Appeal No. UKEATS/0053/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 11 June 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MS JUDITH HUTCHISON — APPELLANT

THE SCOTTISH MINISTERS — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS JUDITH HUTCHISON (The Appellant in Person)
For the Respondent	MR D ROSS (Advocate) Instructed by: Employment Law Branch Commercial and Business Services Division Scottish Government Legal Directorate Area GC South Victoria Quay Edinburgh EH6 6QQ

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Striking-out/dismissal

Unfair constructive dismissal. The Claimant was employed as a procurator fiscal depute. She was off sick with stress related illness when the Respondent invited applications to a voluntary exit scheme. She applied and her application resulted in a quote which she accepted, and Respondents agreed that she could take part in the scheme. She left the employment of the Respondents. She then claimed that she had been unfairly constructively dismissed as the Respondents had breached her contract resulting in her stress related illness. Her claim was dismissed as having no reasonable prospects of success at a PHR. She appealed. Held: that she was not dismissed constructively or otherwise but left by mutual agreement. Appeal refused.

THE HONOURABLE LADY STACEY

Background

1. The Claimant began employment as a senior depute procurator fiscal in August 2003. In May 2011 she was certified by her doctor unfit to work due to 'work-related stress'. She remained absent due to her medical condition until November 2011. In September and October 2011 the Respondent operated a voluntary exit scheme (VES) in which all staff with permanent contracts were invited to express an interest. The Claimant was absent on sick leave but became aware of the scheme and contacted the Respondent in November 2011 asking for details of the scheme. She was advised any application that she wished to make would be accepted for consideration. The Claimant completed an application and submitted it. The Respondent replied giving the Claimant a quote for the terms applicable to her. The Claimant accepted the quote and negotiated with the Respondent regarding the leaving date. She left the service of the Respondent on 22 December 2011. She was paid a lump sum. She submitted a form ET 1 claiming that she had been unfairly constructively dismissed.

The proceedings before the ET

2. A case management discussion (CMD) was held on 10 May 2012 at which the issue between the parties was whether a pre-hearing review (PHR) should be fixed to determine the question of whether the Claimant was dismissed. The note of the CMD shows that there was discussion about the concerns raised by the Employment Judge that if a PHR were to be fixed purely on the question of whether there had been a dismissal, then there may be a likelihood of a duplication of evidence. The solicitor for the Respondent was invited to articulate the specific issue to be determined at the PHR and it did so in the following terms:

> **"Whether the complaint of constructive unfair dismissal should be struck out under Rule 18 (7) (b) as having no reasonable prospect of success on the basis that the claimant's employment came to an end by means of her application for voluntary severance under the scheme of that nature operated by the respondents so that there could not be said to be a dismissal constructive or otherwise."**

3. The Employment Tribunal hearing took place on 24 July 2012 before an Employment Judge sitting alone. The Claimant was represented by a solicitor, Ms Sabba, and the Respondent by counsel, Mr Ross. The Employment Judge made findings in fact including number 17 to the following effect:

> **"The claimant returned to work in early November 2010. The claimant did not return to her usual post. There were medical reports confirming that a return to the college environment was detrimental to her health."**

The date is an error and is the first of several errors concerning dates in the findings in fact numbered 17 to 23. Before the EAT the parties were agreed that the dates in those findings in fact should be 2011, except for paragraph 21 which should be 2012. It was unfortunate that the errors had been made, but both parties accepted that it made no difference to the determination. The Employment Judge went on to find in findings 18, 19 and 20 that the Claimant was advised that the Respondent had agreed to put her application forward for a formal quote, that the quote was received by the Claimant, and that she confirmed that she wished to accept "the offer of compensation to leave on the date advised in the quote." The date given in the quote was the end of March 2012 and the Claimant asked to have that date brought forward to 22 December 2011, to which the Respondent agreed. In paragraph 24 the Employment Judge made the following finding:

> **"The claimant considered that she had exhausted all means of trying to resolve the difficulties at work. The claimant had decided to leave the organisation because she felt she could no longer continue to work there. The claimant had decided that even if her VES application was declined she would leave."**

4. The Employment Judge narrated the submissions made on behalf of the Respondent, broadly to the effect that the termination of the contract between Claimant and Respondent had been by mutual agreement and that there had been no dismissal. She narrated the Claimant's submissions which were to the effect that the Claimant had been constructively dismissed as the

Respondent's actions had gone to the root of her contract. She therefore had no choice but to resign and that the resignation was caused by the Respondent's actions. Reference was made to the case of **Sandhu v Jan de Rijk Transport** [2007] ICR 1137, in which the employee had been told that he was being dismissed, but went on to negotiate on terms of his leaving.

5. In paragraph 59 the Employment Judge set out the understanding established for the PHR to the effect that the Claimant's case had to be taken at its highest and that for the purposes of the PHR it would be assumed that she would be able to establish the Respondent had fundamentally breached the contract of employment thus entitling the Claimant to resign. The issue for the PHR was whether the Claimant could establish she terminated the contract by reason of the Respondent's conduct or if the contract terminated by mutual agreement. It was understood between parties that the PHR would hear evidence on the question of the reason for the termination of the contract. Therefore the hearing was an amalgam of a legal debate and a hearing with evidence.

The ET decision

6. The Employment Judge decided that having entered into the scheme, the Claimant's employment terminated by way of mutual termination. She found at paragraph 75 as follows:

> **"The claimant brought a complaint of constructive dismissal in terms of section 98(1)(c) Employment Rights Act. The claimant must, in order to succeed with such a claim, establish (amongst other things) that she terminated the contract of employment by reason of the employer's conduct. I was satisfied that the claimant did not have a reasonable prospect of success of establishing that she had terminated the contract of employment in the circumstances of this case. I reached that conclusion because, on the facts before me, the contract came to an end by way of mutual termination. Alternatively, should the evidence support such an argument – and it did not appear to do so – the contract came to an end by way of a dismissal by the employer. I was not persuaded by either Ms Sabba's submissions or the authorities to which I was referred, that a mutual termination, or a so-called "mutual termination" caused by pressure from the employer, can be construed as a resignation or termination of the contract by the claimant."**

She decided to strike out the claim in terms of rule 18(7)(b) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**.

The grounds of appeal

7. In her grounds of appeal, which are a mixture of assertions of law and narrative, the Claimant asserted that the Employment Judge had misapplied the relevant law such as to amount to an error of law. She noted that the Employment Judge had stated that she completely understood the rationale that having decided to leave, it was preferable for the Claimant to leave with a financial package rather than with nothing, but complained that the Employment Judge had continued by attaching importance to the fact that the Claimant had resigned albeit in response to a fundamental breach of her employment contract. The Claimant asserted that this amounted to a fundamental misunderstanding of the law surrounding unfair constructive dismissal.

8. In ground of appeal five the Claimant sought to argue that the Employment Judge's logic had been flawed and circular. In ground of appeal six the Claimant sought to argue that the Employment Judge found that an employee who resigns as the result of constructive dismissal cannot take advantage of negotiating favourable exit terms. She argued that the situation in the case of **Sandhu v Jan de Rijk Transport Limited**, was in point in her case. She essentially repeated the argument made by Ms Sabba at the ET, to the effect that the employee was entitled to salvage what he could at the end of the employment relationship. Ground of appeal seven related to the Employment Judge's observation that there was no authority in which a case of constructive unfair dismissal had been found to exist following negotiation between employer and employee. The Claimant sought to argue that they are required to be no authority and that the Employment Judge was asked to find that the dismissal had been both constructive and unfair, which was not dependent on there being existing authority.

9. At ground of appeal eight the Claimant sought to argue that the Employment Judge had not asked the correct question in arriving at her decision, under reference to the case of **Jones v F Sirl & Son (Furnishers) Ltd** EAT/155/95. She sought to argue that the correct question was "what was the effective cause of the claimant's employment coming to an end?" She argued that had that question been asked, the only answer to which the Employment Judge could have come would have been that it ended due to the treatment of the Claimant by the Respondents.

10. Ground of appeal nine related to the finding in fact by the Employment Judge that the Claimant had been absent from work due to work-related stress and had found working for the employer to be a very negative experience. It was found that there were reports confirming that her return to the previous work environment would be detrimental to her health. It was sought to argue that these findings indicated that there was more to the cause for departure than just acceptance of VES. Finally ground of appeal 10 sought to have the EAT substitute its judgment for that of the ET and to find that the Claimant was dismissed. In discussion the Claimant accepted that her last ground of appeal was inept and that if I were with her then I should allow the appeal and remit to the ET to proceed with the case.

The Claimant's submissions

11. The Claimant relied on the argument made in the Tribunal below and said that her position was analogous to that of the claimant in the case of **Sandhu**. She argued that the treatment that she had received from the Respondents was such as to put her in the same position as a person such as Mr Sandhu who was obliged to leave his post because he was dismissed. She had no option but to leave and that was not affected by her successful attempt to salvage what she could in a payment. She argued that she was in the same position as a person who was told she was dismissed, and who accepted that, but negotiated a payment from

her employer. The Claimant argued that she knew that she had to act on the Respondent's breach within a reasonable period of time, as otherwise she would have accepted it and continued with the contract. She argued that she was off sick when she heard of the VES; she was declared fit for certain work by her doctor, and returned, but immediately sought to enter the scheme.

The Respondent's submissions

12. Mr Ross argued that there was no error of law made by the Employment Judge. The Judge had heard evidence to determine the method by which the employee left employment and she had found quite clearly that it was by means of a VES. The point of hearing evidence at the PHR was to determine the way in which the contract of employment had ended. It was assumed for the purposes of the PHR that the Respondents had acted in such a way as to breach the contract and entitle the Claimant to resign. That being so, there would have been no point in having the PHR, with evidence, if the Claimant's submissions were correct. The Claimant had returned to work, and had not told the Respondents that she regarded the contract between them as at an end due to the Respondent's breach. Instead she continued in the employment relationship, carrying out work and applying to be included in the VES. He argued that the Claimant might be correct to say that her motive for leaving was that she had become ill as a result of work related stress; but the mechanism of her departure was a mutual agreement that she be accepted into the voluntary exit scheme.

Discussion and decision

13. The Claimant's appeal is misconceived. She accepts that she was not dismissed by the Respondents; she argues that she left because of their breach of contract. She was aware of the difficulty an employee faces in claiming unfair constructive dismissal if she continues to work

for any length of time in the face of breach. She maintained she had not done so, but instead had left very shortly after her return to fitness.

14. In making that argument the Claimant failed to address the point. For the purposes of the ET hearing, it was accepted that the Respondent had acted in such a way as to entitle the Claimant to leave and make a claim for unfair dismissal. The Claimant could have done so, but she did not do so. Instead she affirmed the contract between herself and her employer by applying to take a voluntary exit package, which clearly was open only to employees. It was not open to the Claimant to enter the VES and at the same time claim that she had been constructively dismissed. Her situation was quite different from that of the employee in **Sandhu**. Mr Ross was correct to argue that she had conflated motive for her leaving with the method of her leaving. The hearing before the ET was concerned with how she left, not why she left.

15. The ET did not err in law. The appeal is refused.