NG1 6HH |
| For the Respondent | DEBARRED |

**SUMMARY**

**UNFAIR DISMISSAL**

**Constructive dismissal**

**Contributory fault**

The Employment Judge found that the employer/Appellant had acted in repudiatory breach of contract in the way they had dealt with a disciplinary hearing which resulted in the Claimant's dismissal. The Claimant had appealed against the dismissal and made it clear in the course of the appeal hearing that he wanted his job back. His appeal succeeded and the Appellant said he was reinstated but he resigned claiming constructive unfair dismissal. The EJ rejected the Appellant's affirmation defence.

The EAT upheld the appeal on the grounds:

(1) that the EJ had not considered whether the Claimant had resigned "in response to" the breach of contract;

(2) that the EJ had wrongly concluded that in the circumstances the Claimant had not affirmed the contract of employment in relation to the breach on the basis of authorities which were not relevant;

(3) that the EJ had wrongly left out various aspects of the Claimant's conduct in considering contributory fault having found that they were part of the s98(1) ERA reason for the dismissal (albeit constructive).

Although the merits indicated very strongly that the Claimant's claim would fail, since the EJ had not addressed the reason for the resignation the EAT could not exclude the possibility that the Claimant had resigned (and been entitled to resign) in response to something the Appellant had done after the hearing of the appeal and the case therefore had to be remitted for re-hearing before a fresh ET.

**HIS HONOUR JUDGE SHANKS**

1. This is an appeal by the employers against a decision of Employment Judge Walker in Nottingham, sent out on 6 March 2013, whereby he found the Claimant to have been unfairly constructively dismissed and that by reason of contributory fault his compensation would be reduced by a third. The Claimant, who is the Respondent to this appeal, has been debarred from participating in the appeal any further, so he is not represented here today. Mr Dominic Bayne has represented the Appellant, as he did at the original hearing.

2. The Claimant worked as a Clean Room General Operator for the employer from February 2010. On 6 July 2011 he suffered an injury at work, which was the subject of an on-going personal injury claim. It was his case before the Tribunal that everything that happened to him at the hands of the employer thereafter was the result of that personal injury claim. The Tribunal found, at paragraph 9 of their judgment, that there was no evidence that his injury had any bearing upon the treatment he received and the Tribunal Judge expressly rejected such a finding.

3. On 12 December 2011 he was given a verbal warning for poor attendance, lateness and a poor attitude.

4. On 2 February 2012 he made a very aggressive attack on his employer on his Facebook page. The Tribunal found that the comments he made on the face of it might well have merited summary dismissal, but he was given a first written warning following a disciplinary hearing.

5. During the week commencing 21 May 2012 the Claimant did not attend work at all. He wrote in on a number of occasions saying that he had childcare issues. He was called to a

disciplinary meeting on 28 May concerning his poor attendance. At that hearing he produced a doctor's certificate saying that he had not been fit to work the week before as a consequence of a viral illness.

6. Mr Davis, who conducted the hearing, found that his timekeeping was such that a further disciplinary sanction should happen and, in respect of his timekeeping during the week, he was given a final written warning. But, following the first disciplinary hearing, he convened another one immediately afterwards on the same day, 28 May 2012. That second hearing related to the provision of the letter from the doctor, suggesting that a viral illness was the cause of his not attending at work. If the doctor's certificate was correct, the reasons given during the course of the week, which related to childcare, would not be correct and on that basis Mr Davis decided that he should be issued with a further written warning for giving misleading reasons during the course of the week. That sanction, following immediately from the final written warning, led to his dismissal. That was set out in a letter the following day, 29 May 2012.

7. The Claimant appealed against that disciplinary hearing among other things on the basis that it had been unfairly conducted in that the second hearing had immediately followed on from the first and that the final written warning given after the first had somehow influenced the outcome of the second. That conduct, namely the way the hearings were conducted on 28 May 2012, was found by the Employment Judge at paragraph 35 of the judgment to amount, in effect, to a repudiatory breach of the Claimant's employment contract. That was the only repudiatory breach that the Employment Judge found to have been committed.

8. As I have just said, the Claimant appealed against the outcome of the hearings on 28 May 2012, and the appeal was heard on 22 June 2012. At the hearing, and in particular at the end of the hearing, the Claimant made it clear that the purpose of the appeal was that he wanted to

have his job back and was ready to go back to work and he did not reserve his position in any way.

9. The outcome of the appeal was set out in a letter of 28 June 2012, which is at pages 45 and 46 of my bundle. But before that letter came to the attention of the Claimant or his solicitors they wrote on his behalf an e-mail on the same day in these terms:

> **"Dear Sirs,**
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> **As you are aware, my client has been offered reinstatement verbally on the phone by Mr Barker** [that was the gentleman who held the appeal hearing]**. However he was told that the final written warning that was issued would remain in force.**
>
> **His appeal has been based on the conduct of the company in victimising him since he made a complaint re personal injury against the company.**
>
> **He complained about the procedure leading up to his dismissal, he complained about the unfair procedure adopted by you as his employer he has also received his P45 with the minutes of the meeting he attended today.**
>
> **He has lost trust and confidence in the company and notes the companies refusal to recognise that the warnings were issued unfairly and they have not been removed.**
>
> **He was also told that as he was reinstated he was not dismissed in the first place. That is wrong in law he was dismissed the dismissal was unfair we say and the procedure was flawed, the motive behind this was the fact he raised a claim for personal injury.**
>
> **We could consider that he can reasonably reject your offer and this is self evident because the final written warning has not been removed.**
>
> **Having already been victimised by the company he has no confidence that the company will not simply find another reason to dismiss using the final written warning that was unfairly issued.**
>
> **Having now completed the appeal process all future contact with my client MUST be through his legal representatives. He will not accept any further phone calls and please ensure that he does not receive any."**

The Employment Judge did not make any finding about the date of the constructive dismissal, but it looks as if the solicitors' email was probably the Claimant's resignation.

10. As I say, on the same day as the email there was a letter from the employers, outlining the outcome of the appeal hearing, which made it clear that the appeal would be upheld, that he would be expected to return to work on Monday 2 July 2012 and that he would be paid any back pay. The letter also dealt with the question of warnings, and it said that the conduct

warning (that is the Facebook matter) and the sickness absence warnings would be dealt with in some way separately, and that the warning in relation to sickness absence would no longer be a final written warning but would be a first written warning. Unfortunately, as I have said, that letter must have come to the Claimant's attention after the e-mail from the solicitors, and the Employment Judge makes no finding about what was said about the status of the various warnings in the conversation on the phone with Mr Barker which is referred to in the solicitors' email.

11. The Employment Judge, as I have said, found that the way the second disciplinary hearing on 28 May 2012 was conducted was a repudiatory breach of contract. Unfortunately he made no finding as to exactly why the Claimant chose to resign, and he rejected a submission that by appealing and by saying that he wished to be reinstated he had affirmed the contract, which would have meant that he was no longer entitled to rely on the way that the second disciplinary hearing had been conducted as ground for resigning.

12. The appeal is really put on three grounds: first, that although the Employment Judge found a repudiatory breach of contract, he failed to consider whether the Claimant's resignation was in response to it; secondly, that the Employment Judge was wrong to find that the Claimant had not affirmed the contract of employment before accepting the employer's repudiation; and third, that the Employment Judge ignored various elements of the Claimant's conduct which he should have taken into account when considering the question of contributory fault and the amount of deduction.

13. So far as the first point is concerned, it is clearly right that there is just no analysis of why the Claimant resigned and, in particular, whether his resignation was in response to the one repudiatory breach found by the Employment Judge.

14. So far as the second ground of appeal is concerned, the Employment Judge rejected the affirmation point at paragraph 38 in his judgment on the basis of **Bournemouth University Higher Education Corporation v Buckland** [2010] IRLR 445, **WE Cox Toner (International) Ltd v Crook** [1981] IRLR 443, and **Marriott v Oxford Cooperative Society** [1970] 1 QB 196. I am quite satisfied that those cases were not directly relevant to the issue. It seems to me clear that if an employee appeals against a dismissal on the basis that the disciplinary hearing has been unfair and he expressly says that he wants his job back during the appeal proceedings without reservation, he affirms the contract and cannot later rely on the unfairness of the original dismissal process. I am therefore satisfied that the Employment Judge was also wrong in the affirmation point, at least so far as it related to the one repudiatory breach that he had found.

15. On the contribution point, I have been shown paragraph 37 of the judgment, which says that, for the purposes of section 98(1) of the **Employment Rights Act**, the Judge found that the reason for the dismissal was poor attendance, timekeeping and attitude, the Facebook entry, and what is described as "misinformation". That seems to me to cover all the behaviour that led to the various warnings to which I have referred. When the Tribunal Judge came to deal with contribution at paragraph 41, he says that he is not taking account of the actions taken in relation to attendance and the Facebook issue, because they did not themselves amount to repudiatory conduct and therefore did not entitle the Claimant to resign. The only head of conduct he takes into account the "misinformation", which was the calling in and giving a reason about his childcare responsibilities in the week of 21 May 2012. It seems to me that those two findings cannot sit together and that the finding on contribution must also be set aside.

16. So, on all three grounds I allow the appeal. The question is, does the case have to be remitted to the Employment Tribunal, thereby possibly enabling the Claimant to have another go? I have had regard to the decision of **Jafri v Lincoln College** [2014] EWCA Civ 449, a recent decision of the Court of Appeal, and in particular the judgment of Laws LJ, who makes it clear that the EAT must not make any factual assessment for itself or any judgment on the merits of the case, and that a result different to that reached by the Employment Tribunal can only be based on the Tribunal's findings of fact supplemented by undisputed or undisputable facts and that otherwise there must be a remittal.

17. There are a number of possibly relevant points on which the Tribunal Judge makes no finding, in particular the reason for and date of the Claimant's resignation, what was said during the conversation with Mr Barker following the appeal hearing and other points made in the email sent on 28 June 2012; it is conceivable, though I would acknowledge most unlikely, that a case on constructive dismissal could still be advanced if such findings were made. Mr Bayne says that any suggestion that the Claimant was entitled to resign after the appeal hearing would be hopeless. He reminds me that the whole motivation argument that was put by the Claimant was rejected. He makes the point that in fact, when one looks at the letter of 28 June 2012, the final written warning was removed: the problem with that submission is that if the e-mail did amount to a resignation based on something that had been said verbally by Mr Barker, then whatever the letter of 28 June 2012 said would not make any difference.

18. So although I have the greatest of sympathy with the Appellant's position, I think, in the light of the **Jafri** decision, it would be dangerous to make a finding myself dismissing the claim and that the matter will have to be remitted to a different Tribunal. If it is any consolation, it seems unlikely, given the Claimant's response to the appeal, that he will take matters further.