Appeal No. UKEAT/0179/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

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(1) PEAKQUOTE LIMITED
(2) ALWYD LTD — APPELLANTS

MR J LEVY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellants	MR ALEXANDER ROBSON (of Counsel) Instructed by: Messrs Withers LLP 16 Old Bailey London EC4M 7EG
For the Respondent	MR LUKE ASHBY (of Counsel) Instructed by: Lyons Davidsons Solicitors Victoria House 51 Victoria Street Bristol BS1 6AD

SUMMARY

UNFAIR DISMISSAL

Constructive dismissal

Contributory fault

The Employment Judge found that the Claimant had been unfairly constructively dismissed by the Respondent employers but that his compensatory award should be reduced by 30% under section 123(6) of the **Employment Rights Act 1996**. The employers appealed against the finding of constructive dismissal and he cross-appealed against the 30% reduction. Appeal and cross-appeal allowed.

On the appeal, the Employment Judge failed properly to analyse the Claimant's case that the employers' course of conduct amounted to a repudiatory breach of the implied term as to trust and confidence or to remind herself of the law relating to such a case and failed to make a clear finding that a breach of that term had caused the Claimant to resign.

On the cross-appeal, it inevitably followed from the finding on the appeal that it should be allowed, but in any event the Employment Judge failed to remind herself that any conduct relied on under section 123(6) had to be blameworthy or culpable.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal and a cross-appeal against a decision of the London (Central) Employment Tribunal (Employment Judge Sharma sitting alone), which was sent out on 24 January 2014 following a hearing on 5 December 2013. The Employment Judge found that the Claimant had been unfairly constructively dismissed but that his compensatory award should be reduced by 30% under section 123(6) of the **Employment Rights Act 1996**. There is an appeal by the employer against the former finding and a cross-appeal by the Claimant against the latter finding. The parties were represented today, as before the Employment Judge, by Mr Ashby for the Claimant and Mr Robson for the Respondent.

The Facts

2. The Respondent employers were a property company run by the Stroh brothers. The Claimant worked for them from 1 December 2005 as the Commercial Property Manager. There were only three other employees. It appears that there was a reasonably close relationship between the Claimant and the two brothers. The Employment Judge says at paragraph 23 of the Judgment that it was the working style of the office to talk, by which I understand her to have meant to talk as opposed to write to each other and communicate by e-mail. The Claimant was never provided with any kind of written contractual terms.

3. In January 2012 the Claimant fell over and suffered an injury to his leg. In October 2012 he went for surgery as a consequence, and I infer that it was fairly serious surgery. It appears, although there is no clear finding to this effect, that nobody knew how long the Claimant would be off work for. Although he sent them numerous e-mails it seems that, apart from a visit to his

house on 15 November 2012, the Stroh brothers did not contact him until the New Year. In particular, they did not respond to a request that he made that he be provided with transport to and from work and an office at ground floor level to enable him to return to work during December 2012. On 20 December 2012 the Claimant e-mailed to say that he would hopefully be back at work on 15 January 2013.

4. There was no express contractual provision relating to sick pay. However the Claimant was paid in full for the first six weeks of his period off work, i.e. up to the beginning of December 2012. On 2 January 2013 he was sent a cheque covering December 2012, which amounted to £85.85, i.e. just statutory sick pay. He had received no warning in advance that this was going to happen, and on 3 January 2013 he e-mailed Mr Stroh (I am not clear which Mr Stroh) saying just that.

5. On 6 January 2013 he raised a grievance. The Employment Judge records, at paragraph 40 of her Judgment, that the grievances were, *inter alia*, (a) that he had always kept in touch with the office; (b) that he had made a request to work from home but there was no response; (c) that he had asked if he could work on the ground floor but there was no response; (d) that the Claimant had attended the office early shortly after he had fallen over to avoid the rush hour in order to keep up to date with his work but had not received any recognition for this. On 11 January 2013 he raised a further grievance and requested a formal grievance meeting. On that occasion the grievances identified were (a) not being paid sick pay in full (that must be a reference to what he had received for December 2012); (b) not being provided with a contract of employment; (c) the lack of communication on the part of the Stroh brothers; and (d) not dealing with safety issues. The Judge records in that paragraph that Mr Stroh's evidence was

that the Claimant had been employed by the Respondent for seven years at that stage and had not raised the issue of having no contract of employment before 11 January 2013.

6. There was a grievance meeting held on 16 January 2013, and it seems that the Strohs rejected the Claimant's complaints for various reasons. The meeting is described by the Employment Judge at paragraphs 42 and following in these terms:

> **"42. A grievance meeting was held on 16 January 2013. The Claimant only made written notes of the meeting … Mr Stroh explained that it was not the norm for him to take notes of meetings. The Claimant recorded that the Stroh brothers were annoyed that he had suggested transport to and from the office. In relation to the Claimant's request to defer his annual summer leave, this request had been declined. With regard to the contract of employment, the notes recorded Mr Stroh as saying that one had not been provided because one had not been requested. With regard to the Strohs' lack of communication from 16th November 2012 to 2 January 2013, the notes recorded the brothers as not making any comments. In regard to the health and safety issues, Mr Stroh stated that had the Claimant had issues, then he should have instructed contractors to put this right.**
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> **43. Mr Stroh disputed the contents of the notes and explained that these notes only came to light during the disclosure exercise in preparation for the hearing.**
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> **Mr Stroh's alleged comment**
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> **44. It was the Claimant's case that at the end of the meeting, Mr Stroh and [sic] told him that "if I do not change my attitude, there would be no work for me to do." The Claimant interpreted this as a threat to dismiss him and this he perceived to be the "last straw". Mr Stroh denied that he had made this statement; what he did say, he explained in cross examination was, that for the office to work, it would be necessary for the Claimant to change his attitude.**
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> **45. The meeting was very short, lasting 15 minutes [that is a rather puzzling statement given the amount of ground that it seems to cover, but that was the finding]. The Claimant concluded the meeting. The brothers asked for comments from the Claimant but the Claimant, according to Mr Stroh, concluded the meeting by saying "No comment, meeting over.**
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> **Resignation letter: 21 January 2013**
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> **46. By letter dated 21 January 2013 … the Claimant resigned with immediate effect stating that he would be treating this [I read that as referring to the resignation] as constructive dismissal.**
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> **47. Mr Stroh pointed out that the Claimant did not wait for the outcome of the grievance meeting before he resigned. This suggested to him that the Claimant had already made up his mind to leave."**

The terms of the letter of resignation are not set out at all, and it can be seen from the paragraphs that I have read that the findings of fact about the meeting are not at all clear, a theme which I am afraid rather runs through the Judge's "findings of fact" (see for example paragraph 19, where a dispute of fact is just left hanging).

The Judge's Decision

7. The main issue for the Judge to decide was whether the Claimant had been constructively dismissed. She rightly summarised the law at paragraphs 4.1(b) and (c). In order to establish a constructive dismissal an employee must show that his employer has committed a breach of contract, that it is a repudiatory breach of contract and that it "played a part" in the decision to resign. The Employment Judge wrongly says the "dismissal" at paragraph 4.1(c), perhaps a forgivable slip.

8. The Employment Judge was asked to make a declaration under section 11 of the **Employment Rights Act** as to the Claimant's entitlement to sick pay. She found that he was entitled to full pay only for six weeks as he was in fact paid. That finding cannot now be challenged. In those circumstances the payment of only statutory sick pay from 1 December 2012 could not in itself be a breach of contract and it could not therefore be relied on as a repudiatory breach of contract which could give rise to constructive dismissal.

9. However, it is clear that the Claimant also relied on a breach of the well-known implied term to the effect 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. His case was, in effect, that the course of conduct by the employer from the time he went off sick, combined with the "last straw" arising from the meeting of 16 January 2013, amounted to a breach of this term, which was repudiatory and which entitled him to resign and claim constructive dismissal on 21 January 2013.

10. Unfortunately the Employment Judge did not, in the Judgment, expressly remind herself of this law or analyse matters in the way I have described. What she said in relation to constructive dismissal is set out at paragraphs 50.1 and 50.2. She says:

> **"50. The complaint was held to be well-founded for the following reasons:-**
>
> > **50.1. Applying the case of *Western Excavation (ECC) Ltd v Sharp*, curtailing payment without any advance notice to the Claimant constituted a fundamental breach of contract going to the root of the contract. Although the Tribunal determined that had the parties addressed their mind to the issue, then a term would have been agreed allowing employees 6 weeks sick pay at the full rate, in these particular circumstances where there was no contract of employment, no notice was given to the Claimant that his pay would be curtailed until after the event; his pay was curtailed on 1st December but he was not informed of this until 2 January 2013. Mr Stroh confirmed, when giving evidence, that no warning had been given to the Claimant. Failure to communicate such an important term constituted a repudiatory breach which went to the root of the contract. Such a breach undermined the implied term of mutual trust and confidence.**
> >
> > **50.2. Applying the case of *Wright v North Ayrshire Council*, the following breaches played a part in the dismissal:-**
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> > > **(a) The lack of communication by the Stroh brothers. They failed to respond to e-mails between the period of 16 November until 2 January 2013;**
> > >
> > > **(b) Where the Claimant had asked the Respondents to revert on specific issues (transport to and from the office, the ability to work from home, being able to work on the ground floor), they failed to do so, even where they themselves had made a decision on these matters. Such decisions were not then communicated to the Claimant;**
> > >
> > > **(c) Health and Safety Issues: Although the Claimant dealt with repairs (and therefore compensation was reduced by way of contributory conduct for this reason), the overall responsibility for ensuring health and safety in the working environment rested with the Respondents; failure to resolve the issues surrounding loose [wiring] played a part in the dismissal; and**
> > >
> > > **(d) Although there was a dispute as to what Mr Stroh precisely had said at the end of the grievance meeting, there was no dispute between the parties that a statement relating to the Claimant's attitude was made, which played a part in the dismissal."**

11. Thus expressed, her reasoning is obviously unsatisfactory. There is a finding of one repudiatory breach, with no effects ascribed to it, in paragraph 50.1, and there is a finding of four breaches which played a part in the "dismissal" (by which I assume she meant the resignation) without any indication of the nature of those breaches or any consideration of whether together, or individually, they were repudiatory, in paragraph 50.2. I do not think that the reference to **Wright v North Ayrshire Council** UKEATS/0017/13/BI can rescue paragraph

50.2 from that conclusion. It is clear that the reference to **Wright** is simply a reference to the need for a breach to "play a part" in the dismissal (or resignation).

The appeal

12. As well as the fundamental difficulty that I have identified, Mr Robson says that, in any event, paragraph 50.1 cannot amount to a breach of the term as to trust and confidence. I reject that. In my view it was open to the Employment Judge to find as a matter of fact that the failure to warn about the reduction in pay as at the beginning of December 2012 amounted to a repudiatory breach of the term of trust and confidence. The problem with paragraph 50.1 is that there is no finding that that breach in any way caused the resignation. And although such a finding may well have been open to the Employment Judge, I am afraid it cannot, looking at the findings of fact, simply be taken for granted. After all, as I have indicated, the grievance raised was not about the lack of warning but about the failure to pay full sick pay at all. Mr Ashby for the Claimant says that paragraph 50.2(a) should somehow be read as including paragraph 50.1, which would mean that there was a finding that the failure to warn played a part in the dismissal. I am afraid that, as a matter of ordinary language, I cannot read the Judgment in that way.

13. When it comes to paragraph 50.2 there is, as I say, no indication of the nature of the breach or breaches or whether they were repudiatory. So, on the all-important 50.2(d), which was presumably the "last straw", there is no clear finding of fact as to what happened at the grievance meeting and no indication that the Employment Judge asked herself whether what happened involved conduct by the employer which was calculated or likely to destroy the relationship of trust and confidence *without reasonable or proper cause.*

14. In those circumstances, although I very strongly suspect that, if the Employment Judge had done her job properly, she would have found in favour of the Claimant on the basis that I understood his claim to be made, I do not think her factual findings or reasons are sufficient to uphold her decision on constructive dismissal. In those circumstances, although I have great sympathy with the Claimant, I am afraid I have to allow the appeal on constructive dismissal and remit the Decision to the Employment Tribunal. The employers are entitled to a properly reasoned Decision which shows that the right questions have been considered and answered favourably to the Claimant.

The Cross-Appeal

15. The cross-appeal relates to findings of contributory fault by the Claimant, and in that respect the Judge said this:

> **"50.3. As can be seen from the manner in which remedy has been calculated (see below), the 30% deduction to the compensatory award was assessed because the Claimant had contributed to his dismissal in that:-**
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> > **(a) He was fully aware of how the Respondents communicated (by orally responding as opposed to by way of e-mails), yet the Claimant only communicated by e-mail. He contacted the office by phone but did not ask to speak to the Stroh brothers. The Claimant confirmed that he had called the office in the mornings, when he knew that the brothers would not be in the office. Not contacting them in a manner which was the main way to communicate with the brothers (namely orally) was surprising given the close relationship, which the brothers and the Claimant had previously enjoyed (by for example, praying together and attending their children's weddings);**
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> > **(b) He was involved in repairs. Mr Stroh stated that where there was an issue, the culture of the office was such that each employee just dealt with the matter. The Claimant had contributed to his dismissal by not proactively dealing with the repairs;**
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> > **(c) The Claimant had tripped on the loose wiring previously but had not informed anyone other than his secretary; this had contributed to his dismissal; had he told the brothers about the fall, they may have repaired it;**
> >
> > **(d) The grievance meeting took place on 16 January 2013. The Claimant resigned on 21 January 2013. He contributed to his dismissal by (i) cutting the meeting short after just 15 minutes when the brothers wanted to continue to discuss the matter and (ii) not awaiting the outcome of the grievance meeting."**

16. As I indicated in argument, it must almost inevitably follow that if the appeal were allowed, the cross-appeal would also be allowed. In any event the Employment Judge failed to record in her Judgment that in order to lead to a reduction under section 123(6) a Claimant's

conduct must be blameworthy or culpable, and it is not clear from paragraph 50.3 that all the conduct there recorded should be categorised in that way. Nor is it all clear how the Employment Judge has reached the conclusions that letters (a), (b) and (c) were causative of the constructive dismissal or how the findings at (d) are supposed to relate to the finding at 50.2(d).

17. I therefore allow the cross-appeal. Consequently all aspects of the unfair dismissal claim will need to be remitted. Given the shortcomings in the Employment Judge's Decision and the time that has passed, I cannot see that there is any merit in remitting the matter to her. It will therefore need to go back to a new Employment Judge, who will consider the whole matter afresh and hear evidence. As I have already said, that is a very regrettable outcome, but that is the way it has to be, I am afraid.

Costs

18. The Appellant applies for re-imbursement of their fees. I note what the President said in the case of **Look Ahead Housing & Care Ltd v Chetty & Anor** UKEAT/0037/14/MC. It seems to me that the Appellant was substantially successful. Although on a strict analysis they succeeded on only one out of three grounds of appeal, nevertheless they got everything they were after, in effect. The Respondent was wholly successful on the cross-appeal, which is something I think I should recognise. Doing my best, I am going to award costs of £1,000 as opposed to £1,600, which is the full fee. I hope that is doing justice.