Appeal No. UKEAT/0261/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 October 2013

Before

THE HONOURABLE MR JUSTICE MITTING

(SITTING ALONE)

MR M R BATANGA BOLOMO — APPELLANT

ISS FACILITY SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NIRAN DE SILVA (of Counsel) Bar Pro Bono Unit
For the Respondent	MS NICKY SIDDALL-COLLIER (Representative)

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

PRACTICE AND PROCEDURE – Striking-out/dismissal

Claim correctly struck out as having no reasonable prospect of success.

THE HONOURABLE MR JUSTICE MITTING

1. The Claimant, Mr Bolomo, was employed by ISS Facility Services Ltd (the Respondent) and their predecessors from January 2006 until 2 July 2011. An incident in January 2011 had led to his suspension on 28 January. He was then reinstated on 11 February. He was absent from work from 28 February due to illness. According to a medical certificate dated 14 June the Claimant had been fit to return to work on 18 April but did not do so. It is not entirely clear to me from the papers why that was so.

2. Meanwhile, on 4 March and 16 May 2011 the Claimant presented two ET1 claims to the Employment Tribunal about various incidents during his recent employment. The claims were heard in August 2011; some succeeded, and some did not. Only those that did succeed are relevant for present purposes. They were as follows: (1) the suspension following upon the incident in January 2011 was an overreaction to the incident, but it was not because of the Claimant's race – he is a black African – and no award of compensation accordingly was made; (2) a white senior manager had made a racially discriminatory comment to and about the Claimant on 15 February in respect of which he was awarded compensation of £3,000 for injury to feelings; (3) the employers had not paid one week of two weeks' sick pay contractually due to the Claimant for the first two weeks of his absence beginning on 28 February; and (4) the employers had wrongly calculated the first week's sick pay on the basis of 21 hours a week not 22 hours a week for the first of those weeks, an underpayment of £7.85. In that context, the Tribunal did not resolve the issue between the Claimant and the employer as to what his contractual hours were, whether the reduction in hours from 22 to 21 was a breach of contract and, if so, whether he had accepted that breach. Those were issues that for present purposes must be assumed in his favour.

3. The consequence of those findings, which were made after hearing evidence from both sides, is by the time the Claimant's contract of employment was terminated by him on 2 July 2011 four events had occurred in respect of which the Tribunal had found that the Claimant had a legitimate ground of complaint. He relied upon them as showing a cumulative breach of the implied duty of trust and confidence.

4. It is necessary then to look in a little more detail at what occurred in the days before the Claimant resigned. By that stage ACAS had been involved to try to facilitate his return to work on terms that were acceptable to both sides. That is, in my judgment, a very significant factor in the issue that the Employment Tribunal had to determine and that I have to determine on this appeal. It signifies that, differences having arisen between the parties, in respect of some of which the Claimant was clearly in the right, efforts were being made by both sides to resolve them.

5. Some time not long after 14 June 2011 the Claimant sent the employer a medical certificate. The medical certificate was from his general practitioner and was in somewhat unusual terms. It said he had assessed the Claimant on 14 June because of the following conditions: non-specific abdominal pain and irritable bowel syndrome. The advice indicated by a ticked box was that the Claimant "may be fit for work taking account of the following advice". Again, the box was ticked, which indicated that the advice concerned "workplace adaptations". Under the heading "Comments", his general practitioner wrote:

> **"This gentleman has been fit for work since 18/4/2011. His symptoms may be in part due to stressful conditions which he finds difficult to tolerate. He would be fit for a total return to work under a different line manager from previous."**

6. The doctor then says that would be the case from 18 April to the 1st of an unclear month 2011. The Employment Judge was unclear whether it was 1 July 2011, as it appears to me to be, or to 1 September 2011. I have little doubt that it was July 2011, not only because that is what it appears to be but because it would be unusual for a general practitioner to certify someone who was fit for work as being fit only for work under a different line manager for a period as long ahead as mid-June to September 2011. Certificates of this kind are ordinarily issued for shorter periods.

7. Having sent in that certificate, Ms Siddall-Collier – I hope I describe her correctly as the senior person dealing with human resources at the employer but who was not immediately or directly concerned with the detail of the management of the Claimant – sent him an email on 28 June 2011. Because much turns upon the terms of the email, I should set it out in full:

> **"Dear Mr Batanga-Bolomo**
>
> **I am contacting you directly as Ms Buttle of ACAS is on annual leave until July.**
>
> **As you are aware the Company intends to defend your claim of race discrimination and therefore makes no admission of liability. However, in order to facilitate your return to work in accordance with your medical certificate dated 14 June 2011 and in good faith, Paul Warner, Regional Manager has made arrangements to alter your places of work and reporting lines until 1 September 2011, the date indicated on your medical certificate. The arrangement will be jointly reviewed at that date.**
>
> **The locations and hours of work are as follows:**
>
> **Premier Place, Devonshire Square, Bishopsgate – 5.30 – 7.00pm (Stephen Boateng) and 250 Bishopsgate 7.30 – 10pm (Carmel Cooper)**
>
> **Stephen will be your primary line manager and he will report directly to Paul Warner rather than to Willie Van Rooyen on any matters relating to you. Overtime is likely to be available should you wish to work additional hours.**
>
> **Please could you confirm whether you are willing to accept these positions and if so, when you would like to return to work.**
>
> **Kind Regards**
>
> **Nicky Siddall-Collier"**

8. I should add in parenthesis that Willie Van Rooyen was the author of the racially discriminatory remark in respect of which the Tribunal made an award of £3,000 to the Claimant. That prompted a reply on the same date, again by email, from the Claimant:

> **"Dear Ms Siddall-Collier,**
>
> **Referring to my conversation with Anne Buttle regarding my return to work. For insurance purposes you have requested a medical certificate on the ground of the fact that Ms Ledesma is not working there anymore and I will report to a new manager. I therefore with the relevant recommendation related to my doctor who made the medical certificate that has been sent to you, I do not have any intention to change my workplace, for your main condition (medical certificate) for my return to work has been lifted up.**
>
> **I hope to hear from you soon**
>
> **Kind regards"**

9. That prompted a reply, mistimed because of a mis-setting of the time on the employer's computer but sent on the following day, probably towards midday:

> **"Dear Mr Batanga Bolomo**
>
> **There has clearly been a communication error. We will probably need to await Ms Buttle's return from annual leave to progress matters further.**
>
> **Regards**
>
> **Nicky"**

10. That prompted a reply, accurately timed at 13.02 on the same date, from the Claimant:

> **"Dear Ms Siddall-Collier,**
>
> **I do not think there has clearly been a communication error, for even before the judge who mentioned that on the ground of safety reason ISS will not allow me to return to work without a medical certificate. You have never mentioned changing my workplace or altering my employment contract. the main purpose of that medical certificate was to allow me to return to my workplace. Ms Anne Buttle, the conciliator is not a liar. What you have reported to her, it is what has been reported to me to facilitate my return to work, because I do not think she will come from somewhere with this information if it was not passed on to her.**
>
> **Kind regards,**
>
> **Maxime Bolomo"**

11. That prompted a reply, again mistimed but that must have been some time between 1.00 and 4.00 that afternoon:

> **"Dear Mr Batanga Bolomo**
>
> **We are perfectly happy for you to return to work but did not anticipate your medical certificate saying that you would only be fit to return under a different manager.**
>
> **It is correct that Ms Ledesma no longer worked at 65 Piccadilly however it is not feasible for Mr Betancourt to be reallocated from his management responsibilities at the two sites because of how the contract is structured.**
>
> **I am in no way suggesting that Ms Buttle is a liar. In order to facilitate your return to work I did suggest to her that we could explore the option of you working for a different manager but I always anticipated that this might involve a change in locations for you and as we were simply loosely exploring the possible options for resolving these elements of your claim I may not have made it clear that this is what I meant.**
>
> **Your original contract of employment with Lancaster does not include a location of work and stipulates "The employee shall work at such sites as the Employer may from time to time require and their duties shall include the internal and external cleaning and upkeep of establishments which the Employer has been contracted to provide cleaning services [sic]". This mobility clause entitles your employer to request that you work at alternative locations and in order to facilitate your return this is the clause that is now being relied upon in asking you to relocate (albeit until the September review).**
>
> **You have stated in your claim form that you are suffering serious financial hardship and therefore I hope that you will accept these positions which are offered in good faith in accordance with the terms of your employment and which will prevent further ongoing losses.**
>
> **Regards**
>
> **Nicky Siddall-Collier"**

12. That prompted an immediate reply:

> **"Dear Ms Siddall-Collier,**
>
> **you are a good talker even when he [sic] comes to contradict [sic] your own sayings. whatever you believe or you imply, only your conscience will judge you as it has been doing so far. I want therefore to know when I will be back to work, may an arrangement can be made [sic]? please let me know as soon as possible to prepare my return.**
>
> **kind regards,**
>
> **Maxime Bolomo"**

13. That prompted a reply ten minutes later from Ms Siddall-Collier, which concluded the exchange of emails:

> **"Dear Mr Batanga Bolomo**
>
> **You may return to work within 12 hours at the Bishopsgate sites.**

It is clear that you do not intend to accept this reasonable and lawful proposal and I therefore suggest that we cease communications on the matter until Ms Buttle's return.

Regards

Nicky"

14. There was then a period of silence, until the Claimant wrote to the employer on 2 July 2011. The document is not included in the appeal bundle, but it has been read to me from her computer by Ms Siddall-Collier, and its relevant words are as follows:

> **"Due to recent incidents relating to racial discrimination and the impairment attitude of ISS in dealing with the incident that led to victimisation, I […] on ground of the loss of trust with the employer answer by resignation, taking effect on 4 July 2011 […] according to ISS policy."**

15. That was a reference to giving a period of two weeks' notice.

16. The employer applied to strike out the Claimant's claim of unfair constructive dismissal. Issues A to L were identified as the grounds upon which the Claimant relied. For present purposes it is not necessary for me to recite any of those issues other than the four in respect of which the Claimant succeeded in his first Tribunal claims. Two additionally need to be considered. They are identified as K and L in the list of issues:

> **"K. that the Respondent decided to change the Claimant's place of work without good reason; and**
>
> **L. that the Respondent reduced the Claimant's working hours without his consent."**

17. On the hearing of that application Employment Judge Glennie briefly recited the history of the earlier proceedings and the earlier Tribunal's findings and dealt with the two remaining allegations, K and L, as follows. He noted, correctly, that they were not the subject matter of the earlier decision and arose from circumstances immediately preceding the Claimant's resignation. He went on to set out somewhat more briefly than I have done the content of the

exchange of emails. He noted that the Claimant took the point that the first email from Ms Siddall-Collier of 29 June 2011 appeared to offer him 20 hours' work per week rather than the 21 or 22 hours to which he was entitled. He concluded, correctly on any view, that the precise construction of that email was not something that could be determined on the application that he was hearing. He said that he could not resolve that disputed issue of fact and so could not resolve what was meant or understood as a result of that communication. He noted Ms Siddall-Collier's contention that her offer was not on any view capable of amounting to part of a series of events that gave rise to a fundamental breach of contract.

18. As to the place of work offered, he noted that the employer was contractually entitled to require the Claimant to work at a place of its choosing because of the mobility clause to which Ms Siddall-Collier referred in the exchange of emails. He said he was satisfied there was no prospect of a finding that even if the employers were contractually entitled to require him to work at the sites in Bishopsgate, that was nevertheless the straw that broke the camel's back, so giving rise to an entitlement in the Claimant to terminate his contract for breach of the implied term of trust and confidence.

19. As far as the hours of work issue was concerned, he said that if it were a problem, it could have been dealt with by the Claimant making an enquiry as to what the Respondent might propose or mean. Accordingly, he held that the two matters that had occurred since the original Employment Tribunal's finding could not give rise to a conclusion that the employer had so undermined the implied term of trust and confidence that the Claimant could rely upon it to resign and thereafter contend that he had been unfairly and constructively dismissed.

20. The test to be applied to strike-out applications is settled. Lady Smith in **Balls v Downham Market High School & College** [2011] IRLR 217 at paragraph 6 put it this way:

> **"[…] the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. […] It is, in short, a high test. There must be *no* reasonable prospects."**

21. Mr De Silva, to whose arguments I am indebted for their clarity and succinctness, submits on behalf of the Claimant that the Employment Judge was not entitled to strike out this claim for two reasons, both separately and cumulatively: first, this was capable of being on the facts a "last-straw" case, by which he meant that by the offer made by Ms Siddall-Collier in her email of 29 June she on behalf of the employer had done something that against the background that I have described was the last straw in a cumulative breach of the implied term of trust and confidence. Secondly, he submits that by offering 20 hours' work per week rather than the 21 or 22 to which the Claimant was entitled she had committed an actual or anticipatory breach of contract, going to the root of the contract because it concerned hours of work and pay, and thereby entitled the Claimant to treat himself as discharged from further performance of his duties or in other words to resign.

22. I have deliberately dealt with the events that led to the resignation in greater detail than did the Employment Judge, because, in my judgment, they demonstrate that however this case is to be presented it cannot succeed. Problems had arisen in the employment relationship. The Claimant was in the right on significant aspects of the problems. He had been the subject of a racially discriminatory remark in respect of which a substantial award of compensation was made in his favour. The employer had overreacted to an incident that appears to have set all of

this off back in January 2011 by suspending him. Thereafter, he had become ill, for reasons that may well have reflected stress at work and his unhappiness at the conduct of the employer in the respects criticised by the first Tribunal. But by the time that the critical incidents occurred, both sides were making what must be taken to be genuine efforts to resolve their differences and to secure his return to work. The offer made by Ms Siddall-Collier in her email of 28 June was ambiguous.

23. Given that the Claimant had worked for four hours per week on five days a week and then for two hours initially, reducing eventually to one, on Saturday, an offer of four hours' work per day on six days a week would have been an offer of more work than he had previously done or been entitled to do. It would have been made against the background of retrenchment by the employer that had led to the earlier reduction in hours and could readily be understood as an offer of 20 hours per week; in other words, an offer that, if it were insisted upon, would have amounted to a breach of contract. Because the breach went as to the number of hours worked and to pay, even though it only involved a reduction in hours of one or two per week, it would have entitled the Claimant to treat himself as discharged from further performance of the contract and to resign.

24. But the offer was clearly made by someone who did not have at her fingertips every detail of the differences that had arisen. Ms Siddall-Collier was the senior human resources manager employed by the employer. She was clearly doing her level best to try to resolve the situation with the assistance of ACAS by offering the Claimant what she thought he was claiming and was entitled to, hence the offer to work under a different line manager at a different place. The Claimant says he did not want to work at a different place. That put the employer in something of a dilemma, according to them, because reorganisation of the line

management without reorganisation of place of work would have been a solution that would have had difficulties in costs for them.

25. Be that as it may – and it is not necessary to reach any final view on whether they were right about that – the offer both as to hours of work and as to place of work was on any reasonable view an offer to attempt to resolve this situation in a manner that did not involve any further breach of contract on the employer's part and did not involve the taking of any step that was in Lord Dyson's words in **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35 anything other than "innocuous". The Claimant's reaction to the offer is a valuable contemporary indication of the manner in which it should be taken. He did not complain about, as he would see it, the reduction in his hours. He did not query whether or not any such reduction was intended. He simply pointed out that he did not wish to change his place of work. That prompted the proper response from Ms Siddall-Collier that his contract permitted the employers to change his place of work and, when it seemed that that was not satisfactory, her eventual conclusion, that matters would have to await the return of the ACAS officer Ms Buttle for a final resolution to be achieved. That was then pre-empted by the Claimant by sending his letter of resignation on 2 July.

26. Two conclusions would, in my judgment, inevitably be drawn from this by an Employment Tribunal were it to hear this case on a fully contested basis. First, it was not Ms Siddall-Collier's intention to breach the contract, let alone to commit a repudiatory breach of contract, by making the offer that she did on 28 June. Secondly, the Claimant did not treat that as a repudiatory breach in his initial response and could not reasonably have done so. Thirdly, as the Employment Judge concluded, if there were ambiguities in the offer, they could and should have been resolved by a request for clarification.

27. The second conclusion that I draw is that an Employment Tribunal would be bound to conclude that the events immediately preceding the Claimant's resignation were not the final straw in a series of events that would entitle him to treat the employer as having breached the implied term of trust and confidence. Mr De Silva submits that that conclusion can only be drawn if the employer was acting in good faith in what it did and did not have an improper or collateral motive. He submits that that is an issue that could only be determined at a final hearing once the oral evidence of Ms Siddall-Collier had been considered. I reject that submission. The assertion can be made that she had a collateral motive, but there is no evidential foundation for it whatsoever. It does not emerge in the tenor of the exchange of emails; it does not emerge from any other evidence. This is a case in which a different employee, Mr Van Rooyen, had misconducted himself. There has never been any suggestion that Ms Siddall-Collier has ever done so, and the proposition that an Employment Tribunal might find that she had an improper or collateral motive in making the offer that she did is, in my judgment, utterly far-fetched. The Tribunal system is not required to permit cases to proceed that depend upon an outcome that on a proper evaluation is utterly far-fetched. This is such a case.

28. On all the facts that I have recited, the Tribunal Judge was entitled to conclude that there was no reasonable prospect of success. Accordingly, this appeal is dismissed.