Appeal No. UKEAT/0304/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 December 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS S SALMON APPELLANT

(1) CASTLEBECK CARE (TEESDALE) LIMITED (IN ADMINISTRATION)
(2) DANSHELL HEALTHCARE LIMITED AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NATHANIEL CAIDEN (of Counsel) Instructed by: Royal College of Nursing Legal Services Lyndon House 58-62 Hagley Road Birmingham West Midlands B16 8PE
For the Respondents	MISS KATHERINE REECE (Representative)

SUMMARY

TRANSFER OF UNDERTAKINGS

UNFAIR DISMISSAL

The Claimant was dismissed prior to the transfer of the undertaking in which she worked. An appeal against that Decision was held by the Transferee. The outcome of the appeal was that it was successful. The Employment Tribunal held that the decision taken on the appeal hearing could not be effective as such unless and until there was (a) a decision to reinstate the employee, as well as to allow the appeal and (b) this had been communicated to the employee, but that neither had occurred. **Held**. There was no need for an express decision as to reinstatement to be taken; now was communication relevant for the purposes of giving effect to the revival of a contract of employment following a successful appeal against an earlier dismissal.

Observations made about the desirability of Notices of Appeal being more concise and better focussed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of Employment Judge Blackwell, sitting alone at Leicester, Reasons for which were promulgated on 28 May 2014. Three employees, Mrs Salmon, Miss Snape and a Mrs Edwards, were employed by the First Respondent, Castlebeck Care Teesdale Limited ("Castlebeck"). They were summarily dismissed for alleged gross misconduct on 10 July 2013. They had a contractual right to appeal. Although the contract was never put in evidence before the Tribunal and it is to my mind a pity that was not the case, the fact that there was such a right was agreed and no submission appears to have been made below as to its precise terms, other than those which were to be inferred from such a description.

2. On 4 September 2013, the business of Castlebeck transferred to the Second Respondent ("Danshell"). Prior to the transfer, Miss Snape's appeal had been heard. No decision had been given, since it was thought that decisions should be made and announced on all the appeals at the same time. Mrs Salmon's appeal was heard on 17 September 2013 by the Human Rights Director, whose employment with Castlebeck had transferred under TUPE to Danshell, as did the contracts of employment of all others who were employed in the undertaking at the time of the transfer.

3. Mrs Salmon's dismissal and that of Miss Snape was deemed "unsafe" by the two officers, now in the employment of Danshell, who determined the appeal. Mrs Edwards' appeal was dismissed. In her case the decision was to stand. No express decision was taken to order reinstatement or to indicate in clear and unequivocal terms that the original contracts of employment of Mrs Salmon and Miss Snape had revived as a result of the successful appeal,

but Danshell instructed Peninsula who acted for them as employment consultants, to agree settlement agreements with both Mrs Salmon and Miss Snape.

4. They were due to meet with a Miss Hills on 10 October, but that meeting was cancelled the day before. They were not told at any contemporaneous time of the outcome of their appeals.

5. Their claim before the Leicester Tribunal was brought against both Castlebeck and Danshell. The Decision upheld the claims against Castlebeck. It rejected the case against Danshell on the basis that the Second Respondent, Danshell, had never been the employer of any of the Claimants.

6. In this appeal Mrs Salmon, who appeals alone, challenges that decision. She asserts that the law properly understood was such that the acceptance that her dismissal should not stand on appeal had the effect of reviving her contract of employment. She then fell within Regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** as being someone who was employed immediately before the transfer (see Regulation 4(3)). Therefore automatically her employment transferred from Castlebeck to Danshell. Danshell's behaviour towards her amounted to it subsequently dismissing her and she claimed compensation against it.

The Tribunal Decision

7. The Tribunal's Judgment was based upon two matters. First, it asked whether there had been a decision to reinstate. It had been referred to the case of **G4S Justice Services (UK) Ltd v Anstey** [2006] IRLR 588 by Mr Caiden, who appeared for the Appellant, as he does before

this Tribunal. That was a case in which GSL (UK) Ltd employed the Claimants, Mr Anstey and Mr Simpson. They were dismissed in April 2005. The business of GSL was taken over by G4S on 1 May, and the appeals were heard by GSL at the end of June or beginning of July. They were successful, and reinstatement was directed. It was held that in those circumstances the Claimants' employment had transferred in accordance with the then equivalent of what is now Regulation 4(3) **TUPE**. In the head-note this is said:

> **"Whether an employee who has been dismissed by the transferor, but whose appeal has yet to be heard, is employed in the undertaking that is transferred within the meaning of [now Regulation 4] of TUPE depends on whether the appeal against dismissal succeeds and reinstatement is ordered. In such a case, the employee's employment is preserved for the purposes only of determining their appeals. If the appeal succeeds and the dismissals are set aside, the dismissal vanishes, viewed retrospectively. The employees continue in employment, but with the transferees as a result of the transfer. If the appeal is unsuccessful, the original dismissal stands and the employee would not then have been employed by the transferors immediately before the transfer."**

8. The Judge looked, therefore, not only at whether the appeal had succeeded but whether, as a separate decision, reinstatement had been ordered. She articulated that same distinction in paragraph 2 of her conclusions and this led to her asking the first question. On that his reasoning was as follows, so far as relevant, reciting the evidence of Mr Blackburn as follows:

> **"We felt that the 2 care assistants (Salmon and Snape) should not have been dismissed and their dismissals were deemed unsafe.**
>
> **I am not aware of the recommendations of the appeal panel being changed at a later stage by Danshell.**
>
> **Prior to the TUPE transfer we had been expected to inform the Administrator of the proposed outcome of the appeal. After the transfer the situation was more complicated. The outcome of the appeal was as we reported to the administrator. However Peninsula were acting for Danshell on employment matters so our findings had to be reported to them …"**

9. He went on to explain that Settlement Agreements should be offered to Mrs Salmon and Miss Snape as a "way forward", commenting:

> **"This was due to the passage of time since their dismissal and Danshell's view that they were not employed by that company. I believe that Peninsula were advised to prepare the terms of the settlement agreement. …"**

10. The Judge took the view that that evidence fell short of a clear decision to reinstate. It is important for the purposes of this appeal to note what was being determined by the Judge. The lack of clarity related to whether there had been a decision as such to reinstate. That was the context in which paragraph 3 of the conclusions is set out. It follows from the Judge's posing as a first question whether there was a "decision to reinstate". Given the reference in paragraph 2 of the conclusions to **G4S Justice Services**, the Judge appeared to think that that case and therefore the law required there to be not just a successful appeal, but also and separately a clear decision to reinstate.

11. The Judge went on at paragraph 5 to conclude that the two officers who heard the appeal were at the relevant time employed by Danshell and so were acting as its agents and observed (paragraph 7) that they had ostensible authority to hear the appeals.

12. The second basis for the Judge's conclusion adverse to Mrs Salmon was that there had been no communication of the decision of the Tribunal. She summed up her conclusion in the last sentence of paragraph 7:

> **"Therefore in my judgment the requirement of a clear decision to reinstate which has been communicated to the Claimants does not succeed on the evidence."**

13. This followed a discussion beginning rather curiously with the first sentence:

> **"There appear to be no authorities directly upon the point but it seems to me as a matter of common sense that a decision is not a decision until it is communicated to the employees involved in the appeal process."**

14. I cannot think that the Tribunal was saying that a decision, properly described as such, was not a decision properly to be described as such unless and until communicated. That would have the extraordinary result that what was a decision would at some stage cease to be such because of an absence of communication, though presumably it could later be resurrected by

sufficient communication. What must be intended here is that the decision was not *effective* as a decision unless and until communicated, and I read it in that sense.

15. Mr Caiden submitted that, if the Judge was against him on his argument that there had here been an appeal which was allowed and that the consequence of that was revival of the contract of employment, such that Mrs Salmon was in the employment in Danshell unless and until dismissed by it, then he urged the Judge to take a purposive approach. He relied on **Litster v Forth Dry Dock & Engineering Co Ltd** [1989] IRLR 161 for that approach. In doing so, he argued that unless such an approach was taken, Mrs Salmon would be without a remedy for an obvious wrong. The Judge rejected that, noting that there was a remedy, even if not so advantageous, which lay against Castlebeck but went on to observe that he thought that Danshell had acted badly in the matter. That was a reference to the failure by Danshell to tell Mrs Salmon the outcome of her appeal. He said:

> **"10. …Once they [ie Danshell] became aware of the outcome of the appeals in this case they should either have supported them or informed the Claimants that they were not going to do so and explained why. It may well be that the appeals were heard contrary to Ms Germaine's instructions but once she or other senior officers at Danshell became aware of the appeals which were in my opinion carried out by people with ostensible authority to act, they should have acted as I have indicated.**
>
> **11. Notwithstanding that reprehensible behaviour, I decline to take a purposive approach on the facts of this case. It follows therefore that the requirements of G4S are not met and that none of these employees, viewed retrospectively became employees of Danshell."**

16. Although the Notice of Appeal extends to some 11 pages and is larded with footnotes and extracts, it contains three essential short points. First, that the Tribunal erred in concluding that there had been no effective reinstatement of the contract as a result of what had happened; second, that it had erred in holding that the outcome of the appeal needed to be communicated to be effective; and third, that it failed in its rejection of a purposive interpretation.

17. In response, Miss Reece, who had the disadvantage of not being Danshell's representative before the Tribunal, argued, first, that the disciplinary appeal could not properly have been heard by Danshell. It was the obligation of the transferor, Castlebeck, to conduct it. She argued that, without legal responsibility for the appeal, any decision made on the appeal would be without substance and effect.

18. Second, appreciating that that argument was an argument which had not, as such, been put before the Tribunal, she argued that the Tribunal's decision was one to which it was entitled to come. There was no clarity about whether there had been a successful appeal. The words used by Mr Blackburn conveyed only the recommendation of the Panel and the proposed outcome. Both of those had a penumbra of uncertainty around them. The decision to allow an appeal might be one of many sorts. There was no detail of any contract of employment before the Tribunal. Accordingly, it could not be said with certainty what the role of the Panel was in hearing the appeal; what its entitlement was in terms of sanction, particularly, in the alternative; and I think her submissions went so far as to suggest that it might be open to the Panel to recommend a settlement, even if it was not thereby accepting as a necessary precursor to that that the employment should be regarded as continuing until settlement was reached.

19. The facts here underlying the decision were that, for its own reasons, in particular the passage of time, the fact of the transfer, uncertainty about the culture at Castlebeck, and a worry about the degree of trust and confidence which the employer could have in Mrs Salmon, Danshell itself wished the dismissal to stand. The decision, therefore, could not be seen as one in which the appeal was to be allowed. In **G4S** reinstatement had been clearly directed. Therefore there was a need for a clear direction to that effect. The Tribunal was right when it dealt with the question of the communication of the outcome for the reasons which it advanced.

Discussion

20. It is with some unease that I approach the appeal in this case knowing that the Decision below was based upon a paucity of evidence. Though the parties were agreed that there was a contractual right to appeal, no submissions were made to the Tribunal by reference to the precise terms of that contract. I infer that, so far as each party was concerned, neither thought that any particular term was material as showing that this contract differed from that which was to be expected should a contract provide for a right of appeal.

21. Secondly, I am concerned that neither party made arguments below as to the precise status of the appeal body within Danshell. The decision in **G4S** to which Miss Reece points expressly held that in that case the contractual obligation to hear and determine appeals heard post-transfer against dismissals effected pre-transfer lay with the transferors notwithstanding the transfer. There was no similar explanation here by the Tribunal because, I infer, neither advocate explored with the Tribunal why it was and how it came about that two employees of Danshell heard the appeal. It appears from the papers that they were both employees who had been in the employment of Castlebeck. That they should hear the appeals was plainly consensual.

22. Miss Reece rejected any suggestion that the employer, Danshell, had acted cynically. If it were to have no authority to determine the appeal by agreement of the parties, then the process of the appeal hearing would be, in my view, a meaningless charade. It would have encouraged expectations in the minds of the employees which were never to be acted upon by the employer if the conclusion of the appeal process was favourable to them. However much this would have been a ground sufficient in itself to dismiss the first point which Miss Reece

takes, there is a more fundamental objection to it which Mr Caiden pursues. The argument was never raised below.

23. The principles which apply to the hearing of a new argument on appeal are well-established. In **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 the Court of Appeal held that the Appeal Tribunal had been in error in exercising its discretion to allow a new point to be heard on appeal to it from the Employment Tribunal for the first time. The head-note observes that the EAT should have had regard to the general rule laid down by Arnold J in **Kumchyk v Derby City Council** [1978] ICR 116 EAT that a party should not be allowed to resile from that which her representative has decided to do. The EAT did not have an unfettered discretion to decide on balance whether justice required that a new point raising new jurisdictional issues should be allowed to be taken.

24. The principle is succinctly expounded by Laws LJ in his concurring agreement at paragraph 18:

> **"… The Employment Appeal Tribunal possesses a discretion, which must be exercised in accordance with established principles, to allow a new point to be raised before it for the first time. It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time. The reasoning of Robert Walker LJ in *Jones v Governing Body of Burdett Coutts School* [1998] IRLR 521 is, with great deference, consonant with this. A new point ought only to be permitted to be raised in exceptional circumstances, as Robert Walker LJ held at p.44B. If the new issue goes to the jurisdiction of the Employment Appeal Tribunal below, that may be an exceptional circumstance, but only, in my judgment, if the issue raised is a discrete one of pure or hard edged law requiring no or no further factual inquiry. There is a public interest, beyond the interests of individual parties, that statutory tribunals exercise the whole of but exceed none of the jurisdiction which Parliament has given them upon such facts as are proved or admitted before them. …"**

25. The present appeal is not a case in which the argument is jurisdictional, but it is plain from the expression of principle which Laws LJ set out that his point about arguments going to jurisdiction not being permitted to be heard on appeal was to emphasise that even they were not, without more, an exceptional case but were an extreme example of the application of the

same principle which was to be applied across the piece, namely that new points are not to be determined on appeal except in exceptional circumstances. That the points were jurisdictional was not in itself automatically exceptional.

26. Here, in my view, if the point had been raised below, further evidence would have been needed. It would have been important to know precisely how and why it came about that Danshell decided to hear the appeals. It would have been important to know what, if any, limitations were placed upon that which normally would be implied in the process of delegating an appeal decision to an appeal panel. Usually within the employment context, the decision of the appeal panel stands as the decision of the employer. There was nothing to show that any different an approach applied here. Any argument to suggest that it should have been run below, and it cannot now be determined on appeal without regard to evidence which has simply not been put before the Tribunal. Accordingly, in line with principle, I cannot properly exercise my discretion to permit this initial argument by Miss Reece to be advanced.

27. I turn, therefore, to the grounds for the appeal and Miss Reece's resistance to them. **G4S Justice Services v Anstey** is capable of being read, on the face of it, as requiring not only that there be a successful appeal against dismissal, but also that, separately, a decision as to reinstatement is made. Miss Reece submits that what is sauce for the goose is sauce for the gander and that the Tribunal was not directed to the decision of **McMaster v Antrim Borough Council** [2010] NICA 45; [2011] IRLR 235, a decision of the Northern Ireland Court of Appeal to which I shall come. She argues, therefore, that the point taken by Mr Caiden is itself a new point and the same principles should apply. I do not agree. What was in issue was what needed to be shown in order that there would be a revival of the contract.

28. The effect of a successful appeal against an earlier dismissal is now well-established in law. **G4S** itself referred to and treated **Roberts v West Coast Trains Ltd** [2004] IRLR 788 as binding authority, which it was as to principle, The second paragraph of the head-note in that report dealing with what the Court of Appeal held reads thus:

> **"Where a contractual disciplinary procedure permits the employers, on appeal, to impose the sanction of demotion in place of an earlier decision to dismiss, that demotion does not involve the termination of the existing contract of employment or the entering into of a new contract. The effect of the decision on the appeal is to revive retrospectively the contract of employment terminated by the earlier decision to dismiss so as to treat the employee as if he had never been dismissed. The fact that the employee made a complaint of unfair dismissal at a date between the initial dismissal and the hearing of the appeal does not affect the legal position in deciding whether or not he was dismissed for the purposes of an unfair dismissal claim."**

That sufficiently indicates the factual context of that case.

29. In the judgment of Mummery LJ (with which Arden LJ and Gage J both agreed) the principles are expanded by reference to the House of Lords' authority of **West Midlands Cooperative Society Ltd v Tipton** [1986] IRLR 112 (see paragraph 29), in the course of which Mummery LJ cited, with a view to adoption, the words of Lord Bridge where he said:

> **"… Adopting the analysis which found favour in *J Sainsbury Ltd v Savage* [1980] IRLR 109, if the domestic appeal succeeds the employee is reinstated with retrospective effect; if it fails the summary dismissal takes effect from the original date …"**

and went on to observe:

> **"Both the original and the appellate decision by the employer, in any case where the contract of employment provides for an appeal and the right of appeal is invoked by the employee, are necessary elements in the overall process of terminating the contract of employment. To separate them and to consider only one-half of the process in determining whether the employer acted reasonably or unreasonably in treating his real reason for dismissal as sufficient is to introduce an unnecessary artificiality into proceedings on a claim of unfair dismissal calculated to defeat, rather than accord with, the "equity and the substantial merits of the case" and for which the language of the statute affords no warrant."**

30. At paragraph 24, echoing the concepts articulated by Lord Bridge, Mummery LJ said:

> **"(6) It was within the terms of that contract that the appeal decision was taken. It was not necessary to effect an express reinstatement to the position of chef previously held by him, nor was it necessary to make an offer to him to enter into a new contract in order to continue Mr Roberts's contract of employment."**

31. The decision in **Roberts** was heavily relied on in **G4S**. It was a fact in that case that reinstatement was directed. I do not read Judge Clark's Judgment as having required a separate order for reinstatement in order for the contract to revive upon there being a successful appeal. It was not necessary to the reasoning that that should be the case. It would be contrary to **Roberts v West Coast Trains** had that been his view, and would have required further explanation.

32. But in any event, the point is made crystal clear by the judgments in **McMaster v Antrim Borough Council**. That was a case in which the employee was summarily dismissed for gross misconduct. An internal appeal upheld the decision. In his case, his contract entitled him to a further appeal to an external body. He exercised that right. The majority of that body believed that a lesser penalty than dismissal was appropriate. It told the employer so. The employer was not prepared to implement the Panel's "recommendation" and told the Claimant that his dismissal still stood.

33. The issue before the court was whether, in the absence of any relevant contractual provision providing for suspension of dismissal and/or temporary continuation of a contract, the effect of a successful resort by the Claimant to a contractual appeal procedure revived the contract of employment so that the effective date of termination was not the date of the original dismissal, and the claims were within time. The Northern Irish Court of Appeal held that, if a contractual disciplinary appeal succeeded:

> **"… the employee is reinstated with retrospective effect. As the appeal decision has been taken within the terms of the relevant contract, it is not necessary to effect an express reinstatement to the position previously held by the employee, nor is it necessary to make an offer to him to enter into a new contract in order to continue the contract of employment. If the contractual appeal fails, the summary dismissal takes effect from the original dismissal."**

34. At paragraph 11, in the Judgment of Coghlin LJ giving the judgment of the court, he said:

> **"The fundamental purpose served by an agreed appeal disciplinary procedure is to ensure that both sides have a full and fair opportunity to put their respective cases and secure a just outcome to any dispute including putting right, where necessary, any errors or shortcomings apparent in the initial hearing. As a matter of principle, it is difficult to accept that the effective operation of an appeal could be simply prevented by an employer either refusing an employee the right to resort to such an agreed procedure or by rejecting an outcome considered to be adverse to his or her interest leaving the frustrated employee with compensation for breach of contract as his or her only remedy. …"**

35. He adopted (paragraph 12) the expression of principle set out by Mummery LJ in **Roberts v West Coast Trains** to which I have referred above, and (paragraph 13) quoted usefully Silber J's view from **Ladbrokes Betting and Gaming Limited v Ally** [2006] All ER (D) 77 in which at his paragraph 18 he had said there was:

> **"… clear authority for the proposition that - unless there was a contractual provision to a contrary effect as a result of an appeal process - the decision to dismiss is replaced by the decision which means that the employee is not to be regarded as having been dismissed [where an appeal was successful]."**

36. I therefore have no hesitation in this case in thinking that the Tribunal was in error in looking for a separate decision, consequent upon a successful appeal, that there should be "reinstatement". The word "reinstatement" itself may mislead because it may be seen in the light of one of the remedies available should a claim for unfair dismissal succeed before a Tribunal. The word reinstatement here, I emphasise, is used in the sense of reviving the contract, the expression used in **Roberts** which, in my view, is more appropriate. I see no reason in principle why in any event it would be necessary for there to be an express revival or reinstatement. It must be implicit in any system of appeal, unless otherwise stated, that the appeal panel has the right to reverse or vary the decision made below. Where a decision is to dismiss, being the most draconian of sanctions, any success on appeal means that the decision is one in which dismissal does not take effect, though some lesser sanction might.

37. I see no reason in principle why an outcome on appeal against dismissal which is favourable to an employee should not, and every reason in principle why it should, therefore automatically revive the contract which, but for the successful appeal, would have terminated on the earlier dismissal.

38. All this is predicated upon a conclusion that there was here a successful appeal. I do not think that the use of the word "recommended", as it happens the same word as considered by the Northern Irish Court of Appeal in **McMaster**, or the word "proposed" has the uncertainty to which the Judge referred at paragraph 4. Nor do I think that the Judge meant it in that sense. He recited the evidence of Mr Blackburn, which was not just that the two care assistants should not have been dismissed, but also that the decision in respect of Mrs Edwards should stand. The contrast between the rejection of Edwards' appeal and the position of Mrs Salmon is clear.

39. The Judge referred repeatedly to the "outcome" of the appeal. This is a word which does not admit of uncertainty or of a tentative decision. What he thought was unclear, as I read the decision, was whether there had been a decision to reinstate made as such. Given that the Appeal Panel had no particular restriction upon its powers to be implied by reference to any contractual term, none having been relied on, the usual inference to be drawn, it seems to me, is that the outcome of the appeal was, and the sense of the judgment is, that the Claimants succeeded on the appeal. That did not have the consequence of the revival of their contracts according to the Judge, for the reason the Judge gave, which I have held to be an error of law.

40. I turn to the question of whether it was necessary to communicate the outcome of the successful appeal. This is not to be equated with the situation in which an employee is told of their dismissal: then, communication is needed. It is needed not least to start the time running

for the questions of the applicability of the time limit under section 111 of the **Employment Rights Act** - **Gisda Cyf v Barratt** [2010] UKSC 41; [2010] IRLR 1073 emphasises that the decision as to the effective date of termination is a matter of statutory interpretation and an application of a construction of the statute to the facts.

41. Where the effect at common law, contractually, is that a decision has been taken to allow the appeal, it seems to me that it is a decision which, on the law as I have set it out by reference to **Roberts**, **GS4** and **McMaster**, has the effect of reviving the contract, subject only to there being some contractual term or provision which prevents it. The Judge may have understood it never to have been determined previously, but it seems to me that the citations from authority which I have set out above show that it is not necessary, in order for a successful appeal to have that effect, that there should be a communication of the result of the appeal.

42. An analogy has been drawn in argument between the objective approach to be taken to establishing the terms of a contract or establishing breach, and the position here. I see no relevance in this. That is because the question here to be established objectively on the evidence is whether there has been a decision to allow the appeal. On the view I take of the Tribunal's findings of fact, it made that decision; it found there had been such a successful appeal.

43. Accordingly, in my view, the effect of the Tribunal's finding of fact, albeit on the limited material put before the Tribunal which may have hampered it in some respects, leads to these conclusions: first, that there had been a successful appeal in Mrs Salmon's case; second, that therefore and without the need for either an express decision to reinstate or communication of it, her contract was revived. It follows that she was employed immediately prior to the transfer

from Castlebeck to Danshell and therefore her rights lie against Danshell and not against Castlebeck.

44. In case it should be necessary in relation to communication I add this. The argument that communication in these circumstances is necessary is that an employer whose authorised officers have taken a decision open to them to allow an appeal may nonetheless not face any of the consequences of that decision. If it chooses simply not to tell the employee that that has happened then, so far as it is concerned, the employee simply remains dismissed and has no rights other than to complain about that dismissal. This is so plainly open to abuse and so plainly in breach of the principle set out in **McMaster** at paragraph 11, which I entirely accept, that a court would think long and hard before concluding that it actually represented the law. There is no need, it seems to me, for the law to demand not just a decision, objectively established, to allow an appeal, but also that it must be communicated in some effective way to the Claimant.

45. To an extent the question is unrealistic because employees who have an outstanding appeal, will naturally be curious as to the result. It will soon become obvious that they are deliberately not being told of it, if that is the case. Secondly, it is artificial because an employer by not communicating is taking a step which is in breach of an implied term of the contract between the parties. A right to appeal and have the appeal heard necessarily involves a right to be told the result of that appeal. It is certainly open to the employee in such a case to complain, if they are not told of the result, that there has in this respect been a repudiatory breach by the employer.

Conclusion

46. It follows this appeal must be allowed. I have said nothing about the third ground which, for reasons explored in argument fell away. I accept entirely Miss Reece's arguments as to that, and Mr Caiden did not press the point upon considering further the exchanges between advocate and bench.

47. The result is that I substitute for the Tribunal's Decision a decision that Mrs Salmon succeeds against the Second Respondent, Danshell. The claim against Castlebeck, and the Judgment in that respect, is discharged.

Postscript

48. The central attribute of good advocacy is focus. It begins with the Notice of Appeal. It is very rare that Notices of Appeal need to be lengthy. They are far better if they express in short and succinct terms the points which they have to make. Being too lengthy invites too lengthy a Respondent's answer. It can lead to too discursive an oral hearing.

49. There is generally no need for footnotes to a Notice of Appeal, nor is there a need for grounds of appeal to amount to a skeleton argument.

50. In this Tribunal, it is useful that sufficient should be said to indicate to the Judge who reviews an appeal on paper (at the "sift" stage, under Rule 3 of the **EAT Rules of Procedure 1993**) that there is truly a point of law. To that extent I would accept that Notices of Appeal may be more discursive than simply identifying the grounds for the appeal by using bold headings. But it is always important to remember the importance of focus, succinctness and hence appropriate brevity. The Appeal Tribunal and the parties - especially where the

Respondent appears in person - benefit greatly by being directed to those few points in an appeal which really matter. It is this, above all, which best facilitates an effective hearing.

51. The Judges of this Tribunal have become increasingly concerned, in some cases (may I say, not this in particular, though this case prompts me to make these remarks) as to the extent to which Notices of Appeal have simply grown beyond recognition compared to those that were thought sufficient even just 10 years ago, and such that the Skeleton Argument in the case tends to have just a few additional paragraphs added to the Notice of Appeal. This is, in their view, unfortunate: and they hope that practitioners will exercise restraint if they can, and show judgment where they feel they cannot.