Appeal No. UKEAT/0201/13/BA
UKEAT/0043/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR P GAMMON MBE

MS G MILLS CBE

MR M CHINDOVE — APPELLANT

WILLIAM MORRISONS SUPERMARKET PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R G MUSASIWA (Representative)
For the Respondent	MR S ROBINSON (Solicitor) Gordons LLP Riverside West Whitehall Rd Leeds LS1 4AW

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Appellate jurisdiction/reasons/Burns-Barke

JURISDICTIONAL POINTS – Claim in time and effective date of termination

C brought two claims: unfair dismissal (constructive), and direct race discrimination. Although the Employment Tribunal concluded there had been two acts of direct race discrimination/harassment against C by a fellow worker, the general manager had not (as he had promised) told C of the outcome of his first informal complaint about the first of those, and (after a properly considered grievance was rejected, and C complained about the outcome to Head Office) the HR director had purported to carry out further investigation (though she had not in fact done anything much if at all, after significant delay), and C resigned only 6 weeks later. Both claims were dismissed. The ET thought that the resignation was too late for C still to be entitled to accept the employer's repudiation (which it found as fact); and that the second of two acts by Herbert was 8 months before the claim and it would not be just and equitable to extend time in respect of it. **Held**: Both these decisions were in error – the first because the ET did not set out its reasons for concluding it was too late, especially since C was off sick at the time and inferences could not so readily be drawn as to affirmation of contract where he was not actively working, and it looked as if the ET regarded passage of time alone as sufficient in itself; the second because the ET had had an argument addressed to it that there was a continuing act/continuum of behaviour, until at least a time within three months of the claim, and had failed altogether to deal with it.

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THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. There are two appeals before us in respect of a judgment and a subsequent refusal to review the judgment of an Employment Tribunal at Liverpool (Employment Judge Reed, Ms Price and Mr Gates OBE).

The background facts

2. The Claimant was employed by Morrisons as a Warehouse Operative from 2003 until he resigned on 18 October 2011. In December 2010 a fellow employee, Mr Herbert, committed an act of racial harassment and discrimination against him, asking to know when he was "going home", Mr Herbert being white and the Claimant being black and British.

3. The Claimant complained to the General Manager, Mr Atwell. He sought to resolve the matter informally, promising the Claimant he would come back to him with the outcome, which he never did. In March 2011 there was a second incident involving Mr Herbert. On this occasion the Claimant found that his forklift truck had been interfered with. When he asked Mr Herbert if he knew anything about it, Mr Herbert became irate, kicked things around, punched the air. The incident overall was one which the Tribunal concluded amounted to racial harassment and discrimination by Mr Herbert against the Claimant. It went on to find that both those incidents were themselves breaches of contract by the employer against the Claimant. There has been no appeal against that finding by the employer.

4. After the March incident, the Claimant put in a written grievance to the Operations Manager, Mr Smith, which the Tribunal found to have been handled properly (see paragraphs 25 and 26). He found there had been no evidence upon which he could take any

action. The Tribunal thought him entitled to reach that conclusion. But it left the Claimant unhappy. He complained to the head office of the supermarket, who referred the complaint back, this time to the Human Resources Manager, Mrs Atwell, as it happens the wife of the General Manager. The Tribunal did not say when precisely the reference occurred, but it must have been sometime before Mrs Atwell came to the Claimant, as she did on 9 September, in order to report. In summary, the Tribunal thought that, although she had purported to investigate the matter, she actually did nothing.

5. The Claimant then sought to progress the matter through the company's head office under the "special complaint" procedure open to him. On 11 October a letter was received, inviting him to discuss the matter at Wakefield, which was not the location of the head office, and by letter dated 18 October the Claimant resigned.

6. He brought two claims. The first was in respect of unfair dismissal, the dismissal being constructive. The second was in respect of race discrimination. The Tribunal concluded, in respect of the first, between paragraphs 33 and 36. It said this:

> **"33. Dealing firstly with the claim of unfair dismissal, we were satisfied that there had been significant mistreatment of Mr Chindove. Specifically, he had been subjected to racial harassment in December 2010 and March 2011. His complaint in relation to the first of those matters had not been dealt with satisfactorily, in that the outcome of the investigation had not been relayed to him. He had also been mistreated in that, when the matter was referred to her, Mrs Atwell had not dealt with his complaint with adequate speed.**
>
> **34. It appeared to us that it was open to Mr Chindove to argue that these matters amounted to a fundamental breach of contract – indeed, the incident in December 2010 would, in our view, amount to such a breach on its own.**
>
> **35. The difficulty encountered by Mr Chindove was this. The last act of mistreatment was the delay occasioned by Mrs Atwell, which came to an end on 7 September 2011.** [That date differs from 9 September, which the Tribunal had earlier used, but nothing, it seems to us turns on the two-day difference] **It was some six weeks later when Mr Chindove decided to resign. We did not accept that the letter of 11 October amounted to mistreatment in any way and it followed that he had failed to establish there was a 'last straw'. Both the delay and the absence of such an act were, we felt, fatal to Mr Chindove's claim."**

7. It then looked at the question of the race discrimination and it found two acts. The second of those two specific acts was that of Herbert in March 2011. The claim form was presented to the Tribunal on 21 November, therefore some eight months later, in respect of a jurisdiction in which the primary time limit is three months. He gave an explanation for that. The Tribunal considered whether it was just and equitable to extend time and decided it was not.

The appeal

8. The Notices of Appeal, separately argued in skeleton arguments devoted, on the one hand, to the constructive dismissal finding and, on the other, to the race discrimination finding, were discursive. For future reference in other cases, we should note that it is of particular assistance if the points of law to be raised on appeal are crisply set out in one or two sentences only. Explanatory text may follow, but the essence of the appeal should be capable of being encapsulated within a couple of phrases if there is a true appeal there at all.

9. On the sift, in the first appeal, Mitting J concluded that there was, amongst what had been written, an arguable ground of appeal. It was the only ground upon which he permitted matters to proceed. It was:

> **"...that in the light of its finding in paragraph 35 (that the last act of mistreatment was the delay occasioned by Mrs Atwell which came on an end on 7 September 2011) the Employment Tribunal was wrong to hold that his discrimination claim was out of time -- see section 123(3)(a) Equality Act 2010. His ET1 was filed within 3 months of that date. This ground of appeal should proceed to a full hearing."**

10. The rejection by Mitting J of the rest of the grounds was reconsidered at a hearing under rule 3(10) by HHJ Eady QC. She thought that there was a potential ground of appeal in respect of the finding as to the six weeks' delay by the Claimant in following Mrs Atwell's report to

him of the outcome of what she called her "investigation". Accordingly our appeal has focussed on those two grounds.

11. In presenting the discrimination ground, with which we begin, it was pointed out to us by Mr Musasiwa, who appeared to represent the Claimant, that, in the Claimant's ET1, he raised the claim that what had happened toward him was not simply an act of discrimination by Herbert, for which the company was responsible, but was a continuing state of affairs, which had gone on throughout his employment and would certainly have gone until 7 or maybe 9 September, when Mrs Atwell reported. Thus, in the ET1 itself, at paragraph 8 the Claimant identified what he called:

> **"...racist maltreatment concerning [Mr Herbert's] conduct in December 2010**
>
> **b. [*management*] and [Mr Herbert's] disgusting abuse following [Mr Herbert's] fresh outburst in March 11."**

At a CMD, we are told, further particulars were ordered. They had been anticipated at the very top of page 7 of the ET1. They were provided in the terms of a statement, which was examined to and presented to the Tribunal. As part of that, at paragraph 9, the Claimant said:

> **"I also pray that the bench recognise that my ill-treatment at Morrison's is a continuum beginning with the 1st incident in December 2010."**

Going on to say:

> **"c. The malaise culminated in the spineless, if corrupted, meandering and indeterminate investigations...**
>
> **d. At the stage of conflict resolution...Morrison's [management] betrayed itself as racist as well."**

At paragraph 14 there was in bold the assertion that Morrison's management "only deployed the light, slow motions or uncommitted actions they took on grounds of my race". These were plainly allegations that the delays in, and the nature of, the investigations conducted by Morrison's were themselves discriminatory. Within the **Equality Act 2010**, if the factual findings which supported them were made, it would be capable of amounting to conduct extending over a period within the meaning of section 123(3)(a) of the Act.

12. Mr Robinson, in the course of a skilful argument, frankly and responsibly presented to us, acknowledged that his information was that the argument had been put to the Tribunal. The argument was simply never addressed by the Tribunal, who did not examine at all any question whether there was a conduct extending over a period or, as Mummery LJ put it in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 95, "a continuing state of affairs" or, as the Claimant himself put it, "a continuum".

13. In order to resolve the claim on time issues, it was necessary to decide whether or not time had run out so that the just and equitable jurisdiction was the only basis upon which it might be extended or whether the claims were within time. That demanded a consideration of this case.

14. Mr Robinson acknowledged the force of those points. He contended, however, that it was not open to the Claimant to pursue this point on appeal. That is because of the wording of the observations made by Mitting J, as reported in the letter of 1 May 2013 giving permission to proceed to a full hearing on that ground.

15. The finding at paragraph 35, to which that letter referred, was plainly, on any fair reading of the judgment, related to the claim in respect of constructive dismissal. The Tribunal very clearly separated that claim from the race claim. It dealt with the first in four short paragraphs in its conclusions and the second in the next five short paragraphs.

16. The word "mistreatment" is not a lawyer's word. It is capable of covering a breach of contract. It is capable of covering a discriminatory act. It is capable of covering conduct which is neither but which might in common parlance be called mistreatment. It is an unfortunate word to use in the context of the conclusions in this judgment, a point to which we shall return. But it does appear (see paragraph 33) by use of the phrase "he had also been mistreated" following reference to acts described as acts of racial harassment as, in the Judge's eyes, being discriminatory.

17. Paragraph 35 might well have been identifying in the words "last act of mistreatment" an act which was one of race discrimination just as the phrase might have been covering something entirely different.

18. The Respondent's solicitors wrote to the Tribunal on 15 May 2013, having been notified by this Tribunal of the views of Mitting J. The letter argued that, if the judgment was read in context, the reference in paragraph 35 was a reference to mistreatment not on the grounds of race but in respect of treatment that could amount to a fundamental breach of the Claimant's contract of employment. This drew back the response from the Tribunal on 3 June 2013, so far as material that:

> **"The Judge has directed me to inform you that he has not seen the appeal, but is clear that paragraph 35 of the Reasons refers to the unfair dismissal claim."**

19. So it does, but that was not actually the point. The question which was raised by the Notice of Appeal did not actually depend upon paragraph 35 identifying an act of race discrimination as such. As we read it, the point being made was simply that the Tribunal had identified that there had been some mistreatment of the Claimant which came to an end on 7 September. That is the finding of fact which was central to this Tribunal's decision to put the appeal through to a full hearing. The question it raised was whether that delay, ending on that date, was or was not itself part of a continuing state of affairs or continuum. That was plainly the issue to which the permission was directed. It was not tied hand and wrist to paragraph 35 in its particular context, as we see it. It raised therefore the very issue which had been raised by the Claimant for determination by the Employment Tribunal, which it simply failed to grapple with at all.

20. In the light of that, and that being our view, it is inevitable that we must allow the appeal on this ground, that is the ground relating to race discrimination. We do so purely upon the basis that the Tribunal was asked to, and did not, resolve a matter for its decision. This is where we come back to its approach.

21. A Tribunal is both advised and obliged as to the way in which it deals with its judgment. A Tribunal Judge is advised by guidance of the President of Employment Tribunals that the judgment should set out the issues between the parties. This judgment did not. It is a particular pity that the guidance was not followed here. The ET1 required focus. One of the helpful aspects of setting out a list of issues at the start is that the agreement of both parties, who may very well be lay people, can be secured at the start. They then know where they are, and, from our perspective, should the matter ever subsequently come to us, we know where they were and

where they were not. Mr Robinson observed that, in his experience, it was almost inevitable that a Tribunal would set out the issues at the outset. We agree that that coincides with our own. The President's guidance is well recognised. It is a pity that it was not so here. If it had been, we suspect that there would have been set out as an issue whether the act was one which continued until either the date of resignation on 7 or maybe 9 September. If so, the Tribunal would have made the decisions which it simply did not.

22. Another aspect of that which a Tribunal is obliged to do, by rule 30(6) at the time of this decision, is to set out the necessary facts and also the law which it intends to apply. Rule 30, headed "Reasons", includes at (6) as follows:

> **"(6) Written reasons for a judgment shall include the following information —**
>
> **(a) the issues which the tribunal or employment judge has identified as being relevant to the claim [this one did not save as could be inferred];**
>
> **(b) if some identified issues were not determined, what those issues were and why they were not determined; [this did not];**
>
> **(c) findings of fact relevant to the issues which have been determined;**
>
> **(d) a concise statement of the applicable law;**
>
> **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues..."**

23. (d) and (e) are of particular relevance when we come to consider the constructive dismissal claim. Though the Employment Judge might be excused for considering that the law of constructive dismissal is trite, it is a fact that there is nothing in the judgment which shows what principles of law he was applying in order to determine that claim. It may be inferred that the Judge had in mind he was looking for a fundamental breach of contract. It may be inferred that he thought that delay in itself could defeat a claim for constructive dismissal. And it could be inferred that he thought there was some significance in there being a "last straw". But it has to be inferred because it is not stated. The wording in paragraph 35 is particularly condensed.

Brevity is a virtue. It is one which we would welcome being observed more than it is by Employment Tribunals. But it can be taken to extremes. This struck us as being if not at, then close to, that boundary.

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of **Western Excavating Ltd v Sharp** [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:

> **"Moreover, he** [the employee] **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."**

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks

is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this Tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. We simply cannot say whether this Tribunal had in mind these necessary factors. It did not set out the law. It did not set out the facts which caused it to apply the law. It did not honour rule 30(6). It did not deal with the detailed statement which the Claimant produced in respect of his constructive dismissal though this may be unduly critical of the Tribunal's judgment. The reference to time looks as though the Tribunal simply thought that the passage of time was sufficient in itself. The decision is, effectively, unreasoned. Mr Robinson said what he could, as best he could, but acknowledged the great difficulties that lay in his way. We have no doubt that the appeal on this ground, too, has to be upheld.

Conclusion

28. For the reasons we have expressed, both grounds succeed. We cannot ourselves decide the question of whether the Claimant, by his conduct, indicated that he wanted the contract to continue despite the breaches towards him and had therefore lost his right to treat himself as discharged. Nor can we decide for ourselves whether there was a continuing course of conduct. To do so would involve asking why it was that, first, Mr Atwell did not return to the Claimant to report the outcome of his informal investigation of the complaint, why also Mrs Atwell took

so long in a purported investigation, which had no real substance, on the Tribunal's findings, and why it was that the grievance was remitted to her from Head Office rather than processed under the special complaints arrangements. It may have been that they were infected, to some extent, by race. We simply cannot say. Mr Musasiwa was keen to tell us that, in the case of **Bahous v Pizza Express Ltd**, the principle was established that "the grievance procedure conducted by an employer immediately after an act of discrimination formed part of a continuing act, with the result that the time limit for claiming race discrimination only began to run when that process was completed". In **Bahous v Pizza Express Ltd** UKEAT/0029/11, a decision of this Tribunal chaired by HHJ Peter Clark of 19 October 2011, we do not see any such principle as having been stated. That was a case in which a Tribunal had concluded that the handling of a grievance which had been made immediately following an act of discrimination had itself involved elements of discrimination, and that that was a finding open to the Tribunal. Nor could we think that there could be such a principle, for it would be an entirely artificial constraint upon the determination of that which is, importantly, a matter of fact. The question is whether the actions were or were not influenced, consciously or unconsciously, by race so as to be discriminatory. But at least the case shows that it is possible for a Tribunal to conclude that a grievance procedure and the act of discrimination preceding it may be linked so that they together form an act which would qualify under section 123(3)(a). We consider that the Tribunal must therefore examine the reasons for the conduct and conclude, taken overall, whether there was or was not a "continuing state of affairs" such as Mummery LJ referred to in **Hendricks**. The Tribunal does not have to determine whether, if there was no such continuing state of affairs, it was just and equitable to permit the claim to continue. There has been no appeal permitted against that finding. That finding must stand. It will, of course, fall if there is no necessity for it should the Tribunal to which we shall remit the matters we

have just mentioned concludes that there was here a continuing act so as to bring the race discrimination claims within time.

29. Summarizing, the Tribunal will have to consider, in the light of our judgment, what are the relevant facts relating to the Claimant's decision whether to go or to stay, following 7 or 9 September, to see whether his conduct was such that he affirmed the contract as continuing and thereby lost the right to treat himself as discharged from it, and, secondly, must examine the employer's behaviour so as to answer the case which was raised, as we have indicated, but not dealt with by the Tribunal.

30. The question whether we should remit to the same or to another Tribunal is a matter of dispute between the parties. Mr Robinson argues that, in reality, our decision is simply that the Tribunal has not given sufficient reasons for a permissible conclusion. Mr Musasiwa argues that the Tribunal, in its approach, had indicated a degree of pre-judgment towards his client and otherwise demonstrated it took an approach to the facts which would mean that it should not return to that Tribunal.

31. We have concluded that we should apply the principles which are set out in **Sinclair Roche Temperley v Heard** [2004] IRLR 763 in the well-known passage of the judgment, beginning at paragraph 46.

32. Proportionality is always a relevant consideration. The case here was initially run over two days. The limited scope of the facts which we have remitted would mean that, whether in an old or a fresh Tribunal, it would have very much the same period of time in which to determine it. The passage of time - here there is a year-and-a-half since the decision, which

gives rise to some risk in such a short case, that some of the facts may not be capable of fresh appreciation but rather of inadequate recall. "Totally flawed decision" - we do not consider the decision totally flawed. As we have indicated, its central findings will stand. But we are very concerned about the way in which the Tribunal approached this particular hearing, as we have indicated, by failing to deal with an argument, failing to set out the issues, failing to honour its obligations under rule 30(6) and being over-concise to the point that it was, and using language which was capable of misleading, rather than being useful, through being colloquial. We balance the matters we have mentioned with Tribunal professionalism. In conclusion, we are all of the mind that this case will be, in these circumstances, better heard by a fresh Tribunal.

33. Accordingly we remit this case to be heard, on the matters we have remitted to it alone, for re-hearing. It will be necessary for the Tribunal to consider what witnesses it wishes to hear in respect of the issues we have identified. We would expect it would probably wish to hear from Mr and Mrs Atwell and the Claimant. It will need to consider with great care, and need not accede to, any invitation to hear evidence which goes beyond that of the witnesses called in the present hearing.