Appeal No. UKEAT/0305/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 January 2015

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MRS D HART — APPELLANT

ST MARY'S SCHOOL (COLCHESTER) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (of Counsel) Direct Public Access
For the Respondent	MISS SOPHIA BERRY (of Counsel) Instructed by: Messrs Hill & Abbott Solicitors Threadneedle House 9-10 Market Road Chelmsford Essex CM1 1XH

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

Employment Judge Amin had erred in law by construing the contract of employment as conferring a unilateral power of variation on the employer and a finding that the purported unilateral variation of it by the employer was a repudiatory breach of contract would be substituted; **Wandsworth London Borough Council v D'Silva** [1998] IRLR 193, **Security and Facilities Division v Hayes** [2001] IRLR 81 and **Bateman v ASDA Stores Ltd** [2010] IRLR 370 considered and applied.

The second issue which Employment Judge Amin had to decide was whether the repudiatory breach had been accepted by the resignation and that was a question of causation. If the repudiatory breach was part of the cause of the resignation, then that suffices because the law does not require or call for sole causation or predominant effect; **Nottinghamshire County Council v Meikle** [2004] IRLR 703, Ford v **Abbycars (West Horndon) Ltd** [2008] UKEAT/0472/07 and **Wright v North Ayrshire Council** [2014] IRLR 4. Employment Judge Amin failed to consider either of her alternatives (paragraph 39 - her analysis of the resignation letter and paragraph 40 - the answer in cross examination as to her state of health) from the point of view as to whether purported variation was part of the cause of the resignation as it arguably was in either case. This issue had to be remitted; **Jafri v Lincoln College** [2014] IRLR 544.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the reserved Judgment of Employment Judge Amin, sitting at East London Hearing Centre on 18 March 2014, the Written Reasons having been sent to the parties on 20 May 2014. The result was that the Appellant's claim that she had been constructively dismissed was rejected. Today she has been represented by Mr Dutton of Counsel. He did not appear below. At the Employment Tribunal the Appellant was represented by somebody described on the first page of the Judgment as a McKenzie Friend, a Mrs Bradley. The Respondent to the appeal has been represented by Miss Berry of Counsel, who did appear below although on the same page she is named as "A Barry".

2. The Appellant worked as part-time Learning Support Teacher at the Respondent's school until she resigned by a letter dated 3 September 2013. The Notice of Appeal raises two issues. Firstly, it is alleged that Employment Judge Amin misconstrued the contract of employment. Secondly, her conclusion that the Appellant had not resigned on account of any breach of contract on the part of the Respondent is challenged by Mr Dutton as being based on a misdirection, in effect as to causation. Mr Dutton's question on this issue, as formulated in his Grounds of Appeal, is: to what extent does the fundamental breach have to be the reason for resignation?

The Facts as found by the Tribunal

3. The story begins with the appointment of the Appellant in July 2001, although she did not start her duties until the beginning of the September term; see the finding at paragraph 1 of the

Judgment where her employment is described as having started on 1 September 2001. It lasted until 31 December 2013.

4. When she was appointed, the Appellant received a letter dated 20 July 2001 from the then Principal of the school (see pages 57 and 58 of the appeal bundle). According to its fourth paragraph it "serves as a contract" pending the issuing of "an official contract". It deals with the working week in its second paragraph, which reads:

> **"At present we envisage this will involve 2 days teaching a week, and you will probably want to discuss and establish with Mrs Edgecombe which days are mutually most convenient. You will also have a fair degree of freedom as to the distribution of your teaching; but it is important that at least half a day each week is devoted to the Senior School, as in that age-group girls have strong reactions to individual teachers and we therefore like them to have some choice as to whom they turn to for help."**

5. It ends with a manuscript note, which may have some bearing on the issues in this case, and which reads:

> **"We probably <u>won't</u> require you for supervisory duties, as some of your teaching sessions will occur at these times and you only get used for cover when we are truly desperate!"**

6. With effect from 18 March 2003 (see page 59 of the appeal bundle) a contract of employment was put in place. The letter of appointment had indicated in the fourth paragraph that an official contract would be issued as soon as possible. Given that the contract which appears at pages 59 to 81 of the appeal bundle was issued some 21 months later, it difficult to say with any certainty this was the official contract referred to in the fourth paragraph of the letter but it seems at least possible that the document starting at page 59 was the official contract because at paragraph 1.5 at page 60 there is set out a clause which refers to the appointment being subject to confirmation within the first two years of employment, and a clause of that kind is clearly referred to in the fourth paragraph of the letter of 20 July 2001 at page 57 of the appeal bundle.

7. In the meantime there had been some alterations to the position of two days teaching a week that had been set out in the second paragraph of the letter of appointment. These are dealt with by Employment Judge Amin at paragraph 11 of her Judgment in fairly brief terms. Paragraph 11 ends with the sentence:

> **"In practice she was working three days a week and this was accepted by the Respondent."**

The penultimate sentence of paragraph 11 refers to an agreement having been reached, but it very much looks as though the document at pages 60 to 81 of the appeal bundle was a pro forma contract. It offered a number of alternatives in some of its clauses. In clause 1.1 the wording is "full/part-time" followed by a space to identify the type of teacher. The word "full" has been struck out. So the agreement is as to the appointment of the Appellant as a part-time Learning Support Teacher; the rest of the clause acknowledges that the employment commenced on 1 September 2001 and this is also confirmed by clause 1.2.

8. This sort of alternative formulation is repeated at clause 4.1 where, in the penultimate sentence, the wording is "starting/current salary". In that clause the word "starting" has been struck through. Employment Judge Amin did not go into the circumstances in her Judgment in any greater detail than appears in paragraph 11. But during the course of the argument in this case my attention has been drawn to the ET1 form, which starts at page 21, and at page 34 gives some further information in these terms:

> **"I believe that the school did not have the reasonable right to impose the five day working change on me for the reasons described below. I started work at St Mary's School on 1st September 2001, initially working 2 days per week then 2.5 days and increased to 3 days by January 2002. At this time the only contract I had was a verbal one with the then Principal. The contract was for 3 days per week. The contract signed on 18th March 2003 was still on the verbal basis of 3 days per week."**

9. Also of some help in establishing the factual background was the document prepared on behalf of the Appellant by her friend, Mrs Bradley. This appears at pages 52 to 56 of the appeal

bundle. At paragraph 7 there is some discussion of instances of the Appellant working a different routine. It reads:

> **"Several years ago, the Claimant did agree to accept a new temporary contract, in addition to her own established 0.6 contract for Tuesday to Thursday, to cover Special Educational Needs for a colleague at St Mary's, working every Monday for two terms. This colleague was obliged to take compassionate leave to care for her mother and this experience did indeed confirm to the Claimant that balancing her own growing responsibilities could not be managed outside the established 3 day commitment. This affirmed her original career decision was right and beneficial to both standards at St Mary's and her own family responsibilities, giving full commitment to both and not merely acting 'to place more importance on her own personal life than the needs of the school,' as concluded by Mr Cooke in his witness statement. …"**

10. The reference to 0.6 was apparently repeated by the Appellant in the course of her evidence when she was cross-examined by Miss Berry. She accepted in cross-examination that she was employed under a 0.6 contract. Not all of this finds its way into the Judgment.

11. At paragraph 11, which I have already mentioned, Employment Judge Amin refers to the letter of appointment as requiring the Claimant to teach two days a week, the precise days to be established with Miss Edgecombe on days convenient to the Claimant. At paragraph 12 Employment Judge Amin deals with more of what might be described as the factual background or factual matrix against which the original part-time contract was entered into. There, she gives some details of the responsibilities that the Claimant had in respect of her mother, and the paragraph ends with this sentence:

> **"The Claimant was trying to balance her care duties with holding down a part time job as a teacher."**

12. At paragraph 13 Employment Judge Amin records that the two days initially required soon turned into three. Then she says this:

> **"The days were always Tuesdays, Wednesdays and Thursdays. This provided the Claimant some stability to organise her care at home and to take care of her home as her husband worked in London and returned only at weekends. The working pattern meant that the Claimant was able to visit her mother in Wales on a Friday if she wished.**

13. Then the Employment Judge turned to what appears to have been the heart of this case. At paragraph 14 she says:

> **"There was a dispute between the parties as to whether the Claimant's days of working were fixed. The Claimant asserted they were and the Respondent asserted that they were not fixed as she was required to work to fit the needs of the school. I find that the days were not contractually fixed but in practice the Claimant worked the days she claimed. This was her oral evidence and no other evidence was provided by the Respondent to rebut her oral evidence."**

There is no further explanation in paragraph 14 of the conclusion reached by Employment Judge Amin that "the days were not contractually fixed".

14. Paragraph 15 may be some sort of explanation of her conclusion because it really refers to the material I have already pointed to in the ET1 form and in Mrs Bradley's statement as dealing with the change of hours. It reads:

> **"The Claimant did, at one point in her working relationship, change her hours of work to start early at 8.30 a.m. and was happy to be flexible in the time she worked. She also covered for an ill colleague and she worked at different sites and different locations as and when required."**

If there was any further factual material of this early period of the Appellant's employment, and in particular of the circumstances relating to the contract produced in March 2003, then it has not found its way into the Judgment.

15. In 2013 the Respondent wished to change the timetable so as to ensure that particular core subjects could always be taught in the morning. The impact upon the Appellant was this. In order to facilitate that change she was invited to spread her working hours over five days not three. A process of consultation followed. The Appellant and the Respondent could not reach any agreement. One major difficulty, so far as the Appellant was concerned, related to her need to avoid working on a Friday. Eventually the Respondent insisted that the changes must be implemented with effect from 1 September 2013.

16. The Appellant resigned by a letter of 3 September 2013. By an oversight this was not included in the appeal bundle but happily, during the course of the hearing, through the efficiency of Miss Berry, I was able to obtain a copy, which now appears at page 6A of the appeal bundle. It is worth considering in full:

> **"Dear Hilary**
>
> **In line with 8.2 of my Contract with you, I hereby give you my notice, in writing, to terminate my employment with St Mary's School with effect from 31st December 2013.**
>
> **Your letter of 15th May 2013 makes reference to clause 2 of my Contract. However, I believe that you should have made a fuller comprehension of the caveat giving clause 1.4 precedence. Furthermore, you chose not to make me an offer of reduced hours on the three days that I work for you, in order that I could continue to carry out my caring duties to my husband, my elderly mother and my grandchildren.**
>
> **Instead, for the new Autumn term, you continued to impose a 5-day timetable, without any flexibility.**
>
> **When I am no longer in your employ, I may seek redress for your actions in an Employment Tribunal.**
>
> **Yours,**
>
> **Denise Hart."**

I am not clear whether the Appellant worked the rest of that term or whether she simply remained employed until 31 December 2013. At all events, her employment ended on that day.

17. Employment Judge Amin's reasoning for rejecting the Appellant's contention that she had been constructively dismissed appears at paragraphs 36 to 41 of the Judgment. These read:

> **"36. I do not find that there was a custom and practice that the Claimant should only ever work three days a week as asserted by the Claimant. This was a contractual agreement, initially two days a week (as per her contract) and then three days a week (as per verbal contract with the then Principal). This was not a custom or practice. The Respondent had a right to vary the contractual hours and in doing so they consulted with the Claimant in good time, provided her with the business document explaining the changes and allowed her time to put forward proposals.**
>
> **37. I also reject the Claimant's argument advanced in her evidence to the tribunal and in her resignation letter that the Respondent should have not relied on Clause 2.1 of her contract of employment but should have given more precedence to Clause 1.4.**
>
> **38. Clause 2.1 (page 36) makes specific reference to Clause 1.4 as an exception. Under Clause 2.1 the Respondent requires the Claimant to be flexible in her working hours to meet the demands of the school. Under Clause 1.4 a fractional part time teacher (like the Claimant) may be subject to variation depending upon the requirements of the School timetable. This is precisely the variation the Respondent was seeking to make through the consultation process. In the circumstances, I conclude that there has been no breach of a fundamental term of the Claimant's contract of employment that entitled the Claimant to resign in response to any such breach.**

39. Even if I am wrong on that finding, I conclude that the Claimant did not resign in response to any repudiatory breach. Her letter of resignation dated 3 September 2013 makes it clear that she resigned because the Respondent refused to offer her reduced hours on the three days she worked in order that she could continue to carry out her caring duties to her husband, her elderly mother and her grandchildren. The Claimant was also adamant that she could not work Fridays for the reasons she explained.

40. Alternatively, she resigned for the reasons given in her evidence to the Tribunal. In cross examination the Claimant confirmed that the reason she resigned was because she suffered from insomnia and she thought she would get better after the holidays. However, as her condition worsened she was advised by her GP to stay away from work and to rest as recovery would take a few months. The Claimant was ill and had no one to turn to. The new changes were due to start on 1 September 2013 and it was not ideal for her to work under the new changed regime and so she resigned.

41. Based on this evidence I find that the Claimant did not resign in response to any alleged fundamental breach of her contract of employment but because she had domestic responsibilities that she could no longer meet under the new changed regime."

The Claimant's Case

18. Mr Dutton submitted that the contractual basis of the Appellant's employment remained in large measure the terms of the original appointment as set out in the letter. In his submission the written contract of March 2003 did not affect that position. What that contract did was merely confirm the existing position, which he submitted was that the number of days she worked could not be varied without her consent or, at the very least, without taking into account her convenience and without either acting unreasonably or acting in a way inconsistent with the implied term as to mutual trust and confidence.

19. He submitted that the contract should be looked at from this point of view. In the letter of appointment there had been no provision made for variation. In any event Employment Judge Amin had not found any variation. It was true that there had been alterations to the number of days worked. These had started out at two and by March 2003 had become three. But there was nothing to show that that alteration had been a unilateral variation of the terms and conditions. He submitted that the likelihood was that this had been a consensual change, although he accepted, in the absence of any finding by the Employment Tribunal about it, that was possibly speculative. Moreover the contract entered into in 2003 clearly did not address

everything. The two clauses with which this case has been concerned are Clause 1.4, which reads:

> **"In the case of the Teacher on a part-time contract the fractional part will be notified separately and may be subject to variation depending upon the requirements of the School Timetable."**

And Clause 2.1, which reads:

> **"During School term time, except as may otherwise be provided for under clause 1.4 above, the Teacher shall work all School hours while the School is in session and at any other time (including during School holidays, at weekends and before and after the School's normal starting and finishing times) as may be necessary in the reasonable opinion of the Principal for the proper performance of his/her duties."**

20. The important thing to recognise, submitted Mr Dutton, was that Clause 2.1 was a clause about when the teacher would work, divided up into during school hours and outside school hours. Most importantly of all, it was subject to Clause 1.4. This is stated to be an exception by the use of the word "except". The scope of the exception was the subject of some argument during the course of the hearing. Mr Dutton's submission was that Clause 2.1 did not apply to part-time working. The position of part-time workers was governed by Clause 1.4. Therefore the issue in this case was the meaning of that clause and, in particular, the meaning of the words "the fractional part will be notified separately and may be subject to variation depending on the requirements of the School Timetable". In his submission, "fractional part" could not refer to the number of days to be worked. It must refer to something else because the number of days had already been established. He also argued that there had been no separate notification of the fractional part under the terms of this agreement. All that the evidence established was that the Appellant had been working three days a week before the contract and, by and large, continued to work three days a week after the contract.

21. According to Mr Dutton's argument, Clause 1.4 was a clause that was either unclear or unambiguous. The ambiguity arose because fractional part must be a reference to the part-time

hours, but it could mean that the time when the hours were to be worked could be varied although the hours remained fixed, or it could mean that the hours could be increased or decreased according to the wishes of the Respondent. In any event, although the syntax and the language of Clause 1.4 is not tautological, it suffers from a distinct lack of clarity. A part-time contract is by definition less than a full-time contract. It may be that the clause should be understood to mean that, in the case of a teacher on a part-time contract, the extent of the part-time working would be notified separately, but by its very definition a part-time contract must involve a fraction of a whole contract. He proposed that the ambiguity or uncertainty by looking should be clarified by looking at the whole of the background that led up to the agreement of 2003. He pointed out that the letter of appointment had provided for the Appellant to work two days a week, the precise days to be established on the basis of what was "mutually most convenient" and the fixing of the day should take account of a "fair degree of freedom as to the distribution of the hours to be worked".

22. Such an approach would be conventional in terms of the construction of contractual documents, submitted Mr Dutton. It accorded with the well-known passage from the speech of Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896 at pages 912 to 913. Mr Dutton submitted that Employment Judge Amin had failed in her analysis at paragraphs 36 to 41 to approach the matter in this way. He also submitted that looking at the factual matrix would lead to two things: firstly, an appreciation of how the clause ought to be construed; the historical background would inform the reader's understanding of what the parties had intended to agree. Secondly, it would reveal the right approach to the words "may be subject to variation depending upon the requirements of the School Timetable". He pointed to the Judgment of the Court of Appeal in **Wandsworth**

London Borough Council v D'Silva [1998] IRLR 193 where at paragraph 31, in the judgment of the court given by Lord Woolf MR, the following appears:

> **"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore, the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the court in construing a contract of employment will seek to avoid such a result."**

23. The background would be important to establishing what the parties intended by that clause. As Lord Woolf said in the passage referred to above a unilateral right to vary a contract is an unusual power. Given the factual matrix of somebody working part-time with a need for fixity of commitment in order to balance work with domestic and caring responsibilities, it was likely that, by using a permissive formulation, "may be subject to variation", the parties intended that such a variation would only come about by agreement. Whilst acknowledging that there might be some limitation to the proposition, Mr Dutton also submitted that not only was clear and unambiguous language necessary but also that the interpretation or construction of the wording would need to reflect a preservation of the implied term as to mutual trust and confidence. If a contract had been entered into on the basis that the days worked were to be limited in number, then a unilateral power to vary so as to increase the number of days worked even if the hours were not increased might be thought to run contrary to the fundamental nature of the contract that had been entered into.

24. As the argument developed a further judgment in the Court of Appeal, **Security and Facilities Division v Hayes** [2001] IRLR 81, the judgment of Peter Gibson LJ at paragraphs 44 and 45, and the judgment of a division of this Tribunal presided over by Silber J in **Bateman v**

ASDA Stores Ltd [2010] IRLR 370 were also considered. Whilst none of these can be regarded as absolutely conclusive on the subject, Mr Dutton submitted that they are firm as to the need for positive and clear language when such an unusual power is being created. He also argued that the *contra proferentem* rule might apply to the circumstances of this case especially if this Tribunal reached the conclusion that the wording was ambiguous.

25. A further way of looking at the construction, submitted Mr Dutton, was to look at the relationship between Clause 2.1 and Clause 1.4 but then put 1.4 to one side. If one read the clauses together, one could see that there had to be an element of reasonableness and so one would arrive at the same position by looking at the last words of Clause 2.1, "as may be necessary in the reasonable opinion of the Principal". Therefore questions of reasonableness arose, but had not been addressed by the Employment Tribunal save to say that it found that there had been a business reason for the change. But the words "as may be necessary" implied a balancing exercise and had not been construed as such by Employment Judge Amin. Likewise the word "reasonable" called for a decision to be made, taking account of the words that had been used in the second paragraph of the appointment letter. The problem, he submitted, with the approach taken by the Respondent to the construction of Clause 2.1 and 1.4 was that, in effect, they were being read as if they amounted to the same thing.

26. His further submission related to the question of whether or not the Appellant had resigned as a result of the breach of contract by the Respondent. He submitted that Employment Judge Amin had lost sight of the fact that the root cause of the difficulties facing the Appellant stemmed from the alteration to her working week. He referred me to paragraphs 35 and 36 of a Judgment of a division of this Tribunal presided over by its then President, Elias J, in **Ford v Abbycars (West Horndon) Ltd** [2008] UKEAT/0472/07. This was a passage that

had been commended by the current President, Langstaff J in the case of **Wright v North Ayrshire Council** [2014] IRLR 4. At paragraph 20 he had said this:

> **"… Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

27. Employment Judge Amin had given herself a direction at paragraph 31 of the Judgment, which Mr Dutton described as being imperfect. In effect, her error was to evaluate the several factors and to conclude that the Appellant had resigned not because of a breach of contract but either because the employer would not lower her hours or because, in cross-examination, the Appellant had accepted that she was ill and had resigned because of that.

28. Mr Dutton characterised Employment Judge Amin's error as being a failure to realise that her own analysis at paragraphs 39 and 40 of her Judgment clearly meant that the Appellant's resignation was a response to the alteration of her contract. This is so whether it is accepted that Employment Judge Amin's analysis in paragraph 40 is a true alternative to paragraph 39 or not. Paragraph 39 deals with contractual matters and matters relating to the number of hours that she worked. Paragraph 40 deals with her answer in cross-examination. Where Employment Judge Amin had erred, submitted Mr Dutton, was that paragraph 40 was simply an additional factor. In any event, the Employment Tribunal had confused the reason for resignation with the consequence of repudiation. When one looks at the letter at page 6A of the appeal bundle, it is quite clear that the acceptance of the situation by the Appellant relates to the fact that she is being required to work over five days. In his Skeleton Argument Mr Dutton had submitted that the conclusion reached by Employment Judge Amin at paragraphs 39 and 40 of the Judgment was one that no Tribunal, properly directing itself on the evidence, could reasonably have arrived at: in other words that it was perverse. He did not develop that submission orally but I bear it in mind.

The Respondent's Case

29. Miss Berry submitted that, on the construction point, one should read Clause 1.4 and 2.1 together and read them against the finding made by Employment Judge Amin at paragraph 14 of her Judgment that the working days were not contractually fixed. The Appellant had agreed that she worked a 0.6 contract in her evidence and clearly the learned Judge had construed paragraphs 1.4 and 2.1 as providing a unilateral right to vary the hours worked. Miss Berry submitted that the words were clear enough to allow the employer to either vary upwards or downwards the length of time that the Appellant worked or to vary the date upon which she did that work even if they did not alter the hours that were worked.

30. The finding at paragraph 14 was supported by the evidential findings at paragraph 15. She did concede, however, that in relation to Clause 1.4 there might need to be some sort of limitation imposed by a need to act reasonably when varying the terms of the contract. She accepted what had been said by Lord Woolf in **D'Silva** and by Peter Gibson LJ in the **Security and Facilities Division v Hayes** case meant that a unilateral power of variation was unusual, required the clearest of contractual drafting and might be subject to some concept of reasonableness. Although the language was not as clear as that used by ASDA in the **Bateman v ASDA** case, the words of Clause 1.4, "may be subject to variation depending upon the requirements of the School Timetable", were absolutely clear. Moreover not only do the words need to be read as a whole but the two clauses, when read together, would lead to the conclusion that the employer was able for the better performance of the teaching duties and for the requirements of the timetable to make alterations and require teachers to work at different times or for different hours or in different ways.

31. She accepted that on one view part-time teachers were included within the scope of Clause 2.1. Whether it is expressed as a fraction of three-fifths or as a decimal of 0.6 the Appellant was paid that percentage of a full salary, and there was no reason why, in those circumstances, given that she received paid holidays on that basis, that the full effect of Clause 2.1 should not apply to her as a part time teacher. But Miss Berry accepted there might be an alternative way of looking at 2.1, namely that it did not apply to part-time teachers under 1.4. Even so, her alternative submission was that then Clause 1.4 would give a wide power of variation dependent on the requirements of the school timetable.

32. As to resignation Miss Berry submitted that there had been no error of direction as to law by Employment Judge Amin. Her phraseology in paragraph 39 in relation to any repudiatory breach and in paragraph 41 in relation to any alleged repudiatory breach could not support the proposition that she was thereby insisting upon a predominant cause. In any event, causation here depended upon the Appellant's own evidence that she had resigned because of ill-health (see paragraph 40 of the Judgment), and in those circumstances Employment Judge Amin had been perfectly entitled to reach the conclusions that she had reached.

33. In the end there was not really an enormous difference between counsel as to how one should approach the task of looking at the terms of the contractual documents created in March 2003. The main difference between them in the end was that Mr Dutton insisted that there may exist a separate part-time contract, outside the scope of the March 2003 agreement, a proposition which Miss Berry could not accept.

Conclusions

34. I agree that the construction of the words in the contract of 2003 should be informed by a consideration of the background leading up to that document having been signed. In my judgment, whether it was a new document or, as I think, rather more likely, simply a late production of the official contract referred to in the letter of appointment at page 57 of the bundle, in order to understand what the words in Clause 2.1 and 1.4 mean, it is necessary to have regard to what had been previously agreed and what had happened leading up to the signing of the document. But I do not agree with Mr Dutton that means there was some other contract existing contemporaneously with the agreement arrived at in 2003. Firstly, it seems to me very difficult to contemplate the existence of any freestanding and surviving agreement when one takes account of the wording of Clause 14.1 of the agreement (see page 66). This reads:

> **"14.1. This present Agreement shall take effect in substitution for any previous contract of employment existing between the School and the Teacher and as from the date thereof any such previous contract shall cease to have effect but without prejudice to any right of action which has arisen or notice or warning given thereunder."**

35. Secondly, whilst I accept that the teacher's contract at pages 59 to 81 of the appeal bundle, although it contains a great deal more than the letter of appointment of 21 months earlier, I do not accept that it contains absolutely everything. As Mr Dutton pointed out, it does not contain any statement as to the length of time that the Appellant was to work under the part-time contract. Clause 1.4 requires that the "fractional part" will be notified separately. Plainly there must be some part of the agreement outside the rubric of the teacher's contract that fixes the number of part-time hours or days. But this does not seem to me to mean that there is another contract. It simply means that the extent of the part-time working was either agreed in some other document or agreed orally in the case of part-time teachers.

36. In the instant case there is no document and not much evidence about any oral agreement. But in my judgment the right analysis must be that the parties agreed that the extent of the part-time working would be the three days per week that the Appellant was working at the time she entered into the agreement. If anything else was to have been agreed, it would have to have been notified. I do not accept, however, Mr Dutton's argument that if there was no express notification then there could be no completed agreement. I think he reads too much into the future passive tense in Clause 1.4; that should not be taken absolutely literally. It must mean, in my judgment, will be notified or will have been notified. This is a contract which contains indications that it is couched in alternative terms to take account of whether the work is full or part-time. Equally it is couched in alternative terms to take account of the fact that the teacher may already be employed but not employed under this specific contract (see again Clause 4.1 at page 62 of the appeal bundle). So it seems to me that, when this contract was entered into, a very significant part of the factual matrix was that the Appellant was working three days a week and that those three days a week had resulted from previous alterations, but there is nothing to suggest that they had been imposed on the Appellant without her consent or that they were in any way inconvenient to her.

37. I accept Mr Dutton's submission that the words "the fractional part" are a cumbersome and inaccurate expression. But it seems to me clear that what the words are getting at, in the context, is the scope of the part-time working. I adopt the approach, as I must, of Lord Hoffmann in **Investors**. Whilst what the Appellant herself intended or what she herself understood is not helpful (or even possibly admissible) in relation to the meaning of the contract, it seems to me from the factual matrix that what the parties intended was the scope of her part-time work would be three days a week. I can see no basis, then, in 2003 for the construction put upon this by Miss Berry. It is true that the fraction has later been expressed as

the decimal 0.6, and naturally I accept what Miss Berry tells me, that, when it was put to the Appellant that she was working a 0.6 fractional[1] contract, that the contract was to be expressed as 0.6 of a full-time contract, she accepted it. But I do not think that the Appellant's acceptance of it has anything like the significance that Miss Berry attributes to it.

38. The position in 2003 seems to me that the Appellant was working part-time three days a week on Tuesdays, Wednesdays and Thursdays. Whether one expresses that as 0.6 of a full-time contract or three-fifths of a full-time contract does not answer the question: what alteration to that could be made without her consent? Employment Judge Amin concluded that, although this was her working pattern and had been so over several years, the contractual hours or contractual days were not fixed. In my judgment she fails to explain at all why that is so.

39. She reaches this conclusion at paragraph 14 of her Judgment. Miss Berry submits that there is some explanation at paragraph 15. But in my judgment it is no explanation at all. The fact that her hours had increased to two-and-a-half days and then three days is not an indication of a unilateral right to vary the contract. The evidence is silent and the findings are silent as to how that was arrived at. But it might well have been arrived at by mutual consent. Likewise there is no suggestion, as it seems to me, in either the Judgment itself or any of the material I have been helpfully pointed to that might indicate any of those matters referred to at paragraph 15 arose as a result of a unilateral variation of the contract by the employer. Indeed, insofar as I am assisted by the material that does not form part of the Judgment, it would seem to me that whilst the Appellant agreed to do certain things, there is no evidence whatsoever that she was compelled to start early or that she was compelled to take over a Monday being worked by

[1] An obviously inaccurate mathematical expression but I understand the actual words put.

somebody who was on compassionate leave. In my judgment none of these matters provide any explanation as to the finding that the hours were not contractually fixed.

40. The alternative approach adopted by Miss Berry is to argue that, on a proper construction of Clause 1.4 and 2.1, either taken separately or together, the contract can be read as meaning that the hours are not fixed. I cannot accept that submission. I start with Clause 2.1. Clause 2.1 tells us something about the extent of the work of a teacher during the school day. It is in mandatory or peremptory form. It dictates that the teacher "shall work all School hours while the School is in session." So that does tell us something about what a teacher is to do while the school is in session. There is then the word "and", but that clearly, whilst it is a conjunction, is leading to an entirely different period of time; that much is obvious from the words "at any other time". So Clause 2 deals with two matters. One is when the school is in session and the other is when it is not. When the school is not in session (and that in the bracketed parenthesis includes school holidays, weekends before normal working hours, after normal working hours) then the teacher "shall work as may be necessary in the reasonable opinion of the Principal for the proper performance of his/her duties". In other words what Clause 2.1 tells us is that the teacher must work a particular amount of time during school hours and may be required to work at other times outside school hours.

41. This, in my judgment, does not apply to the hours to be worked by a part-time teacher whilst the school is in session. The exception created by the words in the first line of 2.1, "except as may otherwise be provided for under clause 1.4 above", takes part-time teachers out of the mandatory provisions relating to working all school hours whilst the school is in session. In my judgment that is the scope of the exception. In other words it applies to the first part of

Clause 2.1. A part-time teacher may be required by the power in the second part of 2.1 to work outside school hours.

42. But that tells us nothing about working within school hours. That is dealt with by Clause 1.4. The fractional part referred to in clause 1.4 is the amount of part-time working provided for by the contract. In this contract what had been notified, although the evidence is very scant about this, is two days (and one can be certain about that because it is in the terms of the letter of appointment) then two-and-a-half days and then three days. What then does the second part of Clause 1.4, "may be subject to variation depending upon the requirements of the School Timetable", mean? In my judgment this is permissive and it does not tell the reader in what circumstances the variation may take effect. "May be subject to variation depending upon the requirements of the School Timetable" might incline one to think that the variation is more likely to take place at the behest of the school. But I do not regard the wording as making that entirely and completely unilateral. The variation could be at the request of the part-time teacher. Both variations would have to be subject to the requirements of the school timetable. The school may refuse a teacher's request for a variation and vice versa. Even though the requirements of the school timetable might suggest to the employer that there should be a variation, in my judgment it does not amount to a power to vary unilaterally. Lord Woolf, at paragraph 30 of the Judgment of the Court of Appeal in **D'Silva**, in a passage which is admittedly *obiter dictum*, referred to power of unilateral variation as an unusual power. His requirement of clarity and also his suggestion that there would have to be a strong case of reasonableness, whilst it has never been affirmed in a case in which the issue was the subject of the *ratio decidendi* of the case, is now well accepted through the later cases, one in the Court of Appeal in the **Security and Facilities Division v Hayes** Judgment, Peter Gibson LJ at paragraphs 44 and 45 and the other the Judgment of a division of this Tribunal presided over by

Silber J in the **Bateman** case. I do not regard the words in paragraph 1.4 as being sufficiently clear when looked at in the context and when one can quite clearly see a prospect of the teacher applying to vary, as well as the school applying to vary, as amounting to a unilateral power of variation in the employer. These are matters that were never considered by Employment Judge Amin. She took the view that this was all very clear and straightforward. In my judgment, in doing so, she fell into error.

43. I turn then to consider the issue of the reason for resignation. In the cases of **Abbycars (West Horndon) Ltd v Ford** and **Wright v North Ayrshire Council**, divisions of this Tribunal have in effect affirmed the approach first proposed by Keene LJ in **Nottinghamshire County Council v Meikle** [2004] IRLR 703 at paragraph 33. He said there:

> **"… The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by NCC."**

That passage is cited in both the **Abbycars** and in the **Wright** case, and it seems to me beyond doubt that the right approach is to ask whether the repudiatory breach plays a part in the resignation.

44. Both the later two cases, and indeed the **Meikle** case itself, are dealing with a number of complaints, some of which amount to a breach of contract and some of which do not. So one ends up with the position in those cases set out at paragraph 20 of the Judgment of this Tribunal in **Wright**, set out above but which it might be convenient to repeat; it reads:

> **"That demonstrates the error. Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."**

45. Is there any distinction between cases where the employee advances a number of reasons for resignation, not all of which turn out to be repudiatory breaches of contract, and cases where some of the reasons advanced for resignation are not connected to the employee's conduct at all whilst some are? In my judgment the answer is that it is all really a question of causation. If the fundamental breach or repudiatory breach (and in the course of argument both expressions have been used) is part of the cause of the resignation, then that suffices because the law does not require or call for sole causation or predominant effect. The law requires that the fundamental breach or repudiatory breach be causally connected to the resignation. As Keene LJ identified in **Meikle** the issue is whether a repudiatory breach has been accepted by the resignation.

46. What troubles me in this case is that Employment Judge Amin appears to have adopted an alternative view at paragraphs 39 and 40 and in my judgment has not asked herself in relation to either whether the purported variation was part of the cause for her resignation. At paragraph 39 she deals with the terms of the letter of resignation (see page 6A of the bundle). She reaches the conclusion that, because the Appellant in the letter referred to her own proposal having been rejected, that meant she had resigned because the Respondent had refused to offer her reduced hours on the three days a week that she did work. That seems to me to be a very strained reading of the letter of resignation. If one concentrates too much on the layout of the letter in four separate paragraphs, one might be forgiven for thinking that each is dealing with a different topic. But on closer inspection that is clearly not correct. The second and third paragraphs are different sides of the same coin. The first sentence of the second paragraph refers to the argument that had been put forward about the right unilaterally to vary the contract. The third sentence complains that the employer has not made an offer about three-day working

on reduced hours. The sentence that is occupying a separate paragraph, if added to it, clearly counterbalances it:

> **"Instead, for the new Autumn term, you continued to impose a 5-day timetable, without any flexibility."**

47. It seems to me that, on a proper reading of the letter, it is at least arguable that the variation is at least part of the reason for the resignation in the first paragraph of the letter. Putting it in other words she has given notice in writing to terminate because: "You have insisted on unilateral variation. I wanted to work three days on reduced hours. But you insist on my spreading those hours over five days." One might add in parenthesis "by unilateral variation". If looked at in that way, it seems to me at least arguable that letter is indeed an acceptance of what is alleged to be a repudiatory breach of contract, namely the unilateral variation, as having ended the contract.

48. The matter is dealt with in the alternative at paragraph 40. Employment Judge Amin records the answer in cross-examination that the Claimant resigned because she was suffering from insomnia and thought she would get better after the holidays:

> **"… However, as her condition worsened she was advised by her GP to stay away from work and to rest as recovery would take a few months. The Claimant was ill and had no one to turn to. The new changes were due to start on 1 September 2013 and it was not ideal for her to work under the changed regime and so she resigned."**

49. I accept Mr Dutton's submission that, looked at in that way, it is at least open to question whether Employment Judge Amin was not, in effect, finding that although she resigned because she was ill, the Appellant's resignation was because she realised she would not get better under the new working regime. I am, however, hesitant about putting that interpretation on it myself. I did not hear the evidence and it seems to me, bearing in mind the recent case of **Jafri v**

Lincoln College [2014] IRLR 544, that I would be usurping the fact finding function of the Employment Tribunal were I to attempt anything other than to remit the matter.

50. Mr Dutton, in his submissions, accepted, if I have understood him correctly, that if I took the view that there had been an error of construction, then this resignation issue might well have to go back for reinvestigation at the Employment Tribunal. I will hear submissions about that. I have reached the conclusion that Employment Judge Amin was in error as to her construction, that Clause 1.4 does not give a power of unilateral variation, and that no matter how reasonable it might be from the point of view of the employer, in the end, if there is not a mutual agreement about it, the contract cannot be varied. To purport to vary it unilaterally was therefore a breach of contract. The question then is whether the employee in this case resigned on account of that or not? That, it seems to me, may still be an open question, although I do not accept that the analysis of Employment Judge Amin at paragraph 39 is necessarily a correct reading of the letter and that the analysis at paragraph 40 may indeed, in effect, be an analysis that connects the resignation to the breach even though part of the reason may have been illness. The matter needs to be looked at again through the prism of the correct direction that sole cause or predominant effect is not necessary; all that is required is that the variation was part of the cause of the resignation.

Disposal

51. Having now heard submissions on disposal and having concluded that Employment Judge Amin erred in relation to repudiatory breach and also that there was an error in her analysis in relation to the acceptance of the repudiatory breach, it seems to me that the matter must be remitted for a rehearing on the basis that there was no power to vary unilaterally and

the insistence on the part of the school that it was entitled to introduce these changes and require the Appellant to work over five days as opposed to three was a breach of her contract.

52. There must be a reconsideration as to what the consequences of that are. Miss Berry submits that the matter ought to go back to Employment Judge Amin because of convenience. She regards the criticisms made of the Judgment by Mr Dutton as excessive. Whilst I agree that they are excessive, and I am always in favour of the most economic disposal of the matter, it does not seem to me that this matter ought to go back to Employment Judge Amin. I would not regard her Judgment as totally flawed, but it does not seem to me that this is a case where a great deal of further cost or expense need be incurred. I will substitute for her conclusion that there was no repudiatory breach of contract, a finding that there was a repudiatory breach of contract. Then the question as to what follows from that must be remitted to an Employment Tribunal. I will give only this direction, that it should be a differently constituted Employment Tribunal but not to Employment Judge Amin. My reason for reaching that conclusion is that in essence this is a second bite of the cherry case and that the best way in which the matter can be justly disposed of is for a fresh consideration of the consequences of a repudiatory breach to be made by a different Employment Judge. Any further directions will be given by the Regional Employment Judge. The parties may or may not wish to call further evidence. They may wish to make submissions. But that is entirely a matter for them to make an application to the Regional Employment Judge as to what form this hearing should take. I am going to direct that this matter should be reheard as to the issue of whether or not, given that there was repudiatory breach by the employer, there has been a constructive dismissal within the meaning of the terms of the statute, at which the parties are at liberty to call further evidence and make such further submissions as they wish.