Appeal No. UKEAT/0539/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 August 2014
Judgment handed down on 30 January 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS N COLOMAR MARI — APPELLANT

REUTERS LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SAMANTHA COOPER (of Counsel) Instructed by: Sternberg Reed Solicitors Focal House 12-18 Station Parade Barking Essex IG11 8DN
For the Respondent	MS LUCY BONE (of Counsel) Instructed by: Burgess Salmon LLP One Glass Wharf Bristol BS2 0ZX

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

Constructive dismissal – breach of contract - affirmation

The Employment Tribunal applied correct principles of law to the question of affirmation: **WE Cox Toner (International) Limited v Crook** [1981] ICR 823 and **Hadji v St Luke's Plymouth** [2013] UKEAT/0095/12 applied. No special principles apply in the case of an employee who alleges that the employer's repudiatory conduct amounts in effect to demotion. **Bashir v Brillo Manufacturing Co Limited** [1979] IRLR 295 and **El-Hoshi v Pizza Express Restaurants** [UKEAT/0857/03] discussed and explained. Observations on the significance of acceptance of sick pay in deciding whether a contract of employment has been affirmed.

The Employment Tribunal was not perverse in rejecting the Claimant's case that she was too unwell to resign.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Ms Nieves Colomar Mari ("the Claimant") against a Judgment of the Employment Tribunal sitting in the East London Hearing Centre following a 3-day hearing on 17-19 July 2013. The Claimant had brought proceedings against Reuters Limited ("the Respondent") claiming sex discrimination, constructive unfair dismissal and notice pay. The Employment Tribunal dismissed all her claims.

2. The hearing before the Employment Tribunal took an unusual course. Although it was a final hearing of all the Claimant's claims, the Employment Tribunal considered as a preliminary point the Respondent's argument that the Claimant's claim of constructive dismissal could not succeed because she had affirmed the contract. For this purpose the Claimant's case had to be taken at its highest: it was assumed therefore that the Respondent had committed a fundamental breach of contract which entitled the Claimant to resign. The Employment Tribunal heard evidence only on the affirmation issue. It accepted the Respondent's argument, finding that the Claimant had indeed affirmed the contract.

3. It is this finding which the Claimant challenges on appeal. By reason of the finding the Employment Tribunal dismissed the claims for constructive unfair dismissal and notice pay. Moreover it approached the Claimant's sex discrimination claim on the basis that she was 19 months out of time, and it declined to extend time for the bringing of the claim. If the underlying finding of affirmation was wrong in law all aspects of the Claimant's case would require re-consideration.

The Background Facts

4. The Claimant was employed by the Respondent with effect from 1 October 2004 as a systems support analyst. She was off work with symptoms of stress, anxiety and depression from May to October 2008 and again from 24 August 2010 until her resignation on 8 April 2012.

5. I must summarise the Claimant's case, while emphasising that the unusual course taken at the Employment Tribunal hearing means that there have been no findings as to its truth.

6. I will begin with the Claimant's ET1 form. She said that from July 2007 until May 2008 she was placed under an unreasonable workload and subjected to an abrasive management style. She also suffered from unwanted conduct amounting to harassment on the grounds of sex. This caused her to be off work with stress and depression from May to October 2008. She then returned to work. She found that her previous work area had been re-allocated in her absence. She was given no specific work area. She was continually asked to do work which was well below her level of expertise. She was treated badly by her colleagues (who were all male). A grievance which she took out concerning her treatment was not dealt with satisfactorily. Despite her complaints, her work remained below her expertise, new areas of work were allocated to other people and she was overlooked for training opportunities and "on-call" work. The final straw was a refusal of access to the system for a purpose which was well within her expertise.

7. It was, she said, by reason of this conduct, described as a "fundamental breakdown of trust and confidence", that she relapsed and was signed off with stress and depression.

8. The Claimant's witness statement set out her case in more detail, but was broadly to the same effect. She confirmed that after her first return to work from sickness she found that her "roles of market-data and system-net backup had been allocated to someone else". She complained of the "scope of her work being restricted to that below her expertise". She said that her requests for work on new projects and vacant roles were ignored.

9. On 13 October 2010 the Claimant wrote a letter to the Respondent in the following terms:

> **"As you will know, I am currently off sick with symptoms of stress and depression and signed off until the 5th of November. Nevertheless, I wish to inform you that I consider that I have been treated very unfairly by the management and my colleagues. I consider that I have been prevented from taking on positions of responsibility and have not been provided with the same opportunities as other members of my team.**
>
> **I consider that this treatment may have been on the grounds of my sex, as I am the only woman in my team and have been referred to as a 'bitch'. I have also been compared to [colleagues'] nagging wives. I also consider that the treatment I have received may have been on the grounds of my disability, in that I have been treated differently since my absence for depression two years ago.**
>
> **Despite bringing my concerns to management numerous times, I do not feel that the company has taken my complaints seriously or have acted with the intention to abide by the term of mutual trust and confidence.**
>
> **Please accept this letter as confirmation that I will no longer tolerate this situation and I am now considering my position. However, I am still not well enough to directly deal with this situation or conduct a grievance. When I am well enough, I will be in contact again."**

10. In her evidence the Claimant said that she had a settled intention of leaving at this point, and it never changed.

11. During her lengthy period of absence the Claimant accepted contractual sick pay until its expiry after 39 weeks in May 2011. She asked, in October 2010 and again after the expiry of her sick pay, for a referral to occupational health for consideration of a claim on the Respondent's personal health insurance. There were also discussions at a welfare meeting in April 2011 about medical referral and TUPE. The Claimant also asked on three separate occasions for her email access to be restored to her: it was restored on each occasion, and on the third occasion she used it to go to the office and gain access to the email system late on a

Sunday evening with, as the Employment Tribunal put it, "hostile intent" (by which I believe the Employment Tribunal meant that she was gathering evidence for use against the Respondent). A letter dated 17 December 2011 shows that she used her status as a permanent employee of the Respondent to justify access to the Respondent's intranet.

12. The Claimant resigned on 8 April 2012 - more than 19 months after she had become absent on grounds of sickness and nearly 18 months after she wrote the letter dated 13 October 2010 which I have quoted. She commenced proceedings on 6 July 2012.

The Employment Tribunal Hearing and Reasons

13. *The Claimant's health.* On the question of affirmation it was part of Claimant's case that she was in such a bad way between October 2010 and April 2012 that she was unable to contemplate resignation.

14. For this and other reasons a psychiatric report was commissioned jointly by the parties from Dr Jonathan Ornstein. He examined the Claimant on 16 May 2013 and wrote a report dated 22 May 2013. He concluded that during the period from May to October 2008 the Claimant had been suffering from a moderate depressive episode and from August 2010 ongoing through to September 2012 she had been suffering from a severe depressive episode. He found that at the time of interview the Claimant was still suffering from mild to moderate depression.

15. As to the effect of what he found to be the severe depressive episode on the Claimant's ability to raise a complaint, he said the following:

> **"[It] seems probable that these symptoms of depression, particularly low energy, low self confidence and low mood would have made it extremely difficult for her to raise the complaint whilst these symptoms were still highly active. It does therefore make sense that following a**

period of therapy where her mood improved, she was … then able to raise a complaint against the Company even though this was not within the prescribed time limit."

16. The report of Dr Ornstein was the principal report before the Employment Tribunal, but it was not the only medical evidence. There was also a letter from Claimant's treating doctor dated 25 February 2013. This set out her visits to the surgery and the treatment she was given. The diagnosis given was "single major depression - mild", and the treatment prescribed was at a relatively low level.

17. The Employment Tribunal dealt with this part of the case in paragraphs 13 to 20 of its Reasons. I will quote these paragraphs in full:

"13. The claimant was off sick with stress and depression from 24th August 2010 until she resigned on 08th April 2012, 22 months. We have seen her GP's note of her medical history … dated 25th February 2013, and a jointly instructed medical report from Dr Ornstein dated 20th May 2013 [sic] … She had previously been absent with stress and depression for 6 months in 2008 - April to October. From April 2008 until she resigned the claimant was prescribed and took Fluoxetine at 20mgs. This is described in the medical reports as the lowest dose that has clinical effect.

14. The claimant did not visit her doctor for months at a time - she had med 3 certificates for periods of as long as 4 months, and repeat prescriptions. It is possible that this was because she felt too ill to go to the doctor, as she says, or that she did not need to go. She had (invaluable) support throughout from her stalwart friend Angela Saffery, and we can see no evidence on which we can conclude, on the balance of probabilities, that she was under diagnosed, or that there was a failing in her medical care.

15. She was offered and underwent counselling and cognitive behavioural therapy ("cbt"): referral 10th May 2011 to counsellor, and 06th September 2011 to psychotherapy (the cbt). She found the cbt helpful. It enabled her to see that she must leave the "bubble" in which she found herself and resign.

16. The claimant asserts that she was in a terrible way throughout this period and simply unable to contemplate resigning or, once she had done so, to contemplate putting in the claim (which was done only a day inside the period for so doing subsequent to her resignation).

17. Dr Ornstein, in his report, says at paragraphs 72 onwards that it would have been "difficult" for her to raise complaints (para 73) and "extremely hard for her to have gathered the confidence and energy necessary to commence with a proceeding of this type" (para 74). He does not appear to have appreciated the support the claimant had from Ms Saffery, or considered that the claimant had been able to take legal advice. He does not comment on the oddity (to us) of his diagnosis of severe depression but minimal medication from her GP. His report is based on a one hour discussion with the claimant and on the GP's 2 page summary of medical history.

18. The claimant is Spanish and her parents' home is in Ibiza. Every year she would return home at Christmas, Easter and in the summer, for one week. She continued this pattern throughout her sickness absence. She did not tell her parents that she was away from work through stress and depression, and they were unaware of her illness throughout the period. She organised her plane tickets by buying them on the internet. Getting herself to and from Ibiza was possible for her, and she did not tell us of any problem with the travel or the

organisation of it. Dr Ornstein does not comment on this, and perhaps did not know. His report is lengthy and may be presumed to include all that he was told that was relevant.

19. We are very wary of expressing a medical opinion, but the decision is ours, and on the basis of far more extensive oral and documentary evidence, and evidence from the respondent which was unavailable to Dr Ornstein.

20. Throughout this period the claimant was engaged in various coherent email traffic with the respondent, and while she had help on some occasions from Ms Saffery, on others she did not. She was able to take legal advice. We do not accept that she was incapable, for medical reasons, of resigning or putting in a claim."

18. *Affirmation generally.* Although the Claimant relied on the severity of her medical condition as a reason why it took so long to resign, it was also part of her case that she did nothing which should lead the Employment Tribunal to make a finding of affirmation. The Employment Tribunal dealt with the case law on this question in paragraphs 8 to 12 of its Reasons in the following way.

"8. The recent case of *Hadji -v- St Luke's Plymouth* UKEAT 0095/12/BA sets out a summary of the position at paragraph 17. We adopt that position. We have noted the tension implicit in the cases quoted in it. *Western Excavating -v- Sharp* says that delay of itself may be affirmation. *WE Cox Toner (International) Ltd -v- Crook* [1981] IRLR 443 says not, but affirmation may be implied by delay. *Fereday -v- South Staffordshire NHS Primary Care Trust* UKEAT/0513/10/ZT repeats this at para 44, and says also that it may be implied by the innocent calling on the guilty for further performance of the contract. At para 43 a quote from *Cox Toner* is approved - acts consistent only with continued performance of the contract will normally show affirmation of the contract.

9. Counsel for the claimant referred us to *El-Hoshi -v- Pizza Express Restaurants Ltd* UKEAT/0857/03/MAA, and in particular the section at para 43 onwards dealing with affirmation. Mr El-Hoshi was off sick. The decision states that "mere delay is neutral" and there, as here, the delay was caused (or at least that is the claimant's assertion) by sickness. We respectfully disagree with that statement - if affirmation can be implied from delay then it is not always neutral. There was the acceptance of sick pay, and that was asserted to be neutral also, so that in *El-Hoshi* two neutral factors were added together and could not amount to affirmation (para 51 of that decision). In *Fereday*, the act of claiming sick pay was enough to amount to affirmation: and the delay was nearly 6 weeks - here it is 19 months. That is of a different order altogether. Yet at 43 of *Fereday* there is quoted without dissent the *Cox Toner* case where it is said at 13 that the injured party must elect at some stage but is not bound to do so within a reasonable or any other time.

10. This confusion in the cases is, in our view, because the decision in each case is fact sensitive - the one point on which all the cases are agreed - and the courts are trying to get to a just result.

11. Therefore it was agreed that the test for the tribunal was to look at all the facts in the round, and then make an assessment as to whether in those circumstances there had been an affirmation of the contract, or not.

12. We note the claimant's assertion that affirmation of a contractual term might not affirm the contract, based on the *El-Hoshi* case, where affirmation of a contract, not the contract, might be possible: this in circumstances where the employer had unilaterally varied the employee's terms. That does not apply here. There were allegations of discrimination, but those amount to the fundamental breach alleged: the underlying contract did not vary."

19. After making its findings on the question of Claimant's health, the Employment Tribunal returned more generally to the question of affirmation in paragraphs 21 to 34 of its Reasons. It is not necessary to set these paragraphs out in full. The Employment Tribunal's reasoning may be summarised as follows. (1) Although the Claimant said in her email dated 13 October 2013 that she was reserving her position, this could not affect the position if she affirmed the contract thereafter. (2) She did affirm the contract thereafter by (i) the repeated requests for, and the use of email access to work email; (ii) acceptance of 39 weeks sick pay; (iii) requests to be considered for permanent health insurance; (iv) discussions at a disciplinary meeting (relating to failure to provide sickness certificates) and at a welfare meeting which discussed matters concerned with continuing employment.

20. It is, however, necessary to quote one paragraph which is said on the Claimant's behalf to have no evidential basis. Paragraph 21 reads as follows.

> **"The claimant's evidence to us was that she wanted to stay employed until she was better, when she would be able to get another job and leave the respondent, and that she was reserving her position as to the fundamental breaches she asserted until then. That is not the same thing as being prevented from taking action: it is the reason for not doing so, which is not the same thing at all."**

21. When the Employment Tribunal handed down its Judgment and Reasons, which it did at a hearing, there was an immediate request by the Claimant for a review. It was argued that the Claimant was effectively saying she was demoted; she was affirming only the contract she had as a "top level adviser", not the lower level contract to which she had been demoted; and therefore on the authority of **El Hoshi** she had not affirmed her contract of employment. The Employment Tribunal rejected this argument. It held that **El Hoshi** was a different case on its facts; and it adhered to the view of the law it had already expressed.

Submissions

22. On behalf of the Claimant, Ms Samantha Cooper put her case in two ways.

23. At the forefront of her case she placed a submission that the Employment Tribunal failed to distinguish between "evidence of the Claimant's affirmation of the employment relationship and evidence of affirmation of a particular employment contract". She submitted that where the employee's case is that he was demoted or offered work of a lesser standard, believed by the employee to be a demotion or contractual variation, particular considerations apply. It is not sufficient that the employee should affirm the employment relationship. It is necessary that he should affirm the varied contract of employment. For these propositions she relied on **Bashir v Brillo Manufacturing Co Limited** [1979] IRLR 295 and **El-Hoshi v Pizza Express Restaurants** [UKEAT/0857/03], cases to which I shall return later in this Judgment.

24. Ms Cooper submitted that it was a "central plank" of the Claimant's case, taken at its highest, that she had effectively been demoted. The Employment Tribunal therefore had to proceed on the basis that she had indeed effectively been demoted. The Employment Tribunal therefore had to look for evidence that she had accepted the contract as varied - the demotion. There was no such evidence, and the Employment Tribunal did not look for it. There was no proper basis for distinguishing **Bashir** and **El-Hoshi**.

25. Ms Cooper relied on one other ground. She argued that the Employment Tribunal was perverse to conclude that the Claimant was not incapable, for medical reasons, of resigning or putting in a claim. She relied on the following points. (1) She said that the Employment Tribunal's conclusion, in paragraph 21, that the Claimant "wanted to stay employed until she was better" was contrary to her oral evidence, that she was too unwell to make any decision.

She accepted that there was reference in the agreed note of the hearing to the Claimant "not knowing if she would be well enough to get another job" and "hoping to get her strength back", but these were merely references to those things which she felt unable to do. (2) The Employment Tribunal impermissibly disregarded the medical evidence within the report of the jointly instructed psychiatric expert, Dr Ornstein. It drew conclusions from the medication prescribed by a non-expert GP without considering what Dr Ornstein said about that medication. Dr Ornstein had said at the conclusion of his report that further sessions of cognitive behavioural therapy might be helpful "as well as a full medication review". He had referred to the availability of a stronger dose of Fluoxetine and other anti-depressant medication. (3) The Employment Tribunal had not taken into account the repeated assertions by the Claimant in correspondence that she had remained unwell.

26. Ms Lucy Bone on behalf of the Respondent submitted that the Employment Tribunal applied correct principles of law in relation to affirmation. In particular, it was entitled to look for guidance to **WE Cox Toner (International) Limited v Crook** [1981] ICR 823 and **Hadji v St Luke's Plymouth** [2013] UKEAT/0095/12. The Employment Tribunal was entitled to distinguish **Bashir** and **El-Hoshi**. They were cases concerned with attempted unilateral variation of contract - a case not put forward in the Claimant's claim form, witness statement or skeleton argument for the hearing below. They concerned relatively short periods of sickness absence. Acceptance of sick pay was not necessarily a neutral factor: see **Fereday v South Staffordshire NHS Primary Care Trust** [2011] UKEAT/0513/10. Further Ms Bone submitted that way in which the case was argued on appeal was not put below. She took me to familiar cases on the question whether an appellate tribunal should permit a point to be taken on appeal which was not taken below: **Kumchyk v Derby City Council** [1978] ICR 1116, **Jones**

v Governing Body of Burdett Coutts School [1998] IRLR 521 and **Glennie v Independent Magazines (UK) Limited** [1999] IRLR 719.

27. On the question of perversity Ms Bone reminded me of the strict test which is applicable to an appellate tribunal vested only with jurisdiction to hear points of law. She submitted that there was evidence on which the Employment Tribunal was entitled to conclude that the Claimant was not too unwell to contemplate resignation. The Employment Tribunal was not bound to accept the report of Dr Ornstein: it heard evidence over 2 days and was entitled to reach its conclusions on the entirety of the evidence. The reference to the lowest dose of medicine is a reference to what the GP prescribed, showing that the GP's treatment was consistent with the depression being treated as relatively mild. The Employment Tribunal's conclusion in paragraph 21 was consistent with the Claimant's evidence and followed its conclusion, already expressed in paragraphs 13 to 20, that the Claimant was not too unwell to resign.

Discussion and Conclusions

28. I will begin with the Employment Tribunal's rejection of the Claimant's case that she was incapable, for medical reasons, of resigning (or putting in a claim).

29. The difficulty of succeeding on a perversity appeal before the Employment Appeal Tribunal is well known. A perversity appeal is essentially a complaint about the Employment Tribunal's findings of fact. Because Parliament has expressly provided that there is to be an appeal to the Appeal Tribunal only on a question of law, there is only the most limited scope for such an appeal. Thus in the leading case, **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93 Mummery LJ said:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care': *British Telecommunications plc v Sheridan* [1990] IRLR 27 at paragraph 34."**

30. In my judgment the Employment Tribunal's conclusion was not perverse. There was ample material on which the Employment Tribunal could reject the Claimant's case that she was incapable of resigning. It was entitled to look at the evidence as a whole (which included her GP records, her correspondence with the Respondent, her ability to seek access to the intranet and visit their premises, her travel arrangements abroad, and so forth) and reach the conclusion it did.

31. I do not think the Employment Tribunal was bound to reach the opposite conclusion by reason of the report of Dr Ornstein. The opinion in this report was based on a one hour consultation with the Claimant and limited medical evidence. The Employment Tribunal had a much fuller picture of the Claimant's correspondence and activities, and had the advantage of hearing the Claimant give evidence over a significant period.

32. Nor do I think the Employment Tribunal was perverse by reason of its approach to the Claimant's medication. The point which the Employment Tribunal drew from the fact that the prescribed dosage of medication was low was that the GP's contemporaneous treatment contrasted with the retrospective view of Dr Ornstein as to the severity of the depression. This was a proper observation for the Employment Tribunal to make. I would add that the Claimant's relatively rare visits to the GP, coupled with her ability to travel and engage in correspondence, all support the Employment Tribunal's conclusion that the Claimant was not so ill that she was unable to resign.

33. It is, I think, important to appreciate that paragraph 21 of the Employment Tribunal's Reasons is not part of its reasoning for rejecting the Claimant's case that she was too ill to resign. The Employment Tribunal had discussed that aspect of the case and reached its conclusion in paragraph 20 of its Reasons. Paragraph 21 should not be read as though the Employment Tribunal had forgotten that the Claimant's evidence was that she was too ill to resign: it is plain from what precedes that paragraph that the Employment Tribunal was perfectly well aware this was her case, and had rejected it. But it certainly was also her evidence that she wanted to stay employed until she felt better and might seek another job: that is apparent from the agreed notes of evidence placed before me. The Employment Tribunal's point in paragraph 21, as I read it, is simply that if (as it had found) the Claimant was not so ill that she was incapable of resigning, a desire to remain employed until she was better and could seek another job did not prevent her from resigning.

34. For these reasons I conclude that the Employment Tribunal did not err in law in rejecting the Claimant's case that she was incapable of resigning for medical reasons.

35. I turn then to the question whether the Employment Tribunal erred in law in its approach to the question of affirmation.

36. To my mind there is no doubt that **WE Cox Toner (International) Limited v Crook** has been for 30 years, and remains, the leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract. I will set out the important passage from the Judgment of Browne-Wilkinson P:

> **"13. It is accepted by both sides (as we think rightly) that the general principles of the law of contract apply to this case, subject to such modifications as are appropriate to take account of the factors which distinguish contracts of employment from other contracts. Although we were not referred to cases outside the field of employment law, our own researches have led us to the view that the general principles applicable to a repudiation of contract are as follows. If one party ('the guilty party') commits a repudiatory breach of the contract, the other party**

('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: *Allen v Robles* [1969] 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 WLR 1053.

14. It is against this background that one has to read the short summary of the law given by Lord Denning MR in the *Western Excavating* case [[1978] ICR 221]. The passage [at p. 226] 'moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged' is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (ie, further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: see *Saunders v Paladin Coachworks Ltd* (1968) 3 ITR 51. Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: see *Bashir v Brillo Manufacturing Company* [1979] IRLR 295.

15. Although we were not referred to the case, we think the remarks of Lord Denning's remarks in the *Western Excavating* case are a reflection of the earlier decision of the Court of Appeal in *Marriott v Oxford and District Co-operative Society* [1970] 1 QB 196. In that case, the employer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning was a member) held that he had not thereby lost his right to claim that he was dismissed (in the *Western Excavating* case at p.30 Lord Denning explains that the case would now be treated as one of constructive dismissal). This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job."

37. Browne-Wilkinson P went on to say that the question whether or not the conduct of the innocent party amounts to an affirmation of the contract is a mixed question of fact and law, so that if the Tribunal has correctly directed itself in law the Employment Appeal Tribunal is not entitled to substitute its decision for that of the Tribunal.

38. In **Hadji v St Luke's Plymouth** His Honour Judge Jeffrey Burke QC summarised the position as follows (paragraph 17):

> **"The essential principles are that:**
>
> > **(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. *Western Excavating v Sharp* [1978] ICR 221 as modified by *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443 and *Cantor Fitzgerald International v Bird* [2002] EWHC 2736 (QB) 29 July 2002.**
> >
> > **(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay - see *Cox Toner* para. 13 p446.**
> >
> > **(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: *Fereday v S Staffs NHS Primary Care Trust* (UKEAT/0513/ZT judgment 12/07/2011) paras. 45/46.**
> >
> > **(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: *Fereday*, para. 44."**

39. This passage summarises and builds upon **Cox Toner** and other cases, and it is an appropriate self-direction for an Employment Tribunal to give itself. As both **Cox Toner** and **Hadji** make clear, the doctrine of affirmation is applied more liberally in the case of an employee who is the victim of a fundamental breach than it would be in the case of most other (commercial) contracts, where any calling upon the opposite party to fulfil its obligations will be likely to constitute affirmation. The application of the doctrine in employment cases is highly fact-sensitive.

40. The Employment Tribunal approached the law in accordance with these principles, in particular expressly applying the statement of His Honour Jeffrey Burke QC in **Hadji**. I see no error of law in the Employment Tribunal adopting this approach.

41. To my mind Ms Cooper's argument depends on the proposition that the Employment Tribunal was bound to approach the matter differently because the Claimant's case, in part at

least, was that she was continually given work beneath her expertise and therefore in effect demoted (though the word "demoted" does not appear in the ET1 or the letter dated 13 October 2010, and there is no suggestion of any change of job title or remuneration arrangements).

42. In principle I do not see why a different approach is required in such a case, whether it is put as breach of an express term or (as it appears to have been put here) as contributing to a breach of the implied term of trust and confidence. Indeed it seems to me that the law would be unworkable if different tests for affirmation applied to different aspects of an employer's conduct. In this case, for example, the failure to give the Claimant work within her expertise was only one of the aspects of the employer's conduct about which she complained. It is difficult to see any justification for applying different tests to different aspects of complaint.

43. I must nevertheless ask whether the cases upon which Ms Cooper relied - **Bashir** and **El-Hoshi** - compel such a conclusion.

44. In **Bashir** the Claimant, a supervisor, was involved in a disturbance with another employee. He was suspended and offered a non-supervisory job in another department at a lower rate of pay. He remained off work sick, drawing sick pay, and instructed solicitors who made it clear that he did not accept the alternative job. The sick pay was the same whether he was in a supervisory role or a non-supervisory role. He told the employers that if they did not re-instate him as a supervisor he would resign. He did so after 3 months. The Tribunal held that he had left it too late. The Employment Appeal Tribunal allowed the appeal, holding that the Employment Tribunal had concentrated impermissibly on the period of delay without taking into account the circumstances as a whole, including the fact that the employee was absent from

work through ill health and receiving sick pay to which he was entitled whether he was a supervisor or not. Slynn P said (paragraph 17):

> **"Accordingly here it seems to us that the Industrial Tribunal, although quite rightly seeking to apply the decision of the Court of Appeal in *Western Excavating v Sharp* [[1978] IRLR 27], have attached too much to the mere passage of time. What they really had to consider was whether, he not having worked, there were other factors which could be taken as showing an election to affirm the contract as varied. On the very special facts of this case, where the employee was absent sick for some two-and-a-half months after the act of the employer which is relied upon as a repudiation, and where the employer was also pressing the man to take the new job, realising that he was refusing it, but going on to pay him sick pay, it seems to us that Mr Bashir was still entitled, at the end of the period, to say when he was ready, or apparently ready, to go back to work that he accepted the repudiation."**

45. This approach is entirely consistent with the later decision in **Cox Toner** - indeed **Bashir** was cited with approval in **Cox Toner**. But Ms Cooper laid emphasis on a sentence in the preceding paragraph (paragraph 16), where Slynn P said that "it does not seem to us that it can be said that by the receipt of sick pay he [the employee] has done an act to affirm the contract as varied".

46. This sentence was not, to my mind, intended to lay down any general principle relating to affirmation. It cannot be read literally, for there was no variation of the contract. Rather it needs to be read against the particular facts. In that case the employer had withdrawn Mr Bashir from his position as supervisor; its only offer to him was to employ him in a non-supervisory job elsewhere. Variation of a contract of employment in this way must however be consensual. Consent must be express or by implication. Mr Bashir did not expressly consent. Could his consent be implied from acceptance of sick pay? It could not, since the sick pay was the same whether he was in the supervisory role or the non-supervisory role. Of course if Mr Bashir had by implication accepted the lesser job, he would without doubt have affirmed the contract, because he would have accepted the variation offered. That is to my mind the significance of the last sentence in paragraph 16 of **Bashir**. It is in the following paragraph 17, which I have already quoted, that Slynn P, having disposed of the possibility that Mr Bashir had

implicitly accepted the variation which had been offered, went on to consider more generally the question of affirmation.

47. I therefore do not consider that **Bashir** is authority for any special or different test applicable to all cases which involve an allegation that an employee has effectively been demoted. I do not consider that it provides any assistance to the Claimant in this case. Here it was no part of the case of the Respondent that it had varied the Claimant's contract and she had accepted the variation. It was the Claimant's case, not accepted by the Respondent, that the Respondent was in fundamental breach of contract in various ways, including a failure to give her work to the level of her expertise. The Employment Tribunal was correct to distinguish **Bashir** and to apply ordinary principles applicable to affirmation.

48. In **El-Hoshi** the employee was an assistant branch manager. Following an act of "whistleblowing" on his part he was punished by being rostered to work in the kitchen on duties which the Employment Tribunal found to be in effect a demotion. He went off work sick. His own correspondence, and then correspondence from his solicitors, made it plain that he did not accept what had happened to him. He received sick pay for some weeks, presumably at the rate to which he was entitled as an assistant branch manager. He commenced his proceedings within 3 months of the events about which he complained. The Employment Tribunal found that he had affirmed the contract by acceptance of the sick pay. The Employment Appeal Tribunal allowed the appeal. In the course of doing so it made the point that receiving sick pay did not mean that the Claimant had accepted the "new regime": see paragraph 47 of its Reasons. This was correct, just as it was correct in **Bashir**.

49. In **El-Hoshi** the Employment Appeal Tribunal went on to say that the acceptance of sick pay in that case was a "neutral factor": see paragraph 51. Given the fact that the Claimant accepted sick pay for a relatively short period, corresponded with the employer to complain about his position, instructed solicitors and began proceedings within 3 months, it is easy to see why the Employment Appeal Tribunal characterised the acceptance of sick pay in that way. But there is no absolute rule that acceptance of sick pay is always neutral: see **Fereday** at paragraphs 43 and 44. The significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract. At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position: this follows from **Cox Toner**, which I have already quoted, for a sick employee can hardly be in any worse position than an employee who continues to work for a limited period.

50. For these reasons I conclude that the Employment Tribunal applied correct principles of law to the question of affirmation. As **Cox Toner** also established, affirmation is a mixed question of fact and law. Since the Employment Tribunal applied the law correctly, and its assessment of the facts is not subject to appeal, this appeal must be dismissed.

51. I have not found it necessary to reach a conclusion on the question whether the argument raised by Ms Cooper was raised for the first time on appeal, as Ms Bone submitted. I am inclined to the view that the argument was raised below, given the citation of **El-Hoshi**. The

argument would, however, only come into sharp focus when the Claimant's principal case - that she was too unwell to contemplate resignation - had been rejected.

52. I would add one post-script. In this case the Employment Tribunal took the question of affirmation as a preliminary issue, assuming the truth of the Claimant's case on fundamental breach of contract. There has been no complaint about the Employment Tribunal taking that course in this case, where (1) the period of delay between breach and resignation was very substantial, (2) there was a linked time point in respect of the sex discrimination claim and (3) the Claimant was a witness requiring special consideration, such that her evidence even on the question of affirmation took some time. It should, however, be regarded as an exceptional course. In nearly all cases which are listed for a Full Hearing it is better to determine the issues.