Appeal No. UKEAT/0038/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 May 2014
Judgment handed down on 21 May 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(SITTING ALONE)

MR M COCKRAM APPELLANT

AIR PRODUCTS PLC RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL TATTON BROWN (of Counsel) Instructed by: Stevens & Bolton LLP Wey House Farnham Road Guildford Surrey GU1 4YD
For the Respondent	MR ANDREW BLAKE (of Counsel) Instructed by: Freshfields Bruckhaus Deringe LLP 65 Fleet Street London EC4Y 1HT

SUMMARY

UNFAIR DISMISSAL; CONSTRUCTIVE DISMISSAL

1. This is an appeal against the judgment of Employment Judge Baron sitting at London South promulgated on September 2013. By that judgement, the Employment Judge struck out the Claimant's claim for unfair dismissal based on an alleged constructive dismissal, as having no reasonable prospect of success on the basis that the Claimant had affirmed the contract by giving seven months notice of termination following the respondent's alleged breach, in circumstances where he was contractually obliged to give only three months notice and the reason for giving seven months notice was "*for his own ends rather than any altruistic reason*".

2. Against that conclusion, the Claimant appeals raising a short question of law in relation to section 95 (1)(c) of the Employment Rights Act 1996; namely whether in circumstances where an employee resigns giving notice that exceeds the contractual minimum period of notice, the common law concept of affirmation has any applicability in the context of post resignation employment and if so how it is to be applied.

3. The parties are referred to as the Claimant and the Respondent as they were before the Employment Tribunal. The Respondent was represented by Mr Andrew Blake of counsel both before the Employment Tribunal and on this appeal; the Claimant by Mr Daniel Tatton Brown, of counsel. Both counsel have presented their cases clearly and concisely, and I am grateful to them both.

MRS JUSTICE SIMLER DBE

FACTS

1. The background facts so far as relevant to this appeal, can be summarised shortly.

2. The Claimant was employed by the Respondent in a senior position as Director of Business Information earning a substantial salary. His employment commenced in August 1988. His contract required him to give three months' notice to terminate his employment.

3. On 30 May 2012 the Claimant complained about comments made in a telephone meeting on 29 May 2012 by Tom Ward, his line manager. His complaint was treated as a grievance and investigated. There was a meeting to discuss that matter on 21 June 2012 and the grievance decision was sent to the Claimant the same day. The Claimant was unhappy with the grievance decision and appealed it on 28 June 2012. The appeal was heard on 6 July 2012 and the appeal decision was sent to the Claimant on 9 July 2012.

4. By letter dated 25 July 2012, addressed to Mr Ward, the Claimant resigned his employment. The tribunal cited the first two and last two paragraphs of that letter at paragraph 21 as follows:

> **"I have been requested by Air Products to re-engage fully with the EPR project team following a grievance hearing and the final outcome of the appeal which was delivered to me on 10 July 2012.**
> **Having carefully considered my position I regard your conduct on 29 May 2012 and the subsequent conduct of the company as being wholly unacceptable. This is so serious I do not believe I can carry on with the company and I am accordingly giving my notice which will expire on 28 February 2013. ….**
> **I believe this is a fundamental breach of the values of the company and its stated code of conduct resulting in my trust and confidence and resulting future in Air Products being destroyed.**
> **It is with regret and disappointment that I make this decision. I have no other work secured to enable me to leave immediately and I need to work for a reasonable period of time and it is for this reason only that I am giving notice."**

5. The Claimant's employment came to an end on 28th of February 2013 and he presented a claim to the tribunal on 24 May 2013 claiming that he was constructively unfairly dismissed, that he had been subjected to detrimental treatment because of having made protected disclosures, and that he had been subjected to unlawful age discrimination.

6. By an application dated 26 June 2013 the Respondent applied for a pre-hearing review to consider striking out the claim of constructive unfair dismissal or in the alternative, to make an order for a deposit as a condition of the Claimant being allowed to continue with the claim of unfair dismissal. The basis of the application was that the Claimant had waived any alleged breach by the Respondent, by reason of having given notice of seven months, a period that was significantly longer than the notice period required by his contract.

7. The preliminary hearing took place on 15 August 2013. The Claimant gave evidence and was cross examined; witness statements were provided on behalf of the Respondent from Caroline France and Diane Patterson but neither gave oral evidence. The only factual issue within the scope of the hearing as the tribunal determined it, related to the giving of long notice.

8. By the judgment of the tribunal, the Employment Judge held as follows:

(i) at paragraph 27: the reason the Claimant gave much longer notice than contractually required to do was for his own financial reasons, and not to enable him to deal with the pension issue as he alleged in the course of the hearing.

(ii) The reason the Claimant gave longer notice than required is a relevant consideration.

(iii) The unfair dismissal claim should be struck out on the grounds that it had no reasonable prospect of success because:

(iv) s.95(1)(c) is "founded firmly on the rock of the common law of contract": see **Western Excavating v. Sharp**. It does not permit an employee to give any period of notice, whatever the length: paragraph 35.

(v) The Claimant gave long notice for his own ends rather than any altruistic reason and thereby affirmed the contract: paragraphs 37 and 38.

(vi) The cases relied upon by the Claimant in which it had been held that there was no affirmation of the contract could be distinguished: paragraph 37 and 38.

APPLICABLE LEGAL PRINCIPLES

9. As Sedley LJ elegantly put it in **Bournemouth University Corp v. Buckland** [2011] QB 323 at paragraph 19, modern employment law is a hybrid of contract and status achieved by grafting statutory protections to the stem of the common law contract. Accordingly every employee (with sufficient qualifying employment) has the right not to be unfairly dismissed afforded by section 94 of the Employment Rights Act 1996 ("ERA") and dismissal is exhaustively defined for the purposes of that statutory right by section 95 ERA. Under section 95(1)(c) ERA 1996 an employee is to be treated as dismissed if he or she:

> **"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."**

10. The Act does not set out the circumstances in which a constructive dismissal claim can be maintained. This is dealt with by the common law which requires a fundamental repudiatory breach of contract by the employer as discussed in the judgment of Lord Denning MR in **Western Excavating v. Sharp** [1978] QB 761 at 769 A to C:

> **"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."**

11. Faced with a repudiatory breach of contract by an employer, an employee has two options. He can accept the repudiation and resign with or without notice. Alternatively he can affirm the contract of employment and remain employed. In the latter case, once the contract has been affirmed, the employee loses the right to resign and claim unfair constructive dismissal.

12. In **Norwest Holst group Administration Ltd v. Harrison** [1985] ICR 668 the employee (whose contract was terminable on 12 months' notice) was required by his employer with effect from 1 July 1982 to cease to be a director and to change his place of work. He responded to this by letter headed "without prejudice" dated 17 June, stating that he regarded the employer's letter as terminating his contract of employment with effect from 30 June and wished to receive 12 months' salary and benefits in lieu of notice but was happy to have further discussions to achieve an amicable resolution. Seven days later the employer retracted their intention to remove his directorship. Later that day he informed them, in unequivocal terms, that he was accepting their threatened breach of contract of 14 June. Against that background, the Employment Appeal Tribunal and Court of Appeal held that the threatened breach was an anticipatory breach and could be withdrawn at any time before it had been unequivocally accepted. Since the employee's letter was not an unequivocal acceptance, the company could

withdraw the threatened breach and the employee was not to be treated as having been dismissed. At 683 E to F Sir Denys Buckley made the following (obiter) observation,

> **"there is, I think, another ground for saying that this letter cannot amount to an acceptance of the repudiation. The effect of an acceptance of an anticipatory repudiation must, in my view, be the immediate termination of the contract. By accepting repudiation, the innocent party elects to treat the contract as abrogated at the moment when he exercises his election. He cannot, in my judgement, affirm the contract for a limited time down to some future date and treat it as abrogated only from that future date."**

13. This approach represents the common law contractual approach: a party cannot affirm the contract for a limited period of time and then abrogate it on the expiry of that period of time at common law. At common law therefore, an employee wishing to resign and successfully claim constructive dismissal would have to resign without notice. To do otherwise would be to affirm that part of the contract covered by the period of notice, whilst disaffirming the rest in the sense of accepting the employer's repudiatory conduct as entitling the employee to bring the contract to an immediate end.

14. Section 95(1)(c) provides an express statutory exception to this principle by providing for termination of the contract by the employee *"with or without notice"*. In **Western Excavating v. Sharp** at 768E Lord Denning suggested that: "the words *'with or'* were inserted because it was realised that [paragraph 95(1)(c)] as enacted in 1965 left a gap. A man who was considerate enough to give notice was worse off than one who left without notice."

15. It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in **Bournemouth University Corporation v Buckland** [2011] QB 323 at para. 54 as follows:

> **"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."**

THE APPEAL

16. It is common ground that section 95(1)(c) ERA varies the common law contractual principles discussed above for the purposes of a statutory claim of unfair dismissal by giving an employee the right to resign on notice without being treated as having affirmed the contract.

17. The question raised on this appeal is what is the extent of that variation?

18. On behalf of the Claimant, Mr Tatton Brown argues that this variation has the effect of excluding the concept of affirmation following an employee's resignation. He argues that if at common law, giving notice of termination is inconsistent with electing to treat oneself as discharged from all obligations to perform the contract further, the fact that the employee is expressly permitted to do so by the statute indicates that he or she cannot be said to have lost the right to claim constructive dismissal by "*affirming*" the contract with a longer period of notice than that which the contract prescribed. So called post-resignation affirmation as a concept cannot be reconciled with the statutory language of s.95(1)(c) and there is no warrant for re-introducing a hybrid version of it. Accordingly he submits, there is no limit on the length of notice which an employee can give for s.95(1)(c) purposes. Both the period of notice served, no matter how long, and the conduct of the employee after resignation, are irrelevant to the

statutory test in s.95(1)(c) ERA. Section 95(1)(c) provides its own statutory code and there is no warrant in this code for limiting the notice period as the Tribunal found.

19. The Judge rejected that contention. In essence he concluded that there must be some limit on the length of notice that can be given, so that there must come a point where the employee will be treated as having affirmed the contract notwithstanding the entitlement to give notice under s.95(1)(c). The length of this period will depend upon the facts of the particular case and its context. In this case, the Judge held that this point had come on the facts and circumstances he found. Mr Blake, on behalf of the Respondent seeks to support that conclusion as his primary argument, but in the alternative, argues that an employee who knowingly gives notice longer than the contractual notice period will always be treated as affirming the contract of employment.

20. Mr Tatton Brown makes a number of criticisms of the reasoning of the Employment Judge. However, since the question raised on this appeal is a pure point of statutory construction, it is not necessary to consider that reasoning in any detail. If the Employment Judge was correct as a matter of law in his construction of s.95(1)(c), then subject to any question of perversity in his application of the statute to the facts of this case, the appeal must fail. Whilst the Claimant may be unhappy with those findings, it is rightly recognised on his behalf that there is simply no basis for an argument of perversity here.

21. In my judgment the proper approach to the question of construction raised on this appeal is as follows. Section 95(1)(c) must be read as a whole, taking account both of the fact that an employee is entitled to resign with notice and the words "*in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*". The circumstances

referred to include, but are not limited to, the actions of the employer said objectively to amount to a threatened or actual fundamental breach of contract. There is no dispute that they also include consideration of the reason for the employee's resignation and (as a matter of well established common law contractual principle) whether or not the employee has elected to resign or has affirmed the contract. Any such election if made must be clear and unequivocal.

22. Affirmation can take various forms, express or implied. Mere delay by itself is unlikely to amount to affirmation, but the case law establishes that the employee must not delay too long in deciding whether to accept the breach and resign, because if he delays too long, while deciding what to do, there may come a time when he will be taken to have affirmed the contract and to have lost the right to treat himself as discharged. Affirmation can be implied, for example, where the employee calls for further performance of the contract (see for example the facts of **W.E. Cox Toner (International) Limited v Crook** [1981] ICR 823) because in such circumstances his conduct is likely to be treated as consistent only with the continued existence of the contract.

23. However, whereas at common law the giving of any notice to terminate the contract would amount to affirmation of it, under s.95(1)(c), the fact of giving notice does not by itself constitute affirmation. This is a limited variation of the common law position to allow only for the giving of notice.

24. Accordingly, to satisfy the requirement that his resignation with or without notice is "*in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct*" the employee must not affirm the contract – whether by prolonged delay before resigning, by implication, by an equivocal election or by conduct that is consistent only with the

continued existence of the contract. Once it is accepted that the concept of affirmation remains relevant to s.95(1)(c) it is difficult to see any principled reason why a distinction should be drawn between pre-resignation affirmation or post-resignation affirmation, with the former being relevant but the latter being an excluded consideration. Although cases where findings of fact of post-resignation affirmation are likely to be rare since, of necessity in such a case, the employee will have communicated his resignation to the employer, there is nothing in the words of the statute that excludes consideration of this question in an appropriate case; and the addition of the words "with notice" do not have this effect.

25. There is nothing in the wording of this sub-section to indicate that the addition of the words "with notice" create a rigid rule of the sort suggested by the Claimant. The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright line or rigid rules. As Jacob LJ said in **Buckland** *"the law looks carefully at the facts before deciding whether there has really been an affirmation"* [54]. Similarly the statutory protection provided by the unfair dismissal scheme is also fact dependent. Within that legal framework there is no basis for inferring that s.95(1)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee resigns on notice and despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.

26. This approach gains some support from comments of the Court of Appeal in the **Buckland** case, albeit that this question was not the focus of the argument or the judgments, and the comments are obiter. At paragraph 55 reference was made by Jacob LJ to Professor Buckland's altruistic reason for giving long notice of his resignation in the face of his employer's repudiatory conduct (in that case because of his concern to avoid disruption to his students' studies). The reasons for giving long notice would be irrelevant on the Claimant's construction; the post-resignation conduct would have been an excluded consideration. Moreover, Jacob LJ referred with apparent approval to the fact that *"the tribunals below … held there had been no affirmation, either before or after the Vinney report."*

27. Nor am I persuaded that the legislative purpose of avoiding unfairness to employees reflected by the addition of the words *"with notice"* in s.95(1)(c) entails that post-resignation affirmation should be excluded as a concept, or that there should be no limit at all on the period of notice that an employee can give in these circumstances. Such an approach would lead to the position that an employee could give many years' notice irrespective of the contractual notice provision, while retaining the right to claim constructive unfair dismissal. This cannot have been intended.

28. Accordingly, for these reasons, I am satisfied that the issue of affirmation (whether pre or post resignation) is a concept capable of being considered under s. 95(1)(c) ERA. The nature and outcome of that consideration depends on all the circumstances of the case including where appropriate, the length of notice given by the innocent party (always recognising that notice is expressly permitted by the sub-section) in the face of an actual or threatened fundamental breach of contract, and the reasons for giving such notice. On this basis the Employment Judge was entitled to construe s.95(1)(c) as he did and no error of law has been established.

29. Having correctly interpreted that provision, the Employment Judge was also entitled to conclude that the Claimant affirmed the contract on the facts of this case. Having found as he did, that the Claimant gave seven months' notice (when his contract required only three months' notice) solely for his own financial reasons and rejected the Claimant's evidence to the contrary, the Judge was entitled to conclude that the Claimant had affirmed the contract of employment by providing services and receiving substantial remuneration in accordance with the contract for a period of seven months following the giving of notice.

30. In these circumstances, despite the persuasive submissions of Mr Tatton Brown, this appeal fails and is dismissed.