Appeal No. UKEAT/0265/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 December 2014

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

MS J M ADDENBROOKE — APPELLANT

PRINCESS ALEXANDRA HOSPITAL NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR JAKE DUTTON
(of Counsel)
Direct Public Access

For the Respondent

MISS ELIZABETH MELVILLE
(of Counsel)
Instructed by:
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SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

The Appellant contended that she had been constructively dismissed. In particular an issue arose as to whether the failure to follow the grievance procedure amounted to a fundamental breach of contract and if so had the Appellant affirmed the contract. First, there was a lack of clarity in the reasoning of the Tribunal. In particular, it was unclear whether or not the Tribunal found that the failure to follow a grievance procedure amounted to a fundamental breach of the implied term of trust and confidence amounting to a repudiation of the contract. Secondly, if the Tribunal had found such a fundamental breach, then the Tribunal had not determined whether or not the employee had affirmed the contract. If the Tribunal determined that the employee had not affirmed the contract, then the Tribunal would have to determine if the breach played a part in the decision to resign and did not do so.

THE HONOURABLE MR JUSTICE LEWIS

Introduction

1. This is an appeal against a Decision of an Employment Judge Brewer dismissing a claim by Miss Addenbrooke that she had been unfairly dismissed. Miss Addenbrooke claimed that she had been constructively dismissed by her employer, the Princess Alexandra Hospital NHS Trust.

The Facts

2. The background to this claim is this. The Claimant qualified as an orthoptist in 1968 and practised from 1969 to 1972. Thereafter she undertook some further work on a part-time basis from 1990 to 1992. The Claimant then joined the Respondent as an orthoptist in October 2010. Initially she was appointed as a one-year probationer, but that post subsequently became permanent. She worked with two other orthoptists. It is clear that the working relationship between the Appellant and the other two orthoptists was not good and they were all unhappy with the working relationship. The Respondent had a non-contractual grievance procedure. On 12 September 2011 the Claimant raised a grievance. She set out a number of issues. These included (a) that the orthoptic department was not working together as a team; (b) lack of adequate communication between the orthoptists on everyday running of the department; (c) what was referred to as social isolation; (d) overt and covert putdowns, verbal and non-verbal in nature; and (e) constantly being treated like a non-person.

3. There was an investigation into that grievance, and it appears that it was concluded on 3 February 2012. It appears that the conclusion was that there was no evidence of verbal and

non-verbal putdowns but that there were personality differences and a lack of leadership. However, the conclusion of the investigation was never communicated to the Appellant.

4. As it happened the Appellant had ceased to work with either of the two people concerned, in one case after February 2011 and in the other case after November 2011.

5. The Decision of the Tribunal records further events. These include at paragraph 42 of the Decision the fact that the Claimant walked out of a clinic on the morning of 2 April 2012 causing at least one patient to miss the appointment. On 19 June 2012 the Claimant was the subject of another complaint by or in respect of a patient where it was alleged that the Appellant had been rude and unprofessional. Then on 28 June the Claimant had what was described as a run-in with two patient carers, and the Appellant again walked out of the clinic. As a result of these incidents the Claimant was excluded from work on 9 July 2012.

6. The interim Human Resources Manager, a Mr Halton, telephoned the Claimant on 19 October 2012. He was seeking to get the Appellant to go back to work and then to resolve any ongoing issues. At that stage, as the Tribunal noted, the Claimant had an unresolved grievance as she was not aware of the outcome reached in relation to the investigation of her grievance, and she also had not worked with the two individuals about whom she had concerns for some time.

7. In the telephone conversation the Human Resources Manager indicated that one way forward was to avoid the disciplinary process, and the Respondent and the Appellant would simply agree that the Appellant would return to work but would accept a warning. That was confirmed by a letter of 19 October 2012. The Tribunal also made some additional findings of

fact, namely the Tribunal found as a fact that on 19 October 2012, after the telephone conversation between the Appellant and Mr Halton, the Appellant had not formalised her decision to resign. At paragraph 61 the Tribunal notes that he found as a fact that the Appellant had not decided to resign by or on 23 October 2012. At paragraph 62 the Appellant is noted as having confirmed in her evidence that nothing in particular happened between 23 and 30 October to prompt her resignation and that she was most unclear in her evidence and her submissions on precisely why she was prompted to resign.

The Employment Tribunal Hearing

8. The claim that the Appellant brought before the Tribunal was, in effect, threefold. First, she claimed that the Respondent had breached the implied term of trust and confidence. Secondly, that they had failed to provide a safe working environment. And thirdly, that on two occasions they had failed to pay her promptly. Those allegations were the subject of further particularisation. That is set out at paragraph 4 as follows: (1) The Respondent failed to deal with the Appellant's grievance dated 12 September 2011. (2) The working environment was made unbearable through acts of verbal and non-verbal bullying by the other two orthoptists. (3) The Respondent required the Appellant to work in overloaded single handed unsafe clinics. (4) The Respondent acted outside of its disciplinary procedure when seeking to discipline the Appellant and (5), the Appellant was not paid on time on two occasions in April and August 2012.

9. The Appellant represented herself at the Tribunal hearing. The Tribunal identified the three questions as follows: (a) Has the Claimant established that the Respondent was in fundamental breach of contract? (b) Has the Claimant established that she resigned as a result of that breach? And (c) did the Claimant waive the breach, essentially by waiting too long to

resign? The actual conclusions on those issues are set out at paragraphs 75 and following. The key paragraph in many respects is paragraph 76, which says this:

> **"The Respondent in no sense dealt with the Claimant's grievance adequately. In my judgment the investigation was at best insufficient and there was of course an admitted total failure to feed back the result of the investigation, such as it was, to the Claimant. Had the Claimant resigned just as a result of this failure the Respondent would be in considerable difficulty and it is unfortunate for the Claimant that she did not do so."**

I will return to paragraph 76 in due course.

10. On the second particularised issue, the bullying issue, the Tribunal found that there was no evidence that the Appellant was reasonable in concluding that she had been bullied by either of the other two orthoptists. On the third particularised issue, the overloaded clinics and safety at work issue, again the Tribunal found no evidence to suggest that the clinics were unsafe. On the disciplinary issue, the fourth particularised issue, the Tribunal found that the Respondent had acted in accordance with its policy. On the fifth issue the Tribunal found, so far as the payments were concerned, that there were small discrepancies rectified almost immediately. Whilst failing to pay properly can lead to a repudiatory breach of contract against a Claimant, the Claimant was not relying on them solely but relies on them simply as straws.

11. Against that, the Tribunal turned to the three questions that it had said it had to ask, and it said this:

> **"87. I now turn to the questions I have to answer. The first is; was there a fundamental breach of contract? This is a last straw case and the Claimant's argument is that all of the matters set out above cumulatively amount to a breach of trust and confidence. She does not rely on any single event. I do not consider that the matters set out above cumulatively amount to a fundamental breach of contract.**
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> **88. Second; in relation to the causation issue, even if I am wrong about there being no fundamental breach of contract I have to ask whether the Claimant resigned as a result of that. The Claimant says the last straw was Mr Halton's letter of 19 October 2012 but it seems to me clear from the evidence of the Claimant herself, the contemporaneous documentation and the Claimant's witness, Ms Forman, that on and after 19 October the Claimant was considering returning to work and it was only sometime after 23 October that she formed the view that she would not do so. Unfortunately the Claimant cannot point to anything which happened during that period which triggered the resignation. She says it was a matter of feelings growing that she did not want to return to work. It seems to me to follow that the letter was not the last straw. It did not cause or contribute to the decision to resign.**

> **89. Further, even if I am wrong about that and the letter was the trigger which gave rise to the Claimant's resignation I find that it was an innocuous act. I agree with the submission of Ms Melville on this point. Lifting a suspension cannot in my judgment be said to contribute anything to the earlier straw so as to allow the Claimant to claim a repudiatory breach of contract at that point."**

The Law

12. I turn, then, to the relevant law relating to the question of constructive unfair dismissal and repudiatory breach of contract entitling an employee to treat himself or herself as able to resign. The first question is whether the conduct amounted to a breach of contract. The second question is whether the breach was a fundamental breach, showing that the employer did not intend to be bound by the contract. In relation to what constituted an alleged breach of the implied term of trust and confidence, which is the issue here, my attention has been drawn to the decision in **Woods v WM Car Services (Peterborough) Ltd** [1981] IRLR 347, and in particular paragraph 17, which says:

> **"In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee … To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it … The conduct of the parties has to be looked at as a whole and its cumulative impact assessed …"**

13. In terms of grievance procedure, I was referred to the decision in **Laneres v Marks and Spencer plc** [2005] ScotCS CSIH_19. In my judgment a more helpful decision is that of the Employment Appeal Tribunal in **Blackburn v Aldi Stores Ltd** [2013] IRLR 846. There at paragraph 25 it is made clear that failure to follow a grievance procedure is capable of amounting to a fundamental breach. The question as to whether in any particular case it does so is a matter of fact for the Tribunal to assess in all the circumstances of the case.

14. If there has been a fundamental breach, the third question then arises, which is whether the breach played a part in the decision of the employee to resign. The appropriate test is set

out in **Wright v North Ayrshire Council** [2014] IRLR 4, in particular at paragraph 18, where the President says, "The issue is whether the breach played a part in the resignation". Finally there may be cases, which have been described as the last straw cases, where the particular latest act of the employer would not amount to a fundamental breach but where that act, taken with other acts, will entitle the employee to treat the employer as repudiating the contract of employment. That may arise in one of two cases: firstly, there may have been an earlier fundamental breach which has been affirmed by the employee. If there is subsequently conduct which, taken together with the employer's earlier fundamental breach, causes the employee to resign or plays a part in the decision of the employee to resign, the later act effectively reactivates the earlier fundamental breach. The second situation is whether the latest act does not amount to a fundamental breach but it is a series of breaches of which the last is the last straw and, coupled with the earlier non-fundamental breaches of contract, also enables the employee to treat the contract as repudiated.

The Appeal

15. Turning to this appeal, the central issue was identified in the reasons given on allowing this appeal to go forward to a Full Hearing as follows. If the Respondent's failure properly to deal with the Appellant's grievance undermined trust and confidence and was a factor, not necessarily the sole factor, in her decision to resign, then that is arguably sufficient to found constructive dismissal subject to questions of delay, affirmation and waiver.

The Appellant's Case

16. Against that background I turn then to the way in which the Appellant and Respondent put their respective cases. The Appellant says that there was, at paragraph 56, a finding that that there had been a fundamental breach of contract in respect of the failure by the Respondent

to follow the grievance procedure. Secondly, the Appellant says there is no finding that the Appellant accepted or affirmed the contract. Thirdly, says the Appellant, if the contract was not affirmed, there remained a fundamental breach and the Tribunal needed to consider, and did not do so, whether that fundamental breach in the decision of the employee to resign. Indeed Mr Dutton for the Appellant went further and said that the fundamental breach was a continuing one. He submitted that the failure to investigate adequately and failure to inform the Appellant of the results of the grievance investigation, was a continuing fundamental breach and the contract could not in fact be affirmed.

The Respondent's Case

17. The Respondent says, firstly, there was no finding that there was a fundamental breach and paragraph 76 should be read in context, and in particular with other paragraphs of the Tribunal Decision. Secondly, if contrary to that submission, there was a fundamental breach, then the inference is that the Tribunal found that the Claimant had affirmed the contract. She had worked for a long period of time after she made her grievance. She was no longer working with the two people about she had made the grievance, and the Respondent invites me to infer that the contract had been affirmed. Thirdly, if that is the case, there would need to be later conduct which, together with the earlier affirmed fundamental breach, contributed to the decision of the employee to resign, but here the Tribunal found as a fact that there was no such later conduct because the letter said to trigger the resignation or to prompt the resignation was not in fact capable of being such an act. In relation to the third matter, the Appellant's submission in reality was that the Decision of the Tribunal that the last act was not capable of being a last straw was perverse.

Conclusions

18. First, in my judgment, there is a lack of clarity and there is an internal contradiction in the Tribunal Decision. There is a contradiction between paragraph 76 and paragraph 86 of the Tribunal Decision. Read alone, the Tribunal in paragraph 76 appears to have decided that there was a repudiatory breach by reason of the way in which the grievance had been handled inadequately with a failure to investigate sufficiently and a failure to communicate the result of the investigations to the Appellant. The natural reading is that the Employment Tribunal was finding that that amounted to a repudiatory breach. Otherwise it is difficult to understand why the Tribunal refer to this as a situation where the Respondent would be in considerable difficulty if the Claimant had accepted the breach. A Respondent would only be in difficulty in the context of this case, which is dealing with constructive unfair dismissal, if the conduct amounted to a repudiatory breach justifying the employee treating himself as dismissed. On the natural reading of paragraph 76, therefore, there does appear to be a finding that there had been a fundamental breach. I recognise that later in the Decision the Tribunal appears to have assumed that none of the breaches were repudiatory breaches despite its earlier comments at paragraph 76. I recognise that the Tribunal could have found that the breach arising out the grievance procedure was not sufficiently serious to amount to a repudiatory breach, but it does not appear that it was saying that at paragraph 76. It may be that the Tribunal had already decided in its mind that the Claimant was not alleging that any individual breach was a fundamental breach and that she was only alleging that there were a series of non-fundamental breaches which, taken together with the last straw of the letter of 19 October 2013, entitled her to treat herself as dismissed. However, the Claimant was a litigant in person. She was simply describing the events that occurred. The real question for the Tribunal was to analyse whether or not the complaint that she was making did involve, firstly, a breach of contract; secondly, a breach of contract which was fundamental; and thirdly, had the contract been affirmed. In my

judgment the Reasons of the Tribunal are unclear. It is not easy to reconcile paragraph 76 with paragraph 86 of the Judgment. For that reason alone, in my judgment, there is an error of law and the matter will have to go back to the Tribunal.

19. Secondly, if the Tribunal was in fact deciding that the way in which the grievance was dealt with amounted to a fundamental breach, then in my judgment it is not possible to infer that the Tribunal was in fact finding that the contract should be affirmed. I reach that conclusion for these reasons. Firstly, there is no express finding that the contract had been affirmed by the Appellant. Secondly, such a finding would turn on the particular facts of the case, and there is no relevant factual findings to indicate the Tribunal was considering the question of affirmation or not. Thirdly, one has to bear in mind that the Appellant did not know that the grievance had been resolved. One simply does not know from the Decision, and it would involve careful consideration of the actual facts, as to whether or not a situation had arisen where the Appellant said "Well I know the grievance has not been dealt with, but nonetheless I am going to carry on working for this employer" or whether the situation was different and whether the Appellant was waiting to see what the outcome of the grievance was. That was a matter which the Tribunal did not resolve.

20. In the circumstances, therefore, there is firstly a real possibility that the Tribunal may have decided that there was a fundamental breach. If so, it did not then consider whether or not the contract had been affirmed. If it had not been affirmed, then the Tribunal would have to decide whether the breach, the failure to deal adequately with the grievances, was part of the reasons why the employee decided to resign why she did or whether it was not. In all the circumstances, it seems to me that the reasoning of the Tribunal is therefore unclear and if there was a finding of fundamental breach, then the Tribunal has not adequately considered

affirmation and, if it was not affirmed, whether the breach was part of the reason for the resignation.

21. I would add two further comments. Firstly, I do not accept the submission of Mr Dutton that this was a continuing breach that could not, as a matter of law, have been affirmed. It is correct that the investigation was inadequate. It is correct that the outcome of the investigation was not communicated to the Appellant. That does not mean that the Claimant could never, as a matter of law, have affirmed the contract. She may well have reached a situation where she says "Well, it does not matter what happens with the grievance now. I am going to carry on working for this employer. I am not going to treat the grievance I made some time ago about people with whom I no longer work as a reason for treating myself as dismissed." It is a question of fact, and the Tribunal would need to consider whether or not there was affirmation if it decides that there was a fundamental breach.

22. The second point to make is that if there was a fundamental breach, but if there was affirmation, then the finding of the Tribunal was that the latest event, the letter of 19 October 2012, was not capable of constituting a last straw because it was an innocuous act. In my judgment Miss Melville is correct to say there has to be a contribution by the latest conduct together with the earlier fundamental breach albeit one which has been affirmed, and the combination must play a part in the resignation. Mr Dutton submitted that the decision of the Tribunal that the letter of 19 October 2012 was innocuous was perverse. In my judgment it is not possible to say it was perverse. The situation was that the employee was excluded from work in the light of serious allegations by patients. In the circumstances what Mr Halton was trying to do was to bring about a situation where a less dramatic course of action was followed and the parties would agree to resume the working relationship albeit that there would be a

warning. It was open to the Tribunal to decide as a matter of fact that was not intended to be conduct and was not capable objectively of being conduct that amounted to a last straw.

23. So, for those reasons, in my judgment ground 1 in the way I have outlined it is made out. Ground 3, the perversity challenge, is not made out. There is a second ground of challenge, which Mr Dutton, on behalf of the Appellant, alleges that the Tribunal erred by failing to apply an objective analysis to the question of fundamental breach and simply asked whether the Appellant relied on the breach to see whether it was fundamental or not. That submission is based on paragraph 86 of the Decision of the Tribunal, where the Tribunal said this in relation to the alleged failures to do with pay. It said:

> **"86. So far as the pay issues were concerned these were small discrepancies rectified almost immediately and whilst failing to pay properly can lead to a repudiatory breach of contract again the Claimant does not rely solely on these matters but relies on them merely as straws."**

24. In my judgment, read fairly and as a whole, what the Tribunal was saying there was that the Claimant was not alleging that these small discrepancies which were rectified immediately amounted to a fundamental breach. She was relying on those as part of a series of non-fundamental breaches which, taken together, entitled to treat the contract as repudiatory. In my judgment, therefore, the second ground of challenge is not made out.

25. Standing back from the details then, there is a lack of clarity in this Decision as to whether or not the Tribunal was finding a fundamental breach by reason of the failure to follow the grievance procedure properly. There is a tension and a contradiction between paragraph 76 and paragraph 87 of the Decision. For that reason alone the appeal should be allowed and the matter sent back. If there was a finding of fundamental breach then the Tribunal would have to have considered whether or not there was affirmation. If there was no affirmation then the Tribunal would have to consider whether or not the fundamental breach was a part of the reason

for the resignation. Those two issues have not yet been considered. For those reasons this appeal is allowed. The matter will be remitted to the same Tribunal. I have had regard to the Decision in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 and paragraph 46 in particular. I bear in mind the considerations of proportionality. I bear in mind the submissions that Mr Dutton made at paragraph 46.4, saying that the Decision is a totally flawed Decision and that it would not be appropriate to send the matter back. In my judgment this is not such a case. The situation is really that the Tribunal needs to amplify its reasons as to whether or not it was finding a fundamental breach. If indeed it was intending to find a fundamental breach in the way the Appellant alleges, then certain further findings need to be made in order to assess the consequences of that. In my judgment, however, it is appropriate to remit the matter to the same Tribunal for that Tribunal to consider the issue.