Appeal No. UKEATS/0044/13/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 29 January 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR EDWARD GRANT McCLUNG — APPELLANT

THE ROYAL BANK OF SCOTLAND PLC — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR EDWARD GRANT McCLUNG (The Appellant in Person)
For the Respondent	MR D CAMERON (Advocate) Instructed by: Reed Smith LLP The Broadgate Tower 20 Primrose Street London EC2A 2RS

SUMMARY

UNFAIR DISMISSAL

Unfair constructive dismissal. The Appellant claimed that he had been constructively dismissed by reason of his employers having conducted an inquiry into his dealings with a particular customer when he was ill. Those enquiries included indicating to the customer that the Claimant may have been acting wrongly. On discovering that that had been done, the Claimant resigned. He argued that the Employment Tribunal had applied the wrong test to constructive dismissal and had concentrated on events which had happened earlier, leading to his going off ill. They did not adjudicate upon the Claimant's claim that the Respondent had breached the implied term of trust and confidence by their actings. **Held** that the ET had not made a decision on the claim put by the Claimant. That was an error of law and the question of unfair constructive dismissal should be remitted to a freshly constituted Tribunal.

THE HONOURABLE LADY STACEY

1. This case relates to unfair constructive dismissal. The Claimant represented himself, as he did in the Tribunal below. Mr Cameron, advocate, represented the Respondent both before the Employment Tribunal and before the Employment Appeal Tribunal.

2. The hearing took place between 29 October 2012 and 13 November 2012 and the written reasons were sent to the parties on 24 December 2012. The Claimant had lodged two forms ET1, the first on 6 September 2011, in which he made claims in respect of religious discrimination and failure to pay bonuses. The second was lodged on 2 November 2011 and claimed unfair dismissal and discrimination. The second application also made a claim in respect of failure to provide an amended written statement of terms and conditions and a claim for unlawful deduction of wages.

3. The Claimant did not proceed with the claim in respect of the unlawful deduction from wages. The ET refused all other claims.

4. The history of the case in the EAT is relevant to the decision I have made. The case was originally sifted by me and dismissed under rule 3(7). At a rule 3(10) hearing, a full hearing was allowed on restricted grounds of appeal. The basis on which the case was sent to a full hearing is set out in the rule 3(10) judgment given by Langstaff P. At paragraph 7 of his written reasons, the president noted that the ET had to ask itself in respect of the unfair dismissal claim whether there had been a fundamental breach of contract by the employer and if so, whether the Claimant had resigned at least partly in response to that. He stated that the test set out by the ET at paragraph 127 of the written reasons is misstated and may be an error of law. In paragraph 8, the President noted that the starting point in such a consideration is whether there

has been a breach. That in turn depends on whether, on balance of probabilities, there has been conduct that breaches the implied term of trust and confidence, or put more fully, conduct that is calculated to destroy or seriously undermine the trust and confidence that an employee is entitled to have in his employer without there being good and proper reason. He noted that the Tribunal examined the activities of each of the managers of the Respondent and was impressed by them. That led it to conclude at paragraph 188 that there was no fundamental breach. However, the President noted in paragraph 9 that the Tribunal did not deal with the issue posed by the Trainer investigation. This related to concerns which the Respondent had about a customer, Mr Trainer, which led it to carry out investigations while the Claimant was off sick. The President noted that the ET, at least arguably, needed to take a view about the investigation concerning Mr Trainer and had to ask whether the way in which the bank had behaved in respect of that investigation was potentially in breach of their contract with the Claimant. It is noted in paragraph 9 that it may be that the ET did not do so because the case was ultimately presented to it on the basis that the "final straw" which led to resignation, now said to amount to constructive dismissal, was in relation to conduct in June 2011. The ET cannot be said to have erred in law if it dealt with the case as it was presented to it.

5. In paragraph 10, the President observes that he finds it proper to grant permission to appeal. He states that as a matter of law, the point that a Claimant identifies as a final straw does not determine the point beyond which he cannot complain about any further repudiatory breach by his employer.

> **"The issue, I repeat, is whether he resigned at least partly in response to a fundamental breach."**

In the rest of the paragraph the President notes that the Claimant could have decided to resign by 10 June, but if behaviour towards him by the employer after that date was in itself a serious

breach of the implied duty of trust and confidence then he could rely on that too as justifying his resignation. In the written reasons from the ET, there is no indication that they dealt with that.

6. In paragraph 11 the President notes, as a separate point, that it is arguable there was unfairness to the Claimant in the way in which the Tribunal dealt with the question of what was the "final straw". It is noted that the issue in respect of constructive dismissal must involve what the Tribunal makes of the Respondent's witnesses. Thus it is arguably irrelevant for the Tribunal to say anything about the credibility of the Claimant, but in this case it criticised him in paragraphs 105-107 for having changed what he said about the last straw. Those concerns about his credibility ignore the fact that the phrase "last straw" was arguably not used in the context of justifying resignation in the first ET1 because after all at that stage the Claimant had not resigned. The President noted that the Claimant stated at the hearing that he felt oppressed by the Judge intervening in the course of his evidence to ask him why he had misled the Tribunal about what was the final straw. As the President was in no position to judge whether or not that had happened, he asked that the Judge and the members as well as Mr Cameron should be asked to provide a note of their recollection.

7. The President refers to a complaint by the Claimant to the effect that the Tribunal Judge asked counsel for the Respondent, on the first day of the Tribunal, if it was correct to say that this would be the first religious discrimination case that had been raised against the Respondent.

8. The President sums up by stating that that there is a ground of appeal in the following terms:

> **"The Tribunal was in error of law in failing to determine whether the way in which the Respondent dealt with its concerns about the deals done on the bank's behalf by the Claimant**

with Peter Trainer were in breach of any duty toward him. That ground is to be understood in the context of the judgment I have just given."

9. The President did not allow any ground of appeal concerned with the discrimination to go forward.

10. Following the hearing under rule 3(10), Mr McClung produced a two page statement in which he stated that the employment judge did say:

"Am I right in saying that this is the first religious discrimination case against RBS Mr Cameron"?

Mr McClung states that Mr Cameron replied: "Yes".

11. Mr McClung goes on to say that while he was giving his evidence on day two the Employment Judge took on a "major combatant" role and asked aggressively in a cross-examination style:

"Why are you misleading the Tribunal when you say the final straw was October when in your first ET1 it states 10 June?"

Mr McClung said he answered in a confused manner. He said that after the aggressive questioning he was confused and went home on Tuesday feeling drained and low. He was then cross-examined by Mr Cameron for one and a half days, on Wednesday and Thursday. He said that all went well for most of it but when the lawyer started to suggest to him that he had known about the investigation prior to Mr Trainer telling him at the end of October he said that he felt confused. Mr McClung says that he asked the EJ what counsel meant by suggesting that he knew of the Trainer incident before Mr Trainer told him at the end of October. Mr McClung maintains that the EJ said that the Respondent would argue that he knew before Peter Trainer told him. Mr McClung's statement is as follows:

> **"The judge stated can I take you back to June, then went over 10 June in my ET1 again and stated 'Lord Denning stated (the precedent) where an employee can't take any more bad things from an employer (Judge Watt at this point threw up his arms and stood up and said) they say that's it I've had enough I'm leaving."**

He said that the judge then asked him to go back to 10 June and to tell him how he felt when he was told he was not being paid a bonus. The Claimant said that he said "I was scunnered" to which the judge replied "that's a good Scottish phrase". As I understood him, Mr McClung had no complaints about that last exchange, and felt that the EJ understood him. However, he felt that the EJ was using uninvited, improper pressure to get him to say that the events in June amounted to the final straw. He says he was asked more questions about certain events around what happened in June, which he had already covered. He began to feel uncomfortable and wondered why the EJ was persevering with this. According to Mr McClung's statement, at the end of the Tribunal day on Thursday he felt very tired and having spent a sleepless night on Friday asked if he could finish his response to the cross-examination. He states:

> **"I had taken on board the persistent line of questions and focus on 10 June from Judge Watt and thought about matters overnight and understood what he was leading me towards based on Denning about Constructive Dismissal. So I said 'I feel I need to clarify what the final straw is that broke my trust & confidence in RBS' and read the first ET1 statement regarding 10 June."**

12. Mr Cameron has produced a statement in which he states that the question about the case being the first case of religious discrimination for the Respondent was not asked, and so was not answered. He states that he does not recollect any such question and that he has checked his own notes and can find no reference to any such question. He has also asked his agents. They do not recollect any question of that sort being asked. Mr Cameron notes that it is alleged that he answered in the affirmative on the same day. He denies that and as he has only been instructed for the Respondent once, that is in the current case, explains that he would not know whether that was their first religious discrimination case or not. He said that he would certainly not have answered without knowing the correct answer.

13. As regards the final straw point, Mr Cameron states that the Claimant made an opening statement in which he alleged that the final straw was the Respondent's communication with Peter Trainer in relation to the Appellant doing "bad things". That took place in October 2011. According to Mr Cameron at the end of the Claimant's evidence in chief, when he had maintained that the final straw was the Trainer incident in October 2011 the Employment Judge asked the Claimant about pages 4 and 7 of his first ET1 in which there was a reference to breakdown of trust and confidence and to the final straw being 10 June 2011. Mr Cameron states that the Claimant was given full opportunity to answer the questions and did so, saying that he did not see the Judge's point and that the statements referred to different applications as he did not know about the Trainer situation in September 2011(the date of the first ET1). Mr Cameron says that in cross-examination he asked the Appellant about his terminology in using the phrases "final straw" and "breakdown in trust and confidence". After cross-examination members of the Tribunal asked some questions and then the Employment Judge again asked about the first ET1. Mr Cameron states that the Employment Judge explained the concept of constructive dismissal and asked open, simple questions. The next day, the Claimant asked to make a statement about the final straw as a form of re-examination and was permitted to do so. He did so by reading from his first ET1 claim form which makes no reference to the Trainer investigation. Mr Cameron notes that in the written submissions lodged by the Appellant on the final day, there was no reference to Peter Trainer nor to any event post-dating 10 June 2011. Mr Cameron offers the view that the Appellant made his case tenaciously and persistently throughout the hearing and never gave any impression of being coerced or pressurised.

14. The members of the Tribunal including the Employment Judge also have given statements. The Employment Judge, Mr Watt, denies asking if this was the first religious discrimination case against RBS. He states that on the first day of the hearing he discussed with

parties exactly what claims were being made by the Claimant. Mr Watt also denies any aggressive questioning of the Claimant with regard to the final straw. He accepts that he did ask him about the final straw and did refer the Claimant to his first application form. He points out that the form is lengthy and it does use terminology normally associated with constructive dismissal cases, such as "final straw" and "breakdown of trust and confidence". Mr Watt says that he explained the basic principles of constructive dismissal but denies that he was aggressive in any way.

15. Both members have given statements in which they say that Mr Watt was not aggressive and that he explained, as it is their experience he usually does, the procedures to the unrepresented litigant clearly and in a polite manner. Each of them denies any suggestion that the question about religious discrimination was asked.

16. As was recognised by the President in the written reasons for the decision under rule 3(10) it is not possible for me to determine what did happen at the hearing where there is a conflict of testimony. I have done the best that I can on the written statements and the submissions I heard from Mr McClung and from Mr Cameron on behalf of the Respondent. I have come to the view that the Employment Judge did not ask the question complained of by Mr McClung. It seems to me far more likely that he asked if the matter of religious discrimination was to be pursued and that Mr McClung has misheard or misunderstood the question. I am influenced by the weight of testimony to the effect that that question was not asked. Mr Cameron's statement comes from a disinterested counsel; he explains that he could not have made the reply attributed to him without seeking instructions, and I have no hesitation in believing him. I also believe the three members of the ET. I have decided that Mr McClung must have misheard or misunderstood because I find it rather an odd thing for the Claimant to have made up, and in any event I have no reason to believe that he would lie about this. I have

therefore decided that the Claimant has not made it up, but has misheard or misunderstood the question that was asked.

17. As to the questioning of the Claimant about the "final straw" by the Employment Judge, there is agreement from all that the Employment Judge did ask about this. I am also clearly told by counsel that he cross-examined on the point, it having been raised by the Employment Judge. Mr McClung states that he found questioning aggressive and that he was worried by it and he told me in his oral submissions that he felt that everybody seemed to think that the final straw was on 10 June and so he had better say that. I accept entirely from the Employment Judge, the members, and Mr Cameron, that from their observation the Employment Judge was not aggressive and that Mr McClung appeared to be able to answer the questions. It is not however possible for others to know how Mr McClung felt about it and I have no reason to think that Mr McClung is untruthful when he says that he felt that he was being asked questions in an aggressive manner and that he took from it, whether that be right or wrong, that he should say that the last straw was in June. I have come to that view because the phrase "final straw (or last straw)" is a phrase which has a meaning for lawyers in the context of constructive dismissal cases. It is also a phrase commonly used by lay people, but not necessarily in precisely the way lawyers use it in the constructive dismissal context. It is plain that Mr McClung could not have meant when he lodged his first ET1 that the events ending in June were the final straw which led to his resigning in a situation which he wishes to categorise as unfair constructive dismissal. He had not resigned at that stage and so he could not have regarded that as the event which led him to resign. He used the phrases 'final straw' and 'breach of trust and confidence' which are very familiar to lawyers in constructive dismissal cases, but he had not resigned, and the Respondent of course knew that. The first ET3 was completed on behalf of the Respondent on the basis that claims were made of religious discrimination and failure to pay bonus said to be contractually due. The Claimant did resign after he found out, according to him, about the

enquiry with Mr Trainer. In the second ET1 the Claimant states that he obtained a witness statement on 26 October 2011 that indicated to him that the Respondent had been trying to uncover issues to use against him while he was off, on long term sick leave. He claims that this "is the final straw in a long series of events and breaches of my trust and confidence in my employer." He then narrates allegations of events from the end of September, going back to July. The form is somewhat rambling and covers many irrelevant matters but it is clear enough that the Claimant is claiming to have been unfairly constructively dismissed having found out about the Respondent's contacting Mr Trainer and expressing a view that the Claimant may have been involved in "bad things". Thus while the Claimant used the phrase "final straw" in the first ET1 in reference to events of June, that was obviously not in contradiction of his second ET1.

18. Mr McClung submitted to me that the ET had erred in law because it had not, as identified by the President, given a view about the Respondent's behaviour in investigating matters with Mr Trainer in the way in which they did. As he was representing himself the Claimant did not always appreciate the relevance or otherwise of parts of his argument to the question before me. He made his submissions politely and tried to assist me. He explained that he "tended to see the world in black and white" and that he lived his life according to the Ten Commandments. At one stage he began to make a submission based on Mr Cameron lacking morality in that he was prepared to appear for the Respondent and make a case for them. I asked him to cease any such submission, as it was a completely improper submission to make. He accepted that.

19. The Claimant's submissions were based on the decision under rule 3(10). He said that the second ET1 was a claim of unfair constructive dismissal and he made it plain in that form that he alleged that the Respondents had treated him unlawfully for some time, hence his earlier

application, but that the reason he had resigned was that the Respondent's action in telling Mr Trainer that he had been acting wrongfully meant that he could not have any trust in his employer. He explained, as he had in his written statement that he had been questioned by the EJ about his use of the words "the final straw" in his first ET1 and he had been confused by that. He had tried to explain at the ET that he was not misleading anyone, and that while he was very upset by being refused bonus payments and by the events he described as religious discrimination, he did not resign at that stage. He said that he "gave in" as he felt that he was pressurised by the experience of being questioned at the ET.

20. Mr McClung submitted that the ET had erred in law by failing to refer in any substantial way to the claim he had made, that the Trainer incident, taken with all that had gone before, had caused him to lose trust and confidence in his employers to the extent that he could not be expected to continue to work for them. Instead, the ET had concentrated on the question of what he had said about his position in June.

21. In paragraph 121 of the reasons the ET had quoted the test for constructive dismissal wrongly according to the Claimant. It had stated, as a quotation from the leading case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221:

> **"If the employee is guilty of conduct which is a significant breach, going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."**

The word "employee" in the first line is wrong; it should be "employer". Mr McClung did not accept that a typing error had been made. He insisted that the ET had made a substantial error. In reply Mr Cameron argued that it was obviously an error of the pen as the quotation did not make sense, and one could tell from the rest of the written reasons that the ET knew what the

court had said. While I accept that errors of this sort are unfortunate and do not increase confidence in the ET, I hold, for the reasons given by counsel, that this is an error of typing and of proof reading. I do not accept that the ET failed to understand the test in the way argued by Mr McClung.

22. The Claimant argued that he had been put under pressure in the same way as the defendant in a criminal trial in the news about a year before was. He produced a news report from The Guardian dated 13 March 2013 of a Court of Appeal decision in a case against a soldier named Danny Nightingale who had been convicted of charges involving possession of firearms and ammunition. It had been decided the conviction was unsafe as he had been put under "improper pressure" to plead guilty. Mr McClung referred to a number of employment law cases. I mean no disrespect to him when I say that I did not find the newspaper report to be of any assistance as it referred to a very different situation. Nor did I find the cases which he referred to be in point; perhaps understandably Mr McClung had sought examples of cases where constructive dismissal was found but they were not of assistance in the decision I had to make.

23. Mr Cameron argued that there had been no error in law and that the Tribunal was entitled to proceed in the way in which it had. He submitted the case of **Western Excavating v Sharp** set out the requirement for constructive dismissal, to the effect that there is an implied term in a contract of employment that the parties will not conduct themselves in a way likely to destroy or seriously damage the relationship of trust and confidence existing between employer and employee. He emphasised under reference to the cases of **Malik v BCCI** [1997] ICR 606 and **Post Office v Roberts** [1980] IRLR 347 that the test is not whether the employer acted unreasonably; rather it is the higher test of whether the acting of the employer was so intolerable, so serious as to amount to repudiation of the contract. He accepted that an

employee could rely on a series of events, but submitted that the "final straw" must contribute, under reference to **Lewis v Motorworld Garages Ltd** [1985] IRLR 465 and **Waltham Forest LBC v Omilaju** [2005] ICR 481. Mr Cameron submitted that the breach must be one of the causes if there were several causes, as decided in **Wright v North Ayrshire Council** [2014] IRLR 4. He submitted under reference to **Buckland v Bournemouth University Higher Education Authority** [2010] EWCA Civ 232 that a constructive dismissal is not necessarily unfair and that unfairness has to be considered under section 98(4) of **ERA 1996** in the usual way.

24. Counsel submitted that the ET had made no finding of repudiatory behaviour by the Respondent. The ET was limited he argued in what it could do in relation to the Trainer episode. In his second ET1 and in his opening statement the claimant had identified the events of October 2011 as the last straw. However in the course of his evidence and in his final submissions he had changed and said that the final straw happened in June. He did not refer to the events of October as being any breach at all. Counsel argued the ET had to deal with the case put before it (**Chapman v Simon** [1994] IRLR 124) and did not err in law in so doing. He submitted that the Claimant had not been under pressure from the EJ and had had every opportunity to present his case in whatever way he chose.

25. Counsel accepted that proper analysis of conduct said to breach the implied term of trust and confidence will necessarily focus on actions of the employer; but the Claimant had to set out what acts he complained of. While I agree with that as a proposition, I do not agree that the ET was entitled to regard the Claimant as departing from his ET1 in which he claimed that he had resigned due to what he discovered the Respondent had done in relation to the Trainer episode.

26. Even if the ET should have considered the Trainer episode to be relevant, counsel submitted that there was no breach of the implied term. He relied on the finding by the ET that the Respondent had genuine concerns and was entitled to investigate. The ET did make findings to that effect, and so it could not be argued that they had ignored the matter. I do not agree; the point on behalf of the Claimant is that the ET did not make findings one way or the other about his allegation that conducting an investigation and stating he had acted wrongly to a customer without telling him, was a breach of the implied term. There is no submission that the Respondent was not entitled to make an investigation; the submission relates to the way the Respondent went about it.

27. The ET found that the Respondent told the Claimant that there were risk matters he would need to address when he came back from sick leave. By September he had been told by the Respondent that this related to Peter Trainer. Counsel submitted that the findings did not disclose anything that could be a serious breach of the implied term. That submission did not deal with the point outlined above, concerning the way that the Respondent went about its investigation. I do not express any view as to the finding that an ET will make on that question; it is for the ET to decide. I do not however regard it as a question which would admit of only one answer.

Decision

28. I considered matters carefully and have come to the view that the Tribunal did err in law. I respectfully agree with Langstaff P that the ET has erred in law in failing to determine an essential part of the question put before it by the Claimant's application. I appreciate that I was not present while the evidence was led and therefore I do not have the knowledge of the way the case was presented that the ET had. Having seen the Claimant's written submissions I appreciate that he may have needed guidance about relevancy in order to ascertain what he

wanted to put before the ET. I make no criticism of the EJ for trying to get the issues set out clearly. However I do not know why the question of the final straw being mentioned in the first ET 1 as happening by June was raised by the EJ and by counsel in the way in which it was. As I have said above I accept that the EJ was not, objectively considered, aggressive and so I do not refer to his manner; rather I question why any emphasis was put on the matter at all. It was clear that the Claimant had not resigned at that stage and so he could not have meant that the events prior to and in June led to his resignation. In any event he had lodged another ET1 shortly after writing a letter of resignation in which he stated that the final straw was the Trainer episode.

29. It was not argued before me, but it is part of the decision making in this case and I take notice of the suggestion by Langstaff P that the ET has erred in its definition of constructive dismissal in paragraph 127 of the reasons. The correct question is whether the Claimant resigned at least partly in response to a fundamental breach by the employer.

30. I intend to say nothing about the facts of the case because parties were agreed that if the appeal is allowed, it must be remitted to a freshly constituted Tribunal to hear evidence and make findings on the question of constructive unfair dismissal. (The other claims have been dismissed.) I have found that the ET erred in law by omitting to make findings. I emphasise that the new Tribunal will require to hear the evidence and make findings anew.

31. I will therefore allow this appeal and remit it to a fresh Tribunal.