

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

At the Tribunal
On 8 May 2014

Before

HIS HONOUR JUDGE PETER CLARK

(SITTING ALONE)

MR CLUTCH AUTO CENTRES

APPELLANT

MR R BLAKEMORE

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MISS KIRSTY SWAN
(Solicitor)
MILS Solicitors
Canonteign House
Lower Ashton
Nr Exeter
Devon
EX6 7RH

For the Respondent

MR RICHARD BLAKEMORE
(The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL - Dismissal/ambiguous resignation

On the parties' pleaded cases the Claimant asserted that he had been dismissed by the Respondent, the Respondent that he had resigned. Both cases rejected by the Employment Tribunal, who found that the employment contract continued.

Respondent's appeal allowed. On the Claimant's case the employment had terminated. That was the basis of his claim of unfair dismissal. He could not resile from that position. **Gunton** and **Geys** considered.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. The Claimant, Mr Blakemore, lodged a form ET1 at the Leeds Employment Tribunal on 14 June 2013. That claim form was professionally drafted by his then representative, Amanda Bishop of Churchill Legal Expenses. In it he contended that he was employed by the Respondent, Mr Clutch Autocentres, from 12 June 2010 until its termination on 6 November 2012. He brought complaints of unfair dismissal, notice pay (wrongful dismissal), holiday pay, and outstanding wages.

The Background

2. In his Particulars of Complaint he averred that on 10 October 2012 he was signed off work by his General Practitioner for three weeks, suffering from anxiety and depression. He attended his workplace in Sheffield on 17 October in connection with his motor car which was parked there. He had a discussion with Mr Efthimiou, General Manager.

3. An issue arose over tools which the Claimant sought to remove from the premises and which he claimed belonged to him. The next day he returned with a friend. The Branch Manager, Mr West, would not permit him to remove the tools. On 27 October he received a form P45 from the Respondent, giving a leaving date of 18 October. On 6 November the Respondent wrote to him, claiming that he had resigned on 18 October, something which the Claimant disputed. He contended that he had been unfairly and wrongfully dismissed by the Respondent and was owed outstanding wages.

4. By their form ET3 the Respondent denied dismissing the Claimant and asserted that he had resigned from the employment on 18 October. Had he not resigned, they said, he would probably have been dismissed, following a disciplinary process, for verbal abuse to Mr Efthimiou on 17 October. The holiday pay claim was admitted in principle, and that part of the claim is no longer pursued.

5. The matter came on for hearing before a full Tribunal chaired by Employment Judge Brain, sitting at Sheffield on 7 May 2013. The Claimant represented himself and the Respondent was represented by Miss Amartey of Counsel.

6. The principal issue, as appears from the pleadings to which I have referred, was whether the Claimant resigned on 18 October, as the Respondent contended and the Claimant denied, or whether he was dismissed by the Respondent on 6 November, as the Claimant insisted and the Respondent denied. What is plain from that statement of the issues was that both parties accepted that the contract of employment had terminated on or before 6 November 2012. The Tribunal's Judgment is dated 20 May 2013. Written Reasons for that Judgment were provided on 18 June.

7. Having made their findings of fact, the Tribunal rejected both parties' contentions. They accepted first that the Claimant had not resigned on 18 October as the Respondent would have it (see paragraph 38) and secondly that the Claimant was not dismissed by the Respondent on 6 November, as he asserted (see paragraph 31).

8. The claim for sick pay failed for the reasons given at paragraph 46. There is no appeal or cross-appeal against any of those findings.

The Employment Tribunal Decision

9. The Respondent's appeal now before me arises out of the purported declaration by the Tribunal (Judgment, paragraph 2) that the Claimant remains an employee of the Respondent, he having been found not to have resigned in October 2012 or to have been dismissed by the Respondent.

10. The position is stated in the Tribunal's Reasons at paragraph 45 in this way:

"It follows, therefore, that the Claimant did not resign his position with the Respondent. As we have rejected the Claimant's case that the Respondent dismissed him, it follows that he remains an employee of the Respondent."

And at paragraph 48 the Tribunal added:

"The Claimant's Solicitor did not include a complaint that the Claimant has suffered an unlawful deduction of wages after 6th November 2012 by way of a claim in the alternative should the unfair dismissal and wrongful dismissal claims fail. Ms Amartey accepted that the result of the Tribunal's finding is that the Claimant remains an employee of the Respondent. The Tribunal urges the parties to seek to resolve matters between them in order to avoid the Claimant needing to present a second complaint to the Tribunal in relation to any monies owed to him for the period after 31st October 2012."

11. I should add for completeness that Mr Blakemore helpfully told me this morning that he had successive sick notes, finally terminating on 29 January 2013.

The Appeal

12. The appeal first came before me on the paper sift. By an order dated 24 September 13 I put to the ET, under the Burns-Barke procedure, the question as to whether the parties were invited to make submissions to the Tribunal as to whether the employment continued to the date of hearing, as the Tribunal found. The answer from the Employment Judge, dated 21 October, by reference to the Tribunal's notes of evidence, was that during the Respondent Counsel's (closing) submissions the Employment Judge said:

"...if we were to find that he (the Claimant) had neither resigned nor been dismissed, you would have a problem."

13. In the light of that somewhat enigmatic response I then directed a Full Hearing of the appeal by order dated 11 December 2013, applying the bias procedure under what is now paragraph 13 of the EAT Practice Direction 2013 in relation to the third ground of appeal. As a result I have an affidavit from Miss Amartey dated 2 January 2014; written comments from Employment Judge Brain and one lay member; and an affidavit from the Claimant dated 18 March 2014.

The Respondent's Case

14. The appeal raises three grounds: first, that the Tribunal misdirected themselves in law in concluding that the Claimant remained an employee of the Respondent when there was no dispute between the parties that his employment had terminated; secondly, that that finding was perverse and thirdly that the Tribunal was guilty of apparent bias and/or improper conduct in suggesting that the Claimant had a fresh claim for arrears of wages after 1 November 2012 in light of their finding that he remained an employee after that date.

15. Having read the papers in advance of this hearing, it seemed to me that the real question, potentially, was one which had not thus far been considered, namely what was the effect of the Claimant commencing proceedings in the ET for unfair dismissal/wrongful dismissal on the continuation of the employment contract, on the premise that he had neither resigned nor been dismissed by the Respondent on or before 6 November 2012. I put that question to both parties two days before this hearing and referred them to the relevant passage in *Harvey* and particularly to the majority decision of the Court of Appeal in **Gunton v Richmond-upon-Thames LBC** [1980] IRLR 321, considered by the Supreme Court in

Société Générale, London Branch v Geys [2013] IRLR 122. I then invited submissions on that question this morning.

16. Miss Swan's answer on behalf of the Respondent was that, as a matter of law, the contract of employment came to an end at the latest when the Claimant lodged a claim form ET1 at the Tribunal complaining of both unfair dismissal and wrongful dismissal with an effective date of termination of 6 November 2012. It is axiomatic that there can be no claim for unfair or wrongful dismissal without a dismissal. Adopting the so-called elective theory as opposed to the automatic termination theory, discussed in **Gunton** and in **Geys**, the Claimant accepted the purported repudiatory breach of contract, dismissal without a disciplinary hearing, which on his case was apparent from the Respondent's letter of 6 November, summarized at paragraph 27 of the Reasons. She relied on the observations of Buckley LJ at paragraphs 32-33 of **Gunton**; as to the qualification expressed by Lord Wilson at paragraph 92 of **Geys**, it should be remembered that Mr Geys wished to assert that his contract remained alive for the purposes of qualifying for a substantial bonus payment. That is quite different from this case where the Claimant relied on termination by the employer to found both his unfair and wrongful dismissal claims.

17. In response, Mr Blakemore told me that this ET1 was formulated as it was following advice from ACAS and assistance from his household legal expenses insurer. As he told me, he is more of a spanner man than a lawyer. I entirely accept that.

18. However, both parties went into the Tribunal hearing on 7 May 2013 on the basis that the employment relationship had ended; the question for the Tribunal was whether that termination was by way of dismissal by the Respondent (constructive dismissal not being alleged). The

Tribunal rejected that proposition. That was the end of the case, subject to the sick pay point considered at paragraph 46.

Conclusions

19. I accept the submission of Miss Swan. Applying **Gunton** and **Geys**, the contract ended, at the Claimant's election, on 6 November 2012. Indeed Mr Blakemore, whilst asserting, in line with the Tribunal's apparent declaration, that he is still employed by the Respondent (as to which, any doubt was removed by the Respondent's letter of 15 May 2013 following the Tribunal hearing to which I have been referred) nonetheless, since we all have to make a living, he is now working on a self-employed basis; again, inconsistent with a continuing contract of employment with the Respondent: see **Gunton**, paragraph 31, per Buckley LJ.

20. Thus, turning to the three Grounds of Appeal: I uphold the first ground; on the Claimant's pleaded case the employment ended on 6 November 2012. He cannot later resile from that position. It is therefore unnecessary to consider the perversity ground (2). Finally, the procedural question raised by ground (3). I accept that it may be appropriate in certain circumstances for an ET to explain, particularly to a litigant in person, the effect of their decision. What is not permissible is to offer an opinion on an issue not raised by the parties, particularly where, in my judgement, that opinion is wrong.

21. The appeal is allowed. For the avoidance of doubt the declaration at paragraph 2 of the Tribunal's Judgment, that the Claimant remains an employee of the Respondent, is set aside. The Claimant's claims stand dismissed. In the event, Mr Blakemore tells me, he has not brought fresh proceedings against the Respondent on the basis of the Tribunal's opinion as to his continued employment.