Appeal No. UKEAT/0460/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

FRITH ACCOUNTANTS LTD — APPELLANT

MRS J LAW — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEITH POTTER (Solicitor) Fieldhouse and Co LLP Hamilton House 87-89 Bell Street Reigate Surrey RH2 7AN
For the Respondent	MR PAUL HAINSWORTH (Representative)

SUMMARY

UNFAIR DISMISSAL

Constructive dismissal

Compensation

Contributory fault

Polkey deduction

The Claimant was held constructively dismissed when her employer raised concerns about her recent performance and health with her son, and not with her. At a subsequent remedy hearing the employer argued (a) that the Employment Tribunal should have found some contribution under s.123(6) **ERA 1996**, rather than rejecting her reluctance to accept that she had mistakes at work as contributing "to any extent" to her dismissal; (b) that it failed to deal with its argument under s.122(2) re basic award; and (c) that it should have assessed the chance of future dismissal at higher than the 40% it did.

HELD: Causation is matter of fact. The conclusion to which the ET came, that her unwillingness to accept that she had erred, had not caused or contributed to her constructive dismissal was within its entitlement to determine facts, and was not obviously wrong. There was no compelling reason why it must have found some contribution, particularly where the dismissal (being constructive) was caused by the employer's repudiatory breach, by conduct for which (being a breach of the term as to trust and confidence) there was no reasonable or proper cause. Ground A dismissed.

However, where causation was not in issue – as it was not under s.122(2) **ERA 1996** – the ET erred because it did not deal with the conduct complained of and say if, or explain why it was not, just and equitable to make any deduction in the light of it. Ground B was upheld.

As to (c) and the 40% deduction, this could not be said to be outside the wide margin within which reasonable disagreement is possible. It was not manifestly too low. Ground C dismissed.

The parties agreed a substitute figure in light of the conclusion on Ground B.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision made by Employment Judge Spencer, at London (South), Reasons for which were given on 5 September 2013. It raises the relationship between constructive dismissal and compensation, in particular by reference to contributory conduct. So far as I know, it may be the first case to deal with an alleged contribution by an employee where the breach of contract by the employer was a breach of the implied term of trust and confidence.

2. The hearing before Judge Spencer was a hearing in respect of remedy, relating to a Claimant who had at an earlier hearing been held to be unfairly dismissed, that being a constructive dismissal, on 9 August 2012. It was argued before the Tribunal that it should make a deduction for contributory conduct, both in respect of the compensatory award under section 123(6) of the **Employment Rights Act 1996** and in respect of the basic award under section 122(2).

3. The two sections are subtly but importantly different. 123(6) provides:

> **"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."**

Section 122(2) is in these terms:

> **"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."**

4. Both sections require the Tribunal to consider the conduct of the complainant. It is settled law since at least **Nelson v British Broadcasting Company (No 2)** [1979] IRLR 346 CA that the conduct must be culpable or blameworthy. It was pointed out in the Judgment of Brandon LJ in that case that that includes conduct which is perverse, foolish or bloody-minded. In **Gibson v British Transport Docks Board** [1982] IRLR 228 Browne-Wilkinson J, as President of the Employment Appeal Tribunal, thought that the conduct had to be "improper". It is not sufficient merely that the conduct be unreasonable, though it may be so unreasonable as to be culpable or blameworthy or fit within that class of conduct. But it is plain that what is required is more than just conduct of which the Tribunal disapproves or conduct which might, on reflection, have been better. And it is important not to water down the test, bearing in mind that contributory fault reduces the amount of compensation to be awarded for the primary fault, which remains the primary fault of the party responsible. Once conduct is culpable or blameworthy, in the **Nelson** sense, the Tribunal is entitled, under both 122(2) and 123(6), to reduce the relevant award to the extent it considers just and equitable. It is likely that in each case what is just and equitable will be the same. But where the sections differ is that in 123(6) the Tribunal must also find that the conduct complained of, in respect of which it may go on to think it just and equitable to reduce the award, caused or contributed to the dismissal "to any extent". Those last three words emphasise, as indeed Slade J recently emphasised in **Carmelli Bakeries v Benali** UKEAT/0616/12/RN, 31 July 2013 (unreported), that what is looked for need not be the principal or sole cause, or even a main cause, of the dismissal. The words "any extent" are obviously and intentionally broad. They follow words, however, of causation.

The facts

5. The Claimant worked in an accountant's office. I am told that there were 11 full-time equivalent employees working there. She was 62 at the date of her dismissal. The Tribunal

found that in 2011 there had been a performance review. She did well. But in 2012 she did not have a pay rise because concerns had begun to develop about her performance. The sense of the Tribunal decision is that her performance was becoming careless in some respects, it was thought by her immediate managers, in a way that was uncharacteristic of her previous performance. She accepted that she had made a mistake in failing to submit returns timeously to HMRC, but thought it was an easy mistake to have made. She did not accept that she was at fault in respect of other errors, so-called, which were drawn to her attention. Provoked by, perhaps, knowing of some conversations which had taken place, in which it seemed to Mrs Milner and Mrs Palmer, her employers, and Mr Frith, the principal of the practice, that the Claimant's conversation had seemed incoherent and rambling, Mr Frith became a little concerned. Rather than raise any issue of performance with the Claimant – none had been formally raised – he met the Claimant's son and started to discuss with him matters relating to his mother's conduct, her performance review, and her behaviour in a way in which the Tribunal felt was a clear breach of the implied term of trust and confidence. It accepted that Mr Frith's concerns were genuine. It accepted that his intentions were good, although that word was qualified by the word "largely". It was, however, apparent to it, said the Tribunal, (paragraph 25) that that was not the way to go about such matters.

6. In response to that breach, horrified by the nature of the discussion which had taken place behind her back, the Claimant resigned. In the liability hearing the Tribunal concluded that this was justified by the circumstances and that there had been a dismissal within the terms of section 95(1)(c) of the **Employment Rights Act 1996**. There has been no appeal against that decision. Accordingly the remedy hearing began on the footing that the Claimant was dismissed. The reason for dismissal would not, of its nature, fall easily within any of the acceptable reasons in section 98, simply because the employer had not consciously dismissed the Claimant, and the question which therefore arose was as to the compensatory and basic

awards to which she was entitled. In its first paragraph the Tribunal said that the particular issues:

> **"...were to establish how long the Claimant would have remained in employment but for her constructive dismissal, the length of any future loss, whether she failed to mitigate her loss and whether there should be any reduction to the basic or compensatory awards to reflect contribution."**

7. As to the question of contribution, the Tribunal set out its conclusions in one short paragraph. It is central to the discussion before me today. It reads:

> **"Mr Potter [asserts] [the parties agree that is the word intended] that the Claimant has contributed to her dismissal and refers to *Sutton v Gates* and *Nelson v BBC*... He refers to it being the Claimant's own fault in the sense that she did not accept the criticisms and continued to make errors. I do not accept that. Even if there had been genuine performance concerns, that was not a reason for Mr Frith to breach Mrs Law's confidence by speaking as he did to Mr Law. In doing so Mr Frith breached his duty to the Claimant of trust and confidence and that was a matter entirely for him."**

8. That gives rise to two issues on this appeal. Ground A is that the Tribunal erred in finding there should be no reduction by reason of contributory fault under section 123(6). Ground B is that the Tribunal erred in failing to consider, or failing to make any express finding whether, there should be a reduction in the basic award under section 122(2). A third ground of appeal (c) relates to a separate matter. The Tribunal concluded that there was a 40% chance that the Claimant would have lost her employment by dismissal or resignation after a period of eight months after the date on which she did resign and was therefore dismissed. The Employer contends that that figure should have been greater and it was an error of law to place it so low.

Contributory conduct – Ground A

9. It will be unusual, though there is no test of exceptionality, for a constructive dismissal to be caused or contributed to by any conduct on behalf of an employee. The reason for that is because a constructive dismissal is determined by applying the law of contract. That was determined in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221. It has recently been

re-asserted in **Bournemouth Higher Education Corporation v Buckland** [2010] ICR 908. What causes there to be a constructive dismissal is not conduct of the employee but conduct of the employer which amounts to the employer abandoning and altogether refusing to perform the contract (the modern test or expression of "fundamental breach"). That is conduct which is, centrally, that of the employer. Where the conduct said to be a fundamental breach in that sense is a breach of the implied term of trust and confidence, then not only will it be repudiatory, but by definition there will be no reasonable or proper cause for the employer's behaviour. That is because the accepted formulation of the test for that which amounts to the implied term is that an employer must not conduct itself in such a way as is calculated or likely to destroy or damage the relationship of trust and confidence between employer and employee *without reasonable or proper cause.* Those last words are important. The unchallenged finding here was not only that there was a breach of contract by the employer but that there was no reasonable or proper cause for it. It had been argued, in the course of the liability hearing, by Mr Potter that the Tribunal should find reasonable or proper cause because of the background, the history of errors and the Claimant's confusing conversations, and the fact that she was unreceptive and resistant to any form of criticism. The Tribunal (paragraph 27 of the liability judgment) did not accept that that amounted to a reasonable and proper cause. However, as has been recognised in the cases, in particular **Polentarutti v Autocraft Ltd** [1991] IRLR 457 EAT, and the case upon which the Appeal Tribunal, presided over by Knox J, drew for that view, a decision of the Northern Irish Court of Appeal, in **Morrison v Amalgamated Transport and General Workers Union** [1989] IRLR 361 at 364, paragraph 14 the doctrine of constructive dismissal deals with whether there is a dismissal. Yet the jurisdiction of a Tribunal is statutory. The question of compensation is dealt with in sections 122 and 123 of the 1996 Act upon the footing that there has been a dismissal, not that there has been a dismissal which is not a constructive one, or the opposite, but any dismissal. The words therefore can apply in an appropriate case to a constructive dismissal. That is what the Appeal Tribunal in

essence determined in **Polentarutti**. It also made it clear (see paragraph 55) that any action of the claimant which met the statutory test could be relied upon. It did not have to amount to the direct and exclusive cause.

10. The Tribunal's decision here is tersely expressed. As I read the decision, and as in part in his submissions, I think, Mr Hainsworth, who appears as representative for the Claimant to respond to the appeal, accepts, the Tribunal does not say clearly that it thought that there was no blameworthy conduct. It appears never to deal with the matter. Rather, in paragraph 18, as I read the decision, taking the Tribunal decision as a whole, it was concerned with the cause of the dismissal. The words used contrasted whether it was the Claimant's own fault in not accepting criticisms and continuing to make errors with whether it was the employer's fault. The last words, in paragraph 18, are that the breach of duty was "a matter entirely for him", the him being Mr Frith. That is a finding that there was no causal contribution to any extent by anything which the Claimant had done. Mr Potter's focus was on the Claimant's failure to accept criticisms and, linked to that, to continue making errors. That expression of fault made by Mr Potter, solicitor for the Appellant, coincided, as Mr Hainsworth has pointed out in his submissions, with the way in which the ground of appeal is expressed. It was not being contended, he submitted, that making performance errors generally was the conduct relied upon. It would be difficult perhaps to argue in most cases that issues which are purely those of performance, particularly performance issues which had never seemed to the employer to merit any formal proceedings to improve them, could fall within the heading of culpable or blameworthy conduct. Accordingly the focus, as Mr Hainsworth has pointed out, was on whether the refusal or failure of the Claimant to accept criticism had, to any extent, caused or contributed to the dismissal.

11. The question of causation has to be approached on a robust basis (see **Warrilow v Robert Walker Ltd** [1984] IRLR 304 at 306, paragraph 21), adopting the well-known appeal decision of **British Fame v Macgregor** [1943] AC 197. It is essentially a matter of fact for a Tribunal to decide. It is only if a Tribunal has abdicated its responsibility to make any finding, or has approached the matter in a wrong way, or has reached a wholly perverse conclusion, that a finding as to causation can be upset on appeal. This is inevitable since an appeal to tests such as the "but for" test of causation can lead to arguments, which may have some merit on a philosophical basis, that act X was the cause of result Y yet lack relevance in the context of litigation. The issue of causation has to be seen in the context here of litigation and compensation for the adverse effects of a wrong done to the victim. It is appropriate, applying such a test, that, as the courts have long done, a robust approach to causation be taken. This will not necessarily be a philosophical one.

12. Mr Potter argues, in a careful and thorough submission, that the Tribunal had implicitly been critical of the Claimant's attitude. It had found in its liability decision that Mr Frith's intentions were largely good. He was placed in a difficult position: apprehending that the Claimant might not react easily to criticism, he was seeking to find a way to deal with the matter. The way in which the Tribunal describe the workplace is as a friendly and supportive environment in which to work. The Tribunal had not drawn any express conclusion as to whether the Claimant had erred in her work to any significantly greater extent than she had done in the years before. But implicitly, submitted Mr Potter, it did accept it. If it had not been for that behaviour, then Mr Frith would not have been contemplating having a difficult conversation with the Claimant after the summer holiday, in which he would challenge her with some of the issues. He had not yet gone so far. But the Tribunal accepted that he had it in mind. Accordingly, what caused him to raise the matter with the Claimant's son, in a way

which constituted a breach of contract, was related to his genuine concerns about her and her welfare, and was therefore caused by them.

13. I reject those submissions. As Mr Hainsworth points out, insofar as an employee is suffering by reason of some lack of capability, without any intention on their part, it will be very difficult if not impossible to hold that culpable of blameworthy. That is why he pointed out that here what was being relied upon for this argument was a conclusion that the Claimant was in fact refusing to accept blame where it was justified. He pointed out that the Tribunal never reached that conclusion. But more to the point, Mr Frith could not sensibly be said to have had the conversation he did because of her resistance to criticism. Insofar as his motives were genuine, and he wished to understand whether there might be some medical condition from which the Claimant suffered, that had nothing to do directly with this particular aspect of her behaviour. He pointed out that the finding which the Tribunal made could not be said to be perverse in circumstances in which the employer itself had not ever put, or at least there was no evidence it had ever put, a refusal to accept criticism to the Claimant herself. There had been no such mention in a letter containing her performance review of 2012. It was not referred to in the Grounds of Resistance except, en passant, as he put it, in paragraph 2 at page 30 of the bundle. If asked whether, in the context of constructive dismissal, by reason of a breach of this term, the Claimant's failure to accept criticism in respect of matters which the Tribunal itself downplayed as being of no great significance, which it did throughout both its Judgments generally, fully entitled the Tribunal to conclude that there was no causal contribution upon the robust test which has to be applied. It might perhaps have been surprising if it had reached such a conclusion. But the issue is simply whether it was entitled to, or whether as a matter of law was bound to hold that there must, on the evidence, be some contribution. I could not go that far. It seems to me that, accordingly, viewing paragraph 18 as I do, the appeal must fail. The Tribunal was entitled to reach the conclusion it did. There was no error of law. The Tribunal

approached the matter correctly save that it did not identify the culpable conduct complained of but rather dealt with the matter assuming that that had been made out.

Contributory conduct – Ground B

14. My reading of paragraph 18, however, necessarily means that I must accept the appeal on Ground B. If the reasoning is all about causation, that does not apply to Ground B. The Tribunal simply did not consider whether it would be just and equitable to deduct a sum from the compensation to reflect its view of the conduct, whatever it was. When I indicated to the parties that this could be a conclusion that this Tribunal would reach, both invited me to take what steps I could to resolve the matter proportionately to avoid, the cost, expense, time and inconvenience of returning to the Tribunal on it. I invited the parties, if they wished, to take time together to consider the matter. Sensibly, they have done so. By agreement they have substituted a revised sum. The conclusion on Ground B is that the appeal is allowed. The Tribunal should have, but did not, deal with an issue before it, which it had itself posed in paragraph 1. For the financial finding in respect of the basic award which it made, a sum of £2,150 will be substituted by agreement.

Percentage deduction – Ground C

15. Ground C relates to a percentage chance identified by the Tribunal. On the sift, Mr Recorder Luba QC thought that the chances of success here were perhaps slim, but because there should be permission to appeal on Grounds A and B, he would permit it on Ground C too. There was marked lack of enthusiasm. There was no significant enthusiasm either shown by Mr Potter, sensibly, although he did argue the point. The reason why enthusiasm would be misplaced for this point is that the assessment of chances inevitably involves some speculation. It cannot be said with certainty that a percentage of 40 percent or 60 percent or 30 percent is any better than the other. The assessment has to be made in good faith by the Tribunal but of

its nature will always be expressed in a round figure and is not easily susceptible to further analysis. This is a case in which the dismissal would not otherwise have occurred, in the sense that this was not a case, as is familiar in **Polkey** situations, in which there has been a dismissal which, but for some procedural unfairness, would have resulted in a termination of the employment. Indeed, this is a case in which there had been, as yet, not one single formal hearing in respect of performance, capability, or conduct. There might yet have been. The Tribunal thought that would not happen at all within the next eight months. That finding has not been challenged. It is the percentage likelihood thereafter that the employment would have terminated by reason of resignation or dismissal that fell to be assessed, if it could be at all. Experience suggests that 40 percent is not insignificant as a chance. The relevant findings are that this environment was supportive. Plainly Mr Frith had no hostility towards the Claimant. The reason for his approaching her son was, as expressed by the Tribunal, almost the opposite. These considerations suggest that considerable effort would be taken to retain the Claimant as an employee, rather than to dismiss her.

16. The Tribunal's conclusion seems to me a conclusion which can only be upset if it falls outside the very wide range within which it is permissible for a Tribunal to place it. Here, it had to be recognised, correctly, that there was some chance that the Claimant would still have performed so poorly as to lead to her dismissal. But I note there was no evidence, so far as I am aware, apart from one year's declining behaviour, to show that she was in any sense in a medical or senile decline. Accordingly the 40 percent recognises a significant chance and if anything seems high. However, I cannot say that it should have been placed at any other level than it was or that it was manifestly outside the range. It was a judgment for the Tribunal. Having heard the evidence and all the facts and made an assessment of the workplace, it was entitled to reach that figure and it cannot sensibly be challenged on appeal.

17. Accordingly I conclude that the appeal on Grounds A and C fails; that the appeal on Ground B is allowed. For the financial result consequential on the success of Ground B, a figure of £2,150 is substituted for that awarded by the Tribunal, that figure having been agreed as appropriate between the parties.