Appeal No. UKEATS/0017/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 27 June 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MR M SIBBALD

MR R THOMSON

MS ELAINE WRIGHT — APPELLANT

NORTH AYRSHIRE COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	The Appellant in person
For the Respondent	Mr John Grant (Solicitor) Wright, Johnston & Mackenzie LLP 302 St Vincent Street Glasgow G2 5RZ

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

In order to determine a claim for constructive dismissal, a Tribunal had applied a test, referred to in *Harvey*, whether the contractual breach by the employer was "the effective cause" of an employee's resignation. It was now time to scotch any idea that this approach is correct if it implies ranking reasons which have all played a part in the resignation in a hierarchy so as to exclude all but the principal, main, predominant, cause from consideration. The definite article "the" is capable of being misleading. The search is not for one cause which predominates over others, or which would on its own be sufficient, but to ask (as Elias J put it in **Abbey Cars v Ford**) whether the repudiatory breach "played a part in the dismissal". This is required on first principles and by Court of Appeal authority (**Meikle**). The Tribunal here appeared to seek for "the" cause rather than "a" cause, and to regret that despite serious breaches by the employer which had caused upset to the employee it had to hold that on that test the effective cause of resignation was that the Claimant could not combine caring for her partner with the demands of her job. The error of law may have played a part in the decision. The case was remitted for further consideration as conforms with the EAT's judgment.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal raises an important issue of principle which it is useful to re-emphasise. The appeal is against a decision by an Employment Tribunal at Glasgow, Employment Judge Watt SSC, Messrs Findlay and Letham which decided in Reasons delivered on 25 September 2012 that the Claimant's application for constructive unfair dismissal should be dismissed upon the basis that she had not been constructively dismissed.

2. The facts in summary are these. The Claimant was employed as a care at home assistant for just under seven years from 3 December 2003 until her resignation on 24 November 2010; she then resigned. She claimed that there had been constructive dismissal. It is trite law that that involves a Tribunal looking to see whether the principles in **Weston Excavating v Sharp** can be applied: that there has been a breach of contract by the employer; that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract; that the employee has resigned in response to the breach, and that before doing so she has not acted so as to affirm the contract notwithstanding the breach.

3. The Employment Tribunal here found that there had been breaches going to the root of the contract. Those breaches were in respect of three grievances which had not properly been answered. Two were never responded to and the third was not responded to timeously; see paragraph 114. In addition, an allegation of theft (entirely misplaced as it turned out) had been made by management. The Tribunal thought that the employer's treatment of the Claimant over the allegation showed a "complete lack of consideration". It was in some respects "unfeeling and inconsiderate", it was likely to cause considerable anxiety, and she was not given a response to a grievance in respect of that in time either.

4. The Tribunal was satisfied that she had been treated, "very badly throughout" that incident by her management. It is thus undoubtedly the case that the Tribunal thought that the

Show Desktop.scf first two requirements for a claim for constructive dismissal had been satisfied. There was no question here of affirmation. The issue was whether the Claimant, when she resigned, did so in response to the employer's breach.

5. The Tribunal here had evidence of the very difficult personal circumstances in which the Claimant was placed. Her mother had been very ill throughout much of 2009. She died in January 2010, but at about that time the Claimant's partner suffered a serious stroke that put him in hospital. She tells us today that it left him with left-sided weakness and cognitive impairment. She had taken much time caring for her mother in her mother's last days. She now found that she had to take time to care for her partner too. Her shifts were unforgiving. Split shifts did not make it easy; attempts to reorganise her working pattern appear not to have been successful.

6. The Tribunal thus potentially had reasons for the Claimant resigning which were in part to do with the behaviour of the employer, which the Tribunal considered to be repudiatory of the contract, but also circumstances beyond the contract which might have made it desirable in the Claimant's eyes that she should leave her work because she could not reconcile her continuing to work with caring for her partner. The Tribunal addressed the law which it thought applied in such circumstances. It did so in paragraph 73 of its decision in these terms:

> **"Sometimes there can be more than one reason why an employee leaves a job, for instance he or she may feel some dissatisfaction with the present job and have received an offer of something that promises to be better. Where there are mixed motives a Tribunal must determine the effective cause of the resignation. In the case of *Jones v Sirl & Sons (Furnishers) Ltd* [1997] IRLR 493 the employee had been subjected to a number of fundamental breaches of contract in the space of a few months. Three weeks after the last of those breaches she**

resigned having been offered another job. The Tribunal took the view that since the employee's departure had been prompted by the offer of alternative employment the employer's breach had not caused her resignation. The EAT overruled this, holding that the correct approach in such a case was to ask what was the effective cause of the resignation."

7. The Tribunal in this paragraph referred to no case other than **Jones v Sirl**. It might be forgiven for doing so since at paragraph 521 of the appropriate section of *Harvey on Industrial Relations* the test is set out in those terms. It is frequently the experience of this Tribunal that advocates, and sometimes Tribunals, interpret the case of **Jones v Sirl** as meaning that where there is more than one cause it is only the main, principal, and in that sense effective, cause which it should be looking for, so that where there is a mixture of motives, as the Tribunal put it here, a Tribunal must, as the Tribunal put it here, determine which is the effective cause of the resignation.

8. The Tribunal in our view plainly were adopting the approach of looking for the effective cause in the sense of the predominant, principal, major or main cause. There is no dispute as to that in Mr Grant's submissions.

9. We should make it clear that that is an error of law.

10. It is a pity that the Tribunal was not referred to Court of Appeal authority rather than the EAT authority which **Jones v Sirl** represents. In **Nottingham County Council v Meikle** [2005] ICR 1 the principles of constructive dismissal are comprehensively discussed. It is now perhaps the leading authority at Court of Appeal level in respect of constructive dismissal, though mention might also be made of the case of **Bournemouth University Higher Education Corporation v Buckland** [2010] EWCA Civ 121, [2010] ICR 908 CA, in which the Court of Appeal re-emphasised that the approach to be taken in a case of alleged constructive unfair dismissal is the common law contractual approach and not an approach

which more generally looks at the fairness or merits of the case. The common law approach looks at the conduct of the parties objectively. Thus in **Meikle** in the judgment of Keene LJ at paragraph 33 this was said:

> **"It has been held by the EAT in *Jones v Sirl & Son (Furnishers) Ltd* that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the *Western Excavating* case. 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 other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of the repudiation …"**

11. **Jones v Sirl** itself is a case which unhappily lends itself to an interpretation of the words "the effective cause" as if the search was for the principal or main cause rather than simply a breach which a response to which in part led to the resignation. In the judgment of the Appeal Tribunal delivered by Judge Colin Smith QC it is said at paragraph 10 that the Industrial Tribunal must look to see whether:

> **"…the employer's repudiatory breach was the *effective cause* of the resignation. It is important, in our judgment, to appreciate that in such a situation of potentially constructive dismissal, particularly in today's labour market, there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of his contract of employment entitling him to put an end to it. Thus an employee may leave both because of the fundamental and repudiatory breaches, and also because of the fact that he has found another job. In such a situation, which will not be uncommon, the industrial tribunal must found out what the effective cause of the resignation was, depending on the individual circumstances of any given case."**

12. Insofar as that passage suggests that the Tribunal must choose between causes, both of which operate, in order to see which was the predominant one, it is in error. If it is saying that the evidence may leave the Tribunal in a circumstance in which it is plain that the behaviour was not in response to a breach, even though that occurred and even though it was serious, but

for some other unconnected reason to the exclusion of a response to the breach, then it would be correct. It is a pity that ambivalence has obscured the principle underlying the decision, which was clearly identified in **Meikle** and is therefore and in any event binding upon this Tribunal.

13. The matter is not entirely clarified by the very last paragraph of the Judgment of **Jones v Sirl** in which the following passage occurs:

> **"Whilst the breach must be the effective cause of the resignation, it does not have to be the sole cause, and there can be a combination of causes provided that the effective cause for the resignation is the breach."**

14. The use of the word "the" demonstrates the importance of the definite article in English language: the indefinite article, "a", or "an", is more appropriate, since it recognises the possibility there may be more than one effective cause, but the word "the" suggests that there is only one.

15. The point does not rest simply on the judgment of the Keene LJ in **Meikle**, a judgment agreed to in that case by Thorpe LJ and Bennett J, but also was put in words which I doubt could be bettered by Elias J as President of the Appeal Tribunal in **Abbey Cars (West Horndon) Ltd v Ford** UKEAT 0472 07, a judgment of 23 May 2008. At paragraph 34 he set out the passage from **Meikle** which we have cited. He commented:

> **"On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal."**

16. He added at paragraph 35:

> **"It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."**

That expression of principle was not material to the actual decision of the Appeal Tribunal in **Abbey Cars** but it is one which we wholeheartedly endorse.

17. The same point was made in the case of **Mrs Logan v Celyn House Ltd** UKEAT 0069/12 (19 July 2012), a decision of the Appeal Tribunal, HHJ Shanks presiding. There, having cited **Meikle** and **Abbey Cars**, at paragraph 12 the Tribunal said this:

> **"Having regard to those two authorities, and there are others applying the same principle, it is clear to this Tribunal that when the Employment Tribunal asked itself what the principal reason for the resignation was it asked itself the wrong question. It should have asked itself whether the breach of contract involved in failing to pay the sick pay.."** [that was the breach at issue in that case] **"..was a reason for the resignation not whether it was the principal reason."**

18. The principle needs to be re-emphasised in the words of Elias J. The issue is whether the breach played a part in the resignation.

19. Here, as we have indicated, none of that line of authority was referred to by the Tribunal. Having set out its approach, which was to look for "the effective cause", at paragraph 73 it said at paragraph 82:

> **"The Tribunal has already indicated that where a Tribunal believe there may be more than one reason why an employee leaves a job, the correct approach is to ask what was the effective cause of the resignation."**

20. 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.

21. The Tribunal correctly identified that cause and effect is a matter of fact. As part of the facts, it set out at paragraph 97 that it had no doubt that Ms Wright felt unhappy about her treatment at the hands of the respondent. It then said this at paragraph 100:

> **"100. The Tribunal are satisfied that there may not have been a careful, logical thought process applied by the claimant when she decided to resign on 24 November 2010. There probably were two possible reasons in her head at the time i.e. the treatment from her employers and the difficulty that she was having in doing her own full-time job together with the caring for her partner. However, the Tribunal are satisfied from her own very honest evidence regarding what she has done after 24 November 2010 that in reality she recognised that she simply could not continue to do her full-time job for North Ayrshire Council and do the caring job for her partner.**
>
> **101. In the circumstances, therefore, the Tribunal are satisfied that the effective cause of the resignation was not the employer's actions (sic) during the series of incidents, but was the fact that she was unable to hold down her own job because of the care responsibilities that she was carrying out for her partner.**
>
> **102. Therefore, the Tribunal consider that the resignation was not because of a breach of the implied term of trust and confidence by the employers and therefore there was no constructive dismissal."**

22. Notwithstanding that conclusion the Tribunal then went on over a number of paragraphs to say with some sense of outrage what its view was of the way in which the employer had behaved towards the claimant. At paragraph 118 it summarised that view in these terms:

> **"118. In all the circumstances, the Tribunal consider that if they had genuinely believed that the effective cause of resignation had been these series of incidents they would probably have considered that there had been a constructive dismissal since the series of incidents, especially the last incident, amounted to a breach of the implied term of trust and confidence.**
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> **119. However, as already stated the Tribunal are satisfied and are unanimous that the effective cause of resignation was the fact that the claimant simply could not cope with a full-time job as well as caring for her partner in Prestwick."**

23. The Appeal Tribunal indicated in its observations on the sift that it would require some persuading if it were not to conclude that the reliance upon "the effective cause" as opposed to looking for a breach which played a part in the resignation was not an error of law, but left it open for the parties to seek to persuade the Tribunal to that effect and, for that matter, to uphold the decision. Mr Grant, in frank and realistic submissions, argued that this Tribunal should dismiss the appeal notwithstanding the failure by the Tribunal to rely upon the principles set out in **Meikle**, **Abbey Cars** and **Logan** and, as he pointed out to us, recognised to the same effect at first instance in the case of **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 (a case which subsequently went to appeal but not on this particular point).

24. He argued that the Tribunal here had not made a finding of any repudiatory breach, but acknowledged upon reflection that since the finding at paragraph 118 was reached on balance of probability that was a sufficient basis to make such a conclusion a matter of fact. Accordingly, he then proceeded upon the basis that there had been repudiatory breaches of the contract of employment by the Respondent Council.

25. Next he argued that the Tribunal were entirely clear that any such repudiatory breach did not form any part of the Claimant's decision to resign. He relied upon paragraph 90 in which the Tribunal expressed its unanimity in concluding that, "the effective cause of the resignation" was the difficulty that the employee had in this case in continuing to carry out her own full-time job whilst also caring for her partner.

26. In submission he was inclined to accept the principle that a Tribunal judgment must be read as a whole. As we have already demonstrated, that paragraph does not stand on its own, but has to be read in the light of the self direction of law which the Tribunal gave and the repetition, on the basis that that was the correct approach in law, of the words "the effective cause" throughout the judgment. As paragraph 82 illustrates, its interpretation of the effective cause seems to have been that it was looking to see which was the predominant or main cause. It never said that the only reason for the Claimant resigning was in order to care for her partner. It used the words "the effective cause" which might be thought by their use to imply that there may have been more than one reason.

27. If the Tribunal had expressed itself by saying that this was the only cause and that, although Ms Wright might, had she been so minded, have resigned in response to the repudiatory conduct by the employer, in fact that had played no part in her resignation, and the resignation was solely because of her need to care for her partner and the fact that she could not

accommodate doing so within the constraints of her shift pattern, then Mr Grant's submissions would be well founded. But the Tribunal did not say that. Accordingly, as it seems to us (a) the Tribunal did not direct itself properly in law; that was an error of approach; (b) we could only then uphold the decision to which the Tribunal came if it was plainly and unarguably right. We cannot do so since reading the decision as a whole it cannot be said that the Tribunal recognised one reason and one reason only; paragraph 100 is equivocal. The repeated use of the expression "the effective cause" in circumstances in which the Tribunal indicated it was looking to see the principal cause again mean that we cannot rely upon its factual conclusions expressed as Mr Grant has argued.

28. The appeal must therefore be and is allowed.

Consequences

29. If the Tribunal here had clearly said that there were two or more reasons for the Claimant acting as she did in resigning, such that although not a major or principal or, in that sense, effective cause of her resignation the conduct of her employer played a part in it then we would have been persuaded that we should substitute a decision that she had been constructively dismissed. She invites us to do so. She argues in effect, having set out much of her history, that there was a link between the way in which the employer treated her in respect of her caring responsibilities for her mother and failed to answer her grievances arising in connection with that, that it could have given her no confidence that she would be able to adjust her shift patterns in order to allow her both to do her job and care effectively for her partner. But such a link is not for us. We are not the primary fact finders. She did not identify that the words used by the Tribunal to express its reasoning showed that the Tribunal had clearly said that there were more reasons than one actually operating on her mind so that her resignation was at least in part in respect to the breach. The words, "the effective cause of resignation" might simply be

a repetition of the words of the legal test and therefore might not have been intended to imply that there was more than one cause.

30. The expression in paragraph 100 of there "probably being 'possible'" reasons gives rise to some question whether the Tribunal was actually identifying more than one reason, one of which would be the effective cause of the breach, or whether it was simply setting out two logical possibilities in order to choose between them, which on that basis would mean they would be viewed as exclusive. They would not of course necessarily be exclusive but we cannot say clearly from the Tribunal's reasoning what it had in mind. The Tribunal itself knows what it thought and made of the facts.

31. Accordingly, it seems to us that this matter must be formally remitted to the same Tribunal, if that remains practically possible, for it to determine in accordance with the law as we have set out above whether the employer's repudiatory breaches which it had found played a part in her resignation from the service of the council. If it concludes that they did not and that the sole reason was her desire to care for her partner then her claim will fail. If it decides the opposite it will succeed and compensation be considered.

32. As to compensation we should note that where this is a variety of reasons for a resignation but only one of them is a response to repudiatory conduct the compensation to which a successful Claimant will be entitled will necessarily be limited to the extent that the response is not the principal reason. A Tribunal may wish to evaluate whether in any event the Claimant would have left employment and adjust an award accordingly. This does not affect the principle to be applied in deciding breach: it is merely to recognise that the facts have a considerable part to play in determining appropriate compensation.

33. That said, in this case it seems to us that there is much to recommend that the parties conciliate rather than return to the Tribunal. The formal order that we make however is for remission to the Tribunal to determine the issue of constructive dismissal in accordance with the law as we have set it out and, depending upon its findings, then to proceed to any question of compensation if one arises.

34. This appeal therefore succeeds, with that consequence.