Appeal No. UKEAT/0199/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 January 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS K BILGAN

MR M WORTHINGTON

MR R RAWSON — APPELLANT

ROBERT NORMAN ASSOCIATES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES CHEGWIDDEN (of Counsel) Bar Pro Bono Unit
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

CONTRACT OF EMPLOYMENT – Damages for breach of contract

UNFAIR DISMISSAL

There were two issues before the Employment Tribunal: whether the Claimant had been unfairly dismissed, and whether he had broken his contract with the Respondent so that the Respondent could succeed on a contractual claim for its loss. He was genuinely thought by the Respondent, on reasonable grounds, to have diverted the Respondent's property and labour when that was used to build a porch for another employee without the Respondent's knowledge and permission, and, having chosen not to participate in a disciplinary hearing, was held dismissed by a fair process after reasonable investigation. The Employment Tribunal then concluded, (without acknowledging that a different test applied, i.e that it had itself to decide if the Claimant had actually done what was alleged, rather than merely asked what the Respondent had reasonably thought he had) that the Claimant had broken his contract. The wrong test was in fact applied; there was insufficient evidence of breach and the appeal against the contractual decision was allowed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. There is a vital distinction between the facts which underlie a claim for unfair dismissal, in particular where that dismissal is for conduct reasons, where the dismissal itself is admitted, and the Tribunal's approach where it is considering questions of contributory conduct or whether the employee is himself in breach of his contract. Unfair dismissal requires an Employment Tribunal to evaluate the employer's conduct. In a conduct dismissal it examines the employer's view of the employee's behaviour. It is not concerned with whether that behaviour actually occurred, only whether, on the facts, the employer reasonably might conclude after a reasonable investigation that it did. When it comes to look at questions of whether the Claimant has been guilty of contributory conduct, in a claim in which the Claimant succeeds, it is not concerned any more with what the employer thinks the employee did. It is concerned with what he actually did. The same is true if there is any question of wrongful dismissal which involves looking at whether the employee himself was in breach of contract. Many claims for wrongful dismissal or constructive dismissal involve an assertion that it was the employee and not the employer who, in the circumstances, was in breach of contract. In such a case, what is relevant is not what the employer thought happened, however reasonable that might be. It is what actually happened. A Tribunal needs to know, and say why it takes the view that it does, that the conduct happened as alleged or did not.

2. The possibility of an employer bringing a counterclaim against an employee for the employee's breach of contract of employment raises exactly the same approach. The question is not whether the employer thought that there was a breach. It is whether there actually was a breach. That, of course, has to be judged on a balance of probabilities. It requires evidence sufficient to satisfy that balance.

3. The present appeal illustrates the importance of bearing these distinctions carefully in mind. It is all too easy to lose focus upon what actually happened where a claim is centrally about whether a dismissal was or was not fair within section 98 of the **Employment Rights Act 1996**. It is said, on this appeal, that the Tribunal at Bury St Edmunds, presided over by Employment Judge Laidler with Mr Bowerman and Mr Coles as members, did so, in its Reasons of 25 June 2012 for holding not only that the Claimant's dismissal was not unfair but also that the employer's counterclaim for breach of contract should be upheld and the Claimant ordered to pay the sum of £1,738.54 in consequence. There is no appeal against the finding in respect of unfair dismissal which occupies most of the reasoning set out in its decision. The appeal is solely in respect of the decision on the counterclaim.

The background

4. The Claimant was employed by the Respondent in the construction industry as a site agent from June 2006 until his dismissal in circumstances we shall describe.

5. In 2011 he was managing a site at Peasenhall in Suffolk. The employer had an anonymous letter in February 2011 alleging that another employee, one Cook, had been getting co-employees to work for him at weekends whilst they were purportedly being paid by the employer to work on the Peasenhall site, and it was suggested had had a front porch added to his house constructed from oak, which had been part of the building materials supplied to Peasenhall. That was investigated promptly by a Mr Corbett, who thought there was no evidence that the Claimant was involved. There was an air of suspicion, but no proof, in respect of Cook.

6. Shortly after that, a new senior contracts manager was appointed. He thought that the Claimant was managing the site badly and raised capability concerns. The principal in the

employer's business happened to visit Cook's house and took photographs of the porch. It was a far larger and grander construction than he had imagined. Just a few days after that, he obtained a letter which was written by the same person who had written anonymously earlier. This letter identified the Claimant as having personally delivered the oak porch to Cook's house and said that the porch had been constructed at Peasenhall during company time with his full knowledge. These events led, within a few days, to an invitation to attend a disciplinary hearing. It was alleged in respect of the Claimant that he had delivered the porch, that he had allowed subordinates to carry out private work during company time to build it, involving an associated breach of trust and falsification of company paperwork, that he had removed materials from Peasenhall, and that aspects of his general performance were unsatisfactory.

7. The Claimant did not attend that disciplinary hearing. He said that he was medically unfit to attend. He agreed that the employer might obtain evidence of that, but then retracted his permission. Though told that the hearing would go ahead, he took no part in it. The inevitable, perhaps, happened in that the employer concluded that he was responsible. An appeal was intimated but the Claimant did nothing to progress it. His dismissal, therefore, was for conduct.

8. The employer raised a counterclaim. Ever since the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, it has been accepted that an employer may bring proceedings before an Employment Tribunal in respect of certain claims for breach of contract. Those claims are identified by reference to the now repealed section 131(2) of the 1978 Act, but it was common ground below that there was jurisdiction in the Tribunal to determine the employer's claim for the cost of the oak timber used to fabricate the porch and the value of the labour which would probably have been used to construct it. That came in total to the sum which the Tribunal duly awarded.

The Employment Tribunal's decision

9. The Tribunal recognised, at the outset, that there were separate issues. At paragraph 5 it listed them under three separate headings: unfair dismissal, breach of contract (that was in respect of the allegation made by the Claimant that the employer had broken its contract by wrongfully dismissing him without notice), and the counterclaim. Under the counterclaim it posed as an issue:

> **"5.7 Did the Claimant breach his contract of employment causing loss to the Respondent?**
>
> **5.8. If so is the Respondent entitled to recover that loss from the Claimant?"**

The Tribunal spent most of its Judgment dealing with the issues which related to unfair dismissal. In its conclusions, beginning at paragraph 103, it accepted that the reason for dismissal was conduct and it went on in paragraph 104 to apply the principles first recognised in **Burchell v BHS** [1978] IRLR 379.

10. It dealt at some length with the reasonableness of the procedure adopted and concluded that the dismissal within the range of reasonable responses. As to that it said:

> **"As this involved fraudulent conduct, dismissal was clearly within the band of reasonable responses."**

It then dealt, in two short paragraphs, with the counterclaim. It said this:

> **"111 The Tribunal accepts the submissions made on behalf of the Respondent that it is an implied term of the contract of employment that neither an employee nor the employer will act in breach of the implied term of mutual trust and confidence. Further, it is an implied term in any contract that the employee owes his employer a duty of faith and fidelity. As a result of the Claimant's breach of contract and being knowingly involved in or aware of the dishonest preparation, creation and removal from site of the structure that became Mr Cook's porch, he breached his contract in relation to the duty of good faith and trust and confidence. The Respondent has satisfied the Tribunal that there was a causal link to the loss sustained by them in relation to the cost of the oak and labour. The value of the loss was not challenged, and Mr Norman, the Tribunal accepts, is an expert in costing in these areas.**

> **112. The Respondent's counterclaim is therefore made out..."**

11. In reaching that conclusion, the Tribunal had moved seamlessly from addressing the employer's reactions to the information which the employer had to a conclusion that the Claimant had broken his contract. There was no clear reasoning as to what the breach was. The third sentence of paragraph 111 simply begins with the words, "As a result of the Claimant's breach of contract...".

12. The pattern of the Judgment is such that it appears that the Tribunal had thought that the breach of contract was, in effect, determined by the employer's view that there had been such a breach of contract. As we have said, the question of breach is not to be determined by whether a party thinks that there has been a breach but whether, objectively viewed, that is actually the case.

13. The fact that the Tribunal was taking this approach is demonstrated to us by paragraph 4 at the start of the Judgment, reviewing the witness evidence the Tribunal had received. It said:

> **"A witness statement was also provided by Lee Simkins** [he was the person who had written the original anonymous letter] **but the Tribunal was not able to give weight to this as he was not present to be cross-examined. It was not however seen as particularly relevant as the Tribunal must consider what the Respondents had at the time rather than later."**

That comment is focussed entirely upon looking at what the Respondent had before it at the time it took the decision. That is the correct approach where unfair dismissal is concerned. But the evidence which Simkins could give was plainly relevant to the question whether the breach had actually occurred. As Mr Chegwidden, who appears for the Appellant, submits, there was no other evidence which objectively could establish, to the required degree of probability, that the Claimant had been responsible for the diversion of goods and labour away from his

employer's project to a fellow employee. None of the other witnesses could say anything from their personal observations about that. The Claimant himself denied that he had been involved in any wrongdoing. He made the point, intended to reflect upon the fact that goods could have been taken from site and workmen could have been absent from site without his knowledge, that on a number of days within the relevant time period he had himself been absent from site. But the Tribunal, in dealing with this, again did not regard it as being of any significant relevance. Plainly it was, if what objectively had to be established was the actual breach.

14. The approach of the Tribunal was identified by Keith J in a note which he wrote for the Employment Judge and parties immediately afterward. He thought that there was force in each of the three grounds of appeal which had been advanced. He noted that the Tribunal had not said in what way the Claimant had broken his contract of employment, that is whether he had sanctioned the construction of the porch using the company's materials and labour or whether he had simply failed to report it. Nor did it give its reasons for that finding, all its previous findings having related to whether the company *had reasonably believed* either that the Claimant had sanctioned the construction of the porch using the company's materials and labour or had failed to report it, not to whether he had in fact done so and, secondly, was said to have excluded evidence which, though not relevant to whether the company had reasonably believed that he had sanctioned it or failed to report it, had been relevant to whether he had actually done it. Nor did it say why it had found a causal link between his breach and the loss.

15. He invited the Tribunal to answer three questions, which he set out. The first was:

> **"(a) In what way did Mr Rawson break the implied term of trust and confidence in his contract of employment, what was the evidence which the tribunal took into account in reaching that conclusion, and what were the tribunal's reasons for that conclusion?"**

16. The Judge, responding on behalf of the Tribunal as she was invited to do, said:

> **"At paragraph 110 we accepted that the reason for dismissal was fraudulent conduct, which was the totality of the allegations set out in the invite to the disciplinary hearing..."**

17. In relation specifically to the porch, this included:

> **"...delivering the oak porch to Phillip Cook's house which was constructed on the Respondent's site, allowing subordinates to carry out private work in company time building the porch and removal of materials from the project namely the oak beams. We accepted that this amounted to a fundamental breach of contract by him."**

18. Mr Chegwidden comments that this continues to elide two different tests. It appears to assume that once the reason for dismissal, which is in the employer's mind, is established as being there, that that amounts to a breach of contract. If that is what the Judge meant to say, it was an error of law. We think that it probably was what she intended to say, and the error of approach is therefore clearly made out. It should be said that the Tribunal might be to some extent forgiven for taking that approach. This is because counsel for the Respondent himself appears to have invited the Tribunal to elide matters in this impermissible way. In his closing skeleton, he said this:

> **"As a result of the investigation that has been carried out the Respondents have concluded that, on the balance of probability, the Claimant was knowingly involved in or aware of the dishonest preparation, creation and removal from site of the structure that has become known as Mr Cook's porch. To act in this way the Claimant must be said to have breached the terms of his contract relating to faith and fidelity and/or mutual trust and confidence..."**

19. The words "to act in this way" do not actually logically follow. The previous sentence speaks of what the Respondents concluded had happened. The second sentence suggests that that would be sufficient to conclude that there had been a breach of contract when it was not the case. Adopting the Respondent's submissions generally, as the Tribunal did, it may have been misled by that. We would wish to make it very clear that, in a case in which lawyers representing parties are or should be aware that there are both section 98 of the Employment

Rights Act and, separately, questions relating to contract to be considered, a Tribunal should be reminded of the need to take a different approach in respect of each. That is, as we would see it, part of an advocate's general responsibility.

20. For completeness, the principles which Mr Chegwidden, appearing for the Claimant before the Tribunal addressed, were in our view correct. We now consider his grounds in greater detail.

The Claimant's case

21. The Respondent has not sought to be represented on this appeal and is happy to abide by the result. Accordingly what we have had to consider has been placed before us without contraversion by Mr Chegwidden. He raises three grounds.

22. The first was the error of approach which we have identified. Second, he argues that the Tribunal misapplied fundamental principles which relate to breach of contract. The Tribunal here assumed that the loss which Mr Rawson's evidence established was the responsibility of the Claimant once his breach of contract had been found. This, Mr Chegwidden submits, does not follow. As Keith J observed, his precise role might be of importance. If, on the facts objectively established on the balance of probabilities, the Claimant had jointly with others diverted material and resources to construct Cook's porch, then he would be liable for the employer's losses in respect of that. But if he were responsible for a failure of supervision which permitted others by their dishonesty to do so, and was not a co-conspirator with them, a different result might follow. His precise role and precise breach needed to be established to know whether liability was several or joint and what loss flowed from his breach. It could not simply be assumed that all the loss did so without further explanation. We accept those submissions.

23. Thirdly, he submits that there was insufficient evidence to reach any conclusion that the porch had been constructed by reason of the breach of the Claimant's contract. There was no evidence given at the Tribunal from anyone other than Simkins to the effect that the Claimant was directly involved, but Simkins' evidence was expressly regarded as of no weight. Thus there was no evidence that he was directly involved. There was material which suggested that he might have been, but none that could possibly go so far as to satisfy a court on the balance of probabilities, which was the requisite test.

24. We consider that Mr Chegwidden is right on this too. There is nothing in the Tribunal Judge's response which assists. The Judge said, at paragraph 7 of her response, that the evidence consisted of seven points. Of those four (points 1, 2, 3, and 6) derive entirely and solely from the letter written by Lee Simkins, but that was treated as of no weight and so could not have been a reason for finding that there had been a breach. The fourth and the seventh refer to letters setting out allegations. Allegations are not proof. The fifth and final is a note that costings for the construction for the porch were sent to the Claimant. To identify what a loss might be if there had been a breach does not establish that there was one. There was simply, therefore, we accept, no material upon which any Tribunal could properly find that there was a breach of contract by the Claimant.

25. The third ground raised the question of apportionment. Here, Mr Chegwidden argued that the facility given by Part 20 of the Civil Procedure Rules to bring contribution proceedings against those who are also responsible for a loss is not available in Employment Tribunals, a matter which makes it important for a Tribunal to consider precisely what is the loss flowing from the particular breach of which the Claimant has, in its view, been convicted. He argues that on this the Tribunal, in the last words we have cited from paragraph 111 and 112, had

confused two matters: first, how much had been lost as a result of the porch being built and a second matter, which was how much of that loss could be imputed to the Claimant as opposed to other employees. This presupposes separate breaches by each, but, without knowing precisely what role the Claimant had, it is impossible for us to tell.

Conclusion

26. Although the Respondent has not appeared before us to defend the decision in this respect, we are satisfied that Mr Chegwidden has faithfully done his duty to alert us to those points which might tell against his argument, and we are satisfied that the points he makes are well-founded. We have no doubt that this appeal should be allowed and it is.

27. It might be thought that we could remit this claim. For a number of reasons we do not do so. First, we would be unhappy to remit a case for a Tribunal to consider if it were then to consider further evidence, when the parties had arrived before it with all the evidence which they intended to present in the first place. Although we have identified an error of approach, it seems clear to us that, if the evidence remained as it was, there was no prospect that any Tribunal could conclude, to the requisite standard, that the Claimant was actually in breach. We emphasise that there is no inconsistency between a finding that an employer has fairly dismissed an employee for misconduct and a finding that the employee was actually not shown to have committed that misconduct on the balance of probabilities. Two different tests apply. We are satisfied here both that the Tribunal was entitled to conclude, as it did, that the employer was entitled to dismiss the Claimant, but there was no sufficient evidence to enable this Tribunal to conclude that the Claimant was in fact guilty of the breaches alleged against him.

28. Accordingly this is a case in which we can simply allow the appeal and dismiss the counterclaim. However, had there been sufficient evidence we would not, in this case, have

chosen to remit. The Employer may have an action open to it in respect of the loss of materials and the money spent on wages, but, as Mr Chegwidden has pointed out, a number of persons in its employment might have been involved in the diversion of materials and labour. The county court would be the appropriate place to determine that claim because, within its procedure, there is a developed approach to contribution claims to which Part 20 applies. There is no such established procedure in the Tribunal. The advantage, and we think the purpose, of permitting counterclaims to be made in Tribunals is that it avoids the need for separate hearings in different fora relating to the same issues when they may conveniently be resolved at one and the same time by one and the same fact-finding body. Once a case such as this is due for remission, if remission is otherwise appropriate, those arguments no longer apply with any force. As a matter of principle, there is no convenience any longer in the same body re-hearing the same matter.

29. Accordingly we accede to the invitation given to us to allow this appeal, for the reasons we have given, to dismiss the counterclaim, and it remains for us to thank Mr Chegwidden, who has demonstrated yet again in this Tribunal how important it is that professionals should give their services pro bono, a role which he has performed with distinction.