Appeal No. UKEATS/0013/14/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 27 June 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR GREIG ALEXANDER HEADRICK APPELLANT

LEISURE EMPLOYMENT SERVICES LIMITED RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Stephen Smith (Solicitor) The Glasgow Law Practice 534 St Vincent Street Anderston Glasgow G3 8XZ
For the Respondent	Mr Donald Cameron, (Advocate) Instructed by: Hill Dickinson LLP No 1 St Paul's Square Liverpool L3 9SJ

SUMMARY

Unfair constructive dismissal. The claimant resigned and claimed that the respondent had breached the contract of employment by refusing to allow him to attend his place of work. The respondent denied that. There was evidence of letters in which the respondent's senior managers stated the claimant could attend work. The claimant's evidence was the site manager refused to allow him to do so. The site manager denied having done so. The ET rejected the claimant's evidence. The claimant argued that the ET had erred in law by deciding to reject his evidence because he had not protested at the time, when in fact he had.

Held: appeal dismissed. The ET was entitled to reach its view on credibility by the method it explained. The ET did not ignore evidence. They took it all into account and gave a cogent reason for preferring the evidence led on behalf of the respondent to that of the claimant.

THE HONOURABLE LADY STACEY

1. This is an appeal against the decision of the ET notified to parties on 25 October 2013. I will refer to the parties as the claimant and the respondent as they were in the ET. Mr Smith, solicitor appeared for the claimant and Mr Cameron, advocate appeared for the respondent both before the ET and before me.

2. The ET decided unanimously that the claimant was not unfairly constructively dismissed by the respondents. He made a separate claim for breach of contract, which was also dismissed.

3. At the sift, Langstaff P decided to allow the case to go to a full hearing on a narrow point. The claimant was an employee whose income was largely made up of commission on sales. The claimant's case was that he had been prevented from attending his place of work, and so prevented from making any sales. He maintained that was a breach of contract. The ET rejected his evidence. They stated the claimant had not complained at the time that he had been prevented from attending at work. They would have expected him to complain had that happened. The President decided that the decision taken by the ET, which was described by them as "difficult" may have been finely balanced and that it was arguable that the ET had not paid regard to contemporaneous correspondence which recorded a complaint about exclusion.

Background facts

4. The facts of the case are that the claimant was a salesman employed by the respondents. The respondents are a company dealing in various holiday and leisure facilities. The claimant's job was to sell caravans. He began work with the respondents on 21 May 2007 at a site named Craig Tara, near to Ayr. Between August 2009 and March 2011 he worked at another site

belonging to the respondents in Blackpool. He then returned to Craig Tara. On 30 January 2012 the sales director, Mr Nichol, informed the appellant that he wanted him to relocate to the respondents' site at Haggerston, in Northumberland. The appellant replied that he needed time to consider and he was told by Mhairi Kelly, a facilitator employed on behalf of the respondent, that Mr Nichol's position was that he should not return to Craig Tara while he was considering his position.

5. On 3 February 2012 the claimant lodged a grievance about the proposed move, and about his being excluded from the site between 2 and 5 February. On 8 February 2012 he asked, by text message, if he was to come in to work as normal. There is no note in the ET reasons of any reply to that message. The claimant did not return to work and a grievance meeting took place on 13 February at which various matters including his wish to return to work were discussed. On 16 February 2012 the respondents sent an email and a letter to the claimant regarding some of the issues including the return to work. They stated that there was no reason why he should not return to Craig Tara but that he should telephone Mr Rae, the manager of that site, before doing so. The claimant did not return to work and on 27 February 2012 the respondent wrote to him telling him the grievance had not been upheld. Ms Davies, head of HR, stated that there was no reason why he should not go to Craig Tara, 'but please agree this with Andy Rae before doing so.' He was told that he could appeal that outcome and by letter of 28 February 2012 his lawyers indicated that he would do so.

6. On 2 March 2012 the claimant's lawyers wrote to the respondents stating that various issues had not been addressed, including the claimant being precluded from attending work. The lawyers sent a reminder on 9 March 2012. At the ET, the claimant said that he had spoken to Mr Rae on the telephone during that period and Mr Rae had told him that he could not return. Mr Rae's evidence was that he could not recollect any such conversation. On 27 March 2012

the claimant attended an appeal hearing on his grievance and on 2 May 2012 the respondent wrote to him telling him that his appeal had not been upheld. By that time the respondent was still seeking to keep the claimant in employment and still wished him to work at the Haggerston site. On 10 May 2012 the claimant's lawyers wrote to the respondent making certain proposals and on 18 May the respondent replied. On 20 May 2012 the claimant returned to work at Craig Tara, without having phoned Mr Rae first. Mr Rae sent him home. There was a heated exchange between the two men. On 21 May 2012 the claimant resigned.

7. Thus it can be seen that in the period between the end of January and towards the end of May the claimant was employed by the respondent but he was not attending any place of work. He had an outstanding grievance which was in the process of being adjudicated. The claimant claimed at the ET that by preventing his attending work, and thereby achieving sales and commission on those sales, the respondent had breached the contract of employment. At the ET there was evidence that Ms Davies had said that there was no reason he could not attend work, but that, at its highest, he should agree that with Andy Rae before attending. Mr Rae's evidence was that he did not prevent the claimant from attending work. The claimant's position was that Mr Rae refused to let him return. The ET appreciated the importance of attendance at work. It decided that it did not accept the claimant's evidence. It found that the claimant stayed away from work voluntarily. It explained that one factor which influenced the decision was that if the claimant had been told by Mr Rae he could not return then the ET would have expected that he would complain to others in the company that he was being given inconsistent instructions. They found that he did not do that. The question before me is whether the ET erred in law in the method by which they went about determining the conflict of evidence between the claimant and Mr Rae.

Facts found by the ET

8. The findings in fact begin with the contractual arrangements between the parties and it is not in dispute that the claimant was a salesman who made the larger part of his remuneration from commission. On 30 January 2012 the claimant and various other persons employed by the respondents attended a conference at the respondents' head office in Hemel Hempstead. While the details of conversations were in dispute, it was not disputed that Mr Nichol spoke to the claimant and told him that he wanted him to move to Haggerston. Nor was it in dispute that the claimant said that he needed to think about it and that he was told by Mhairi Kelly that he should not go back to Craig Tara while he was doing so.

9. Mr Nichol gave evidence before the ET and from it findings were made that moving salesmen around was not unusual within the respondents' business and, as was not disputed, there was a mobility clause in the contract of employment. The instruction not to go back to Craig Tara applied while the claimant was considering his position. Mr Rae's evidence was that he did speak to the claimant shortly after the claimant had spoken with Mr Nichol and that there was some discussion about whether the claimant should return to Craig Tara. According to Mr Rae he did not speak to the claimant again until they met again on 20 May 2012 at Craig Tara.

10. The ET found that the claimant had taken legal advice and on 3 February 2012 he wrote a letter raising a grievance in relation to the proposed move. Contact was made with him on 6 February to arrange a date for a hearing of the grievance, which was fixed for 13 February. The grievance meeting was held in Hemel Hempstead and was taken by Ms Davies, head of HR. At that hearing the claimant said that he had tried to telephone Mr Rae and after some attempts did speak to him. He was told there was no job at Craig Tara. He was told that someone else was sitting at his desk and telling caravan owners that he no longer worked there.

These events, according to the findings made by the ET happened after the grievance had been lodged but before it had been heard. The ET found that Ms Davies told the claimant that she would look into matters. The claimant asked her if he was suspended and she said he was not. According to the claimant he phoned Mr Rae after that meeting to tell him that he was not suspended but Mr Rae said he was not prepared to comment.

11. The ET found that on 16 February Ms Davies gave a partial response to the grievance and in her letter stated that there was no reason why the claimant could not return to Craig Tara, but asked him to contact Mr Rae before doing so. Ms Davies sent a further email on 20 February dealing with questions about the move to Haggerston. The claimant was not satisfied with the response and instructed his lawyers who wrote again on 22 February. In that letter the lawyers stated that the refusal to permit the claimant to work from 2 February had not been addressed. They pointed out that in their opinion that was a fundamental breach of contract. Ms Davies wrote on 27 February stating that there was no reason why the claimant should not go to Craig Tara. According to the claimant's evidence he phoned Mr Rae after getting that letter. The claimant said that on the telephone Mr Rae told him that he was not allowed on the site. Mr Rae's evidence was in conflict with that because he said he had no recollection of such a call. The claimant's lawyers wrote on 2 March saying that they did not consider that the correspondence from the respondents dealt with matters and reminding them that the claimant remained precluded from returning to work.

12. An appeal against the grievance decision was taken by Mr Richardson of the respondents on 27 March 2012. At that hearing the claimant told Mr Richardson that he had not been allowed back to Craig Tara, at the time of his lodging the grievance, that is in the days immediately after 30 January. Mr Richardson wrote to the claimant by letter dated 2 May 2012 stating that the move to Haggerston remained open and asking the claimant to let him know

within 7 days. The solicitors for the claimant replied by letter of 10 May in which they stated that their client would move to Haggerston on Monday 4 June on certain conditions. One of those conditions was that he be paid a sum of money representing loss of commission suffered in the months February to May 2012. Ms Davies replied to that by letter on 18 May. Amongst other things she said that at no time had the claimant been precluded from working, and that it was his decision not to work.

Submissions for the claimant

13. Mr Smith, solicitor for the claimant, submitted that the claimant's evidence about being precluded from going to work should have been accepted by the ET. He appreciated that the function of the ET was to make findings in fact and that if there was a basis in the evidence for their decision, then he had a high test to meet before that decision could be overturned. He would require to show that the Tribunal had erred in law by ignoring evidence or making a decision which was perverse. Mr Smith began by drawing my attention to the terms of paragraph 187 of the decision which is in the following terms:

> **"This was not an easy matter for the Tribunal to resolve but given the apparent absence of complaint from the claimant to either Ms Davies or Mr Nichol or indeed Mr Richardson at appeal hearing, that the block to him returning to work was Mr Rae telling him he was not allowed back on the site, despite what he had been told by email of 16 February 2012 and subsequent letter of 27 February 2012, persuaded the Tribunal that he had not been 'barred' by Mr Rae telling him that despite what Sue Davies said, he was not allowed back on the site. From the evidence given by the claimant the Tribunal could well see that he was not an individual who would let matters lie or simply accept what Mr Rae had said (if he said it) without taking matters further or seeking to clarify that with more senior managers. The Tribunal considered that on balance the claimant as he worked through the grievance and appeal procedures had decided that he would not make a return to Craig Tara rather than it being the case that he was being actively precluded from doing so".**

14. Mr Smith submitted that the ET had erred in law because that paragraph showed that they proceeded on the basis that the claimant had not complained about his being precluded from going to work. He said that the claimant had complained by his own hand and by instructing the solicitors who wrote letters on his behalf. In discussion, Mr Smith accepted that the first sentence of paragraph 187 was long and contained a good deal of information. He

appeared to accept that the matter which was dealt with in that sentence was that the claimant had not complained to Ms Davies, Mr Nichol or Mr Richardson that the reason that he could not get back to work was that despite Ms Davies saying that there was no reason he could not go back, Mr Rae was in fact refusing to have him back on site.

15. The ET was endeavouring to decide on the facts in the face of a conflict of evidence. The claimant said that Mr Rae told him he could not go back; Mr Rae said that he did not say that. Mr Smith appreciated that the ET's function was to decide on the facts and then apply the law to them. He argued however that the ET had expected too much of the claimant. The claimant was not a lawyer and while there might have been points that he could have taken up with his employers he did not do so. He should not however be judged on that basis.

16. Mr Smith appreciated that the finding that the claimant chose not to go back to work rather than was prevented from being at work was of vital importance to the determination of the case. He argued that the ET, made that finding in fact, and used it when making their decision on the propriety or otherwise of the grievance process as could be seen from paragraph 194. Further he argued that when considering the legal nature of the final days of the relationship between claimant and respondents, 20 and 21 May, the ET relied on its findings about the reason for the claimant not being at work. He therefore argued that the method by which they had reached that finding was of vital importance because the decision affected the whole case. He argued that if the ET had made their decision on a legally erroneous basis then it could not stand. His motion was that the appeal should be allowed and the matter remitted to a fresh tribunal to start again.

Submissions for the respondents

17. Mr Cameron, counsel for the respondents, submitted that the written reasons of the ET

made entirely clear the way in which they had gone about their task and the matters on which they had laid weight. He argued that there was plenty of evidence enabling them to come to the decision that the lack of attendance at work was caused by the claimant not going to work rather than the respondents refusing to allow him access. He made reference to the section of the written reasons which begins at paragraph 179. At paragraph 180 the ET found that the claimant was told not to go to work for a short period while he was considering whether or not he would move. He sent a text message thereafter which did not, according to the Tribunal's view expressed at paragraph 181, show that he believed that he was permanently excluded. The ET found again at paragraph 181 that Ms Davies emailed the claimant on 16 February telling him that he could go on the site. The ET had noted that the claimant's solicitors wrote on 22 February to the respondent complaining about the claimant being excluded from work. That letter was written after the email from Ms Davies of 16 February and which she said that he could go on the site. Therefore, if the claimant was to be believed, Ms Davies had told him that he could go on the site but after that Mr Rae had refused to allow him on site. The Tribunal found it significant that nothing was made of that apparent contradiction between the instructions of two persons speaking on behalf of the respondent. They also found it significant (paragraph 182) that on 27 February a further letter from Ms Davies reaffirmed that there was no reason why the claimant could not go to the site. Despite being told that Mr Nichol would be there on 22 February, the claimant made no attempt to contact him or to speak about it. There was evidence before the ET of telephone records. There was no record of any call from the claimant to Mr Rae at or about 16 February or after that which might have shown that he had made the calls that he said he had made.

18. Counsel said that when turning to paragraph 187, when read in context of the paragraphs which went before it, it was clear that there were numerous bases for the Employment Tribunal to reach the conclusion that the claimant had not been prevented from

returning to work. The construction of the paragraph was plain and what had influenced the Tribunal in deciding whether they found the claimant's evidence credible was the fact that at no time did he complain to the respondents about the contradictory messages he said he had got, from Ms Davies on the one hand to the effect that he could go to work and from Mr Rae on the other hand to the effect that he could not.

19. Mr Cameron argued that it was quite wrong to suggest that the ET had ignored the solicitors' letters. They were well aware of the content of the solicitors' letter and mentioned them in earlier paragraphs. Those letters did not say anything about the apparently contradictory instructions. Thus the ET considered everything that was before them and were entitled to find that the claimant was not credible for the reason given, as it was plain that he had neither by his own hand complained about the contradictory instructions nor had he asked his solicitors to complain on his behalf about that.

20. The ET had said that they found the decision difficult and Mr Cameron submitted that while that might be so, it was nevertheless the ET's function to make the decision and they had done so.

21. Counsel argued that the decisions made by the ET on the matter of the grievance and on the events at the end of May were indeed influenced by their finding about the claimant's credibility. Nevertheless he argued that the finding was one that they were entitled to make and he reminded me that there was no separate ground of appeal in relation to the other matters.

Conclusion

22. The question as to whether the claimant was prevented from attending work is vital in the context of a claim for constructive unfair dismissal, where remuneration is mostly by

commission. Therefore the matter requires to be carefully considered. The ET did consider it carefully. They noted all the evidence that was before them and they realised that there was a conflict in what was said in evidence by Mr Rae and what was said in evidence by the claimant.

23. In that situation they were required to consider which if either they found to be credible. In doing so they were entitled to have regard to demeanour. They did so and found (paragraph 187) that the claimant was "not an individual who would let matters lie or simply accept what Mr Rae had said (if he said it) without taking matters further or seeking to clarify that with more senior managers". That was a view of the claimant they were entitled to reach. They spent some time listening to evidence about telephone calls and had telephone records to consider. It is plain from the reasons that they appreciated the importance of the decision they had to make on credibility. They did not proceed simply on the basis of demeanour or by deciding which version of events seemed more likely in light of the way in which the evidence was presented. Rather, they considered carefully the surrounding circumstances. They came to the view that had Mr Rae contradicted what Ms Davies had said, the claimant would have taken up that contradiction with the respondents. He did not do so. I accept Mr Smith's general proposition that the claimant should not be judged for his forensic skills and if there was a point which could be taken but was not taken then the test would be whether an ordinary person, concerned with his work and his livelihood would have taken it rather than whether a lawyer would have taken it. The ET applied the test of whether this particular claimant would have taken the point. They found that he would. That was a decision that they were entitled to take.

24. The decision about the credibility of the claimant affected the question as to whether he was refused access to work and that also affected the quality of the decision-making around his grievance procedure and could be said to have affected the categorisation of the events of 20 and 21 May. Mr Smith was correct to say that if the decision had been made in error of law

then these other parts of the case would have been affected. I have not found however that there was any error of law. The ET were entitled to use the primary findings that they made, to the effect that the claimant did not take up the apparent contradiction to inform them in deciding the case. The ET were plainly aware that they must consider carefully this important matter and they did give it due consideration.

25. Mr Smith referred to **Yeboah v Crofton [2002] IRLR 634** and **Francis v Cleveland Police Authority (2011) UKEAT/0335/10/ZT.** He drew my attention to paragraph 95 of the **Yeboah** case in which the court explains that there will be an error of law if the ET makes a crucial finding of fact which is not supported by evidence:-

> **"Inevitably, there will from time to time be cases in which an employment tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed. But no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal".**

Mr Smith argued that while the test was high, the case of **Francis** was an example of a case in which the test was met. He made reference to paragraph 50 of that case in which the EAT, in allowing the appeal made the following finding:

> **"Accordingly we conclude that the Tribunal indeed proceeded on an assumption or finding of fact concerning the absence of recorded visits to the GP which no reasonable Tribunal, on a proper appreciation of the law and the evidence could have proceeded".**

26. In my opinion the reference to the case of **Francis** was not in point. In that case the ET had proceeded on the basis of an assumption about medical records. There was no question of the ET making a value judgment as they did in the current case. The ET made an assumption which they were not entitled to make. That is quite different from the exercise carried out by the ET in the present case. The decision reached in the present case was one made after careful consideration of all of the evidence. While it must be accepted that the wording of paragraph 187 is not ideal, it is perfectly comprehensible and makes very clear that the ET made its decision because it was concerned about the lack of a complaint about inconsistent

instructions. When I asked Mr Smith to tell me what other possible construction there was of that long sentence he was unable to do so. There was a clear dispute of fact which the ET had to decide. Did the respondent prevent the claimant from going to work? The claimant said that the respondent did so by Mr Rae refusing to let him on site. He accepted that senior management had said he could attend, but he maintained that Mr Rae had thwarted that. The evidence from the respondent was that the claimant was told he could attend, and that Mr Rae did not speak to him at all at the time the claimant said he did. The ET decided that if the version given by the claimant was correct, he would have said so to senior management at the time. The ET found that he did ask about going on site, but he did not complain that Mr Rae had prevented him from doing so. His solicitors did not make that complaint on his behalf. The ET considered that and decided that they preferred the evidence led on behalf of the respondent.

27. There is no error of law in the judgment of the ET. The appeal is dismissed.