Appeal No. UKEAT/0247/12/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2012
Judgment handed down on 25 April 2013

Before

HIS HONOUR JUDGE McMULLEN QC

MS G MILLS CBE

MR T STANWORTH

MS P THOMSON — APPELLANT

BARNET PRIMARY CARE TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID McILROY (of Counsel) Instructed by: Barker Gillette LLP 11-12 Wigmore Place London W1U 2LU
For the Respondent	MS BETSAN CRIDDLE (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

The Respondent dismissed the Claimant in May 2008. She appealed and was reinstated in October 2008. The Respondent imposed conditions of retraining before her return to work, after an absence of two years. The Claimant claimed constructive unfair dismissal as a result of the dismissal and the subsequent conditions. The Employment Tribunal would have held she was unfairly and wrongfully dismissed in May 2008 but she accepted a new contract. She waived her right to add the May breaches to other matters and complain of constructive dismissal by the last straw.

The EAT held the correct construction of the reinstatement letter was she was reinstated to the status of employee but her reintroduction to a particular role in the workplace was subject to retraining. She did not have to accept a new contract for the old contract was revived. She was then entitled to add the subsequent conduct of the Respondent to the May breaches and claim constructive dismissal in December 2008. She had not waived her entitlement nor affirmed the contract after the wrongful dismissal by raising issues as to her retraining programme or the fact that back pay and current pay went into her bank account. The Claimant was constructively dismissed. Unfairness and any remedy remitted to the Employment Tribunal.

HIS HONOUR JUDGE McMULLEN QC

1. These are our reserved reasons for the judgment we gave at the oral hearing. In the meantime a subsequent authority was drawn to our attention by counsel which we took time to consider and there has been a further delay for reasons out of all our hands, as the parties understand. This case is about constructive unfair dismissal and continuity of employment. This is the judgment of the court to which all members appointed by statute for their diverse specialist experience have contributed.

2. We will refer to the parties as the Claimant and the Respondent.

Introduction

3. It is an appeal by the Claimant in those proceedings against the judgment of a London Central Employment Tribunal presided over by Employment Judge Tayler sitting over 7 days. Reasons were sent to the parties on 16 March 2011 extending to 32 pages. The parties are represented respectively by Mr David McIlroy and Ms Betsan Criddle of counsel.

4. The Claimant contended that she was subjected to detriment on the ground that she had made protected disclosures and that she was unfairly and wrongfully dismissed. All the claims were dismissed. The Claimant does not pursue the detriment claim but challenges the finding that she was not dismissed, saying that she was constructively dismissed. A request for a review of the judgment was made and refused by the judge. The Notice of Appeal was stayed pending that. Then Mr Recorder Luba QC gave directions on the sift for this case to go to a full hearing for he found the Tribunal's application of the law not to be compelling.

5. The Employment Tribunal was asked to review its judgment in the light of what the Claimant contended was a failure to address the "last straw" argument put to it in writing at the hearing. That was a correct step procedurally for the Claimant to take and in the light of the Employment Judge's refusal to send the matter for review, it understandably forms ground 3 of the Notice of Appeal.

The legislation

6. The legislation to be applied is not in dispute. The right not to be unfairly dismissed is found in **Employment Rights Act 1996** s.94 and it is restricted to those who have a qualifying period of employment, at the time of these proceedings, of one year's continuous employment: s.108(1). Weeks in which there is a contract of employment count towards this total: s.212(1). Where there is no contract of employment s.212(3) may bridge the gap.

> **"(3) … any week (not within subsection (1)) during the whole or part of which an employee is –**
>
> > **(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose**
>
> **counts in computing the employee's period of employment."**

7. Section 95(1) deals with the circumstances in which an employee is dismissed and constructive dismissal is dealt with in the following way:

> **"95(1)**
>
> **(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

The facts

8. The Tribunal introduced the parties:

"11. The Respondent is a Primary Care Trust. It has responsibility for the district nurse service in Barnet. It has significant resources including Human Resources staff. It has a series of detailed procedures.

12. The Claimant commenced work for the Respondent in September 1988. At the time in question she was a Senior Practitioner (District Nurse Nursing) working to a job description at p.39.1. As such she had a number of nurses who reported to her.

13. The Claimant has a degree in tissue viability and, although not formally specialising in this area, it was her particular area of interest.

14. As a district nurse she was required to work autonomously. A considerable level of trust was placed in her to ensure that patients were treated appropriately.

15. A considerable amount of the claimant's time was spent in dealing with patients with severe leg ulcer…"

9. Her employment began in 1988 and it was terminated on 28 May 2008. Importance is attached by the parties and the Tribunal to the policies operated by the Respondent which were described as follows:

"17. The original Disciplinary Policy covered both conduct and capability (p39b). However, at the relevant time this had been split into two policies, a Conduct Policy (p132) which made provision for stages of warning leading up to possible dismissal and for individuals to be charged with gross misconduct. Detailed provision was made as to the procedural safeguards to be undertaken when investigating charges of misconduct. Provision was made for staff to be suspended while investigations were undertaken. In addition, there was an appeal process.

18. The Capability Procedure provides for a number of stages when it is considered that a member of staff is under performing (p160). There is provision for an informal stage followed by a formal meeting with the possibility of a formal verbal warning, followed by a written warning with a requirement to set out the level of improvement required and for a final stage interview at which dismissal might be considered. Any appeal against dismissal for incapability lay under the conduct appeals process. The appeal procedure provided for imposition of a lesser sanction. The capability procedure made no provision for a final written warning. This was provided for in the conduct policy."

10. There are policies on grievances, harassment and bullying; and also a complaints procedure for use by patients. A complaint made by a patient may be channelled through the conduct *or* the capability procedure as appropriate.

11. In early 2008 criticisms were made of the Claimant's performance. A report was made ostensibly under the (patient) complaints procedure. A hearing said to be under the capability procedure took place over 3 days, leading to the summary dismissal of the Claimant by Alison

Pointu, the Director of Nursing, on 28 May 2008. The dismissal was expressly on grounds of capability.

12. The Claimant's trade union representative Ms Alison Telfer lodged an appeal on 12 June 2008 criticising the process and the sanction. The appeal took place on 9 October. On 14 October 2008 Alison Hardacre, the interim Director of Strategic Planning and Commissioning, wrote to the Claimant indicating that while her performance raised significant concern, the decision to dismiss her summarily was revoked. She said this:

> **"However, in the light of the evident gaps in the application of good practice with regards to managing your performance and the failure by managers to draw these errors to your attention and the lack of opportunity to provide you with scope to demonstrate your willingness and ability to improve, the appeal panel accepts that the PCT has not treated you in line with the spirit of the Capability Policy and procedure; that of supporting you to achieve an acceptable standard of performance. That notwithstanding, the evidence presented to the appeal panel indicated that the errors were serious matters that managers had to address with you via the Trust's Capability Procedure. The move to formal procedures did not allow you the opportunity to address any identified performance issues and to work to an appropriate action plan for improvement. At any rate, if any of this was addressed with you by managers, no evidence was presented to the panel nor a clear time line established from your performance…**
>
> **In this case the panel find that there is sufficient evidence of poor performance but without evidence of good application of Trust policy to adequately manage your performance, there were not sufficient grounds to justify a move to immediate dismissal.**
>
> **The panel's decision is therefore to reinstate you to employment with the Trust. However, there have been sufficient concerns raised about your professional standards, for the panel to insist on certain conditions being met prior to your full reinstatement to your post.**
>
> **The decision is therefore as follows:**
>
> **1. The disciplinary sanction imposed upon you will be reduced to a final written warning, regarding your capability in relation to poor management of staff i.e. failure to implement and monitor adherence to agreed work protocol; and poor record keeping and failure to follow agreed standard procedures in relation to wound management.**
>
> **2. Before reintroduction to the workplace, a full assessment of your competency is to take place, particularly in light of your two years' absence from the workplace in order to ensure patient safety.**
>
> **3. An action plan regarding your introduction to the workplace will be established in discussion with you to ensure that your performance levels are improved and maintained once a satisfactory assessment has been undertaken.**
>
> **4. Adequate support such as mentoring will be put in place with an associated training programme as appropriate on your reintroduction to the workplace to ensure there is ongoing improvement in your performance.**
>
> **5. If it is possible to do so, the Trust will discuss with the senior management team of BCS whether you are moved to another team within the Borough.**
>
> **It should be noted that the final written warning shall remain on file for a period of 3 years. This is in line with the limits outlined in the appeals process outlined in the Conduct Policy.**

> **Any further lapse in capability and/or conduct shall be investigated using the appropriate Trust policy. Any further formal process that finds there are ongoing capability and/or conduct issues would be likely to lead to your dismissal as there is a final warning regarding your tenure of employment with the Trust. The circumstances where a further formal process may be triggered would include if further concerns are raised about your competency and/or performance during the assessment and reintroduction process described at points 2 and 3 above.**
>
> **As our decision is that you should be reinstated to Trust, I can also confirm that your pay will be reinstated and you will also receive back dated pay from the period from the date of your dismissal.**
>
> **…**
>
> **Your ability to practise as an RCN is subject to continuing registration with the professional body, NMC. If at any time your registration is suspended, or your practice is restricted in any way by the NMC, you are required to notify the Trust as the act of suspending you from the register would mean that you would not be able to discharge your full contractual duties, and restrictions imposed on your practice may have a similar effect.**
>
> **The decision of the panel is to reinstate your contract with immediate effect. The Human Resources Team will work with you and your representative to ensure the conditions for your return to work as outlined above are met." [emphasis added]**

13. The passages emphasised form the dispute here. The Employment Tribunal cited most of the above but not, we think crucially, the last paragraph. The conclusion of the Employment Tribunal is this:

> **"133. The letter was unusual in that it 'reinstated' the Claimant to employment but provided for a 'reinstatement' to her post to occur only once specific terms had been agreed for retraining and return to the workplace. Pending the occurrence of this she would be paid back pay and continue to be paid by the Trust."**

14. This letter caused a number of queries to be raised by her union so Ms Christine Bennett, former Assistant Director of Human Resources, clarified the position in the following way on 20 November 2008:

> **". … I can confirm that Pauline has been reinstated onto the payroll and that back pay will be paid as soon as possible. Pauline will NOT be reinstated to any role within the Trust until she agrees to a programme of intensive development and has successfully completed the programme and her competency assured. If Pauline does not agree to these measures we will not be able to reinstate her into the work place and in the event that this situation occurs, we will need to discuss further with Pauline how to proceed." [emphasis added]**

And to the Claimant on the same date in the following terms:

> **"… Alison [Telfer of RCN] has raised a number of issues in relation to your reinstatement to the workforce. …**

> **I am in the process of discussing with the relevant managers your reinstatement to the workforce. in order for your reinstatement to be successful I need confirmation from you that you will agree and comply with the measures that the Trust puts in place….**
>
> **I am attaching a copy of the proposed essential development programme of activity. Please note that this may need to be added to once the assessment of your fitness to work begins. Feedback regarding your understanding of issues will be requested from the relevant trainer and/or lead manager assigned to assess your competence. The final decision regarding your capability to work for the Trust will be determined by the Director of nursing on the basis of feedback and observations from senior management…."[emphasis added]**

15. A fair summary of the contents of these letters is given by the Employment Tribunal (although it did not cite the first two paragraphs in the last letter):

> **"136. The letter enclosed an extensive programme of activities including a series of training courses. We were informed that if they were conducted back to back they would last approximately three weeks; although, in reality they would be likely to stretch over a period of approximately a year. The plan involved a substantial process of retraining and reassessing the Claimant."**

16. By 3 December 2008 the Claimant had received her back pay but she sought a pay slip because she had not received one. Ms Bennett confirmed that the Claimant "will need to be retrained before she can return to work…".

17. On 6 December 2008, prior to the deadline set for her response to the Respondent, the Claimant resigned saying in relevant part:

> **"… I now have to acknowledge that it was never an intention of Barnet pct to allow my return to work after I complained of bias, unfairness and injustice towards me from nurse managers. This was despite the Trust's pretence of working towards this outcome.**
>
> **I also acknowledge the Trust's regret and aversion to the requirement that I be reinstated as a District nurse team leader in the Trust when they had put so much effort into arranging my dismissal and preventing my return to work." [emphasis added]**

18. The Claimant's last day of employment was 13 January 2009. She lodged a grievance which was rejected and then Tribunal proceedings. These included whistleblowing claims which were dismissed and are not pursued on appeal.

19. The Employment Tribunal found that there were very substantial criticisms to be made of the Respondent:

> **"164. We accept that there were a series of failings by the Respondent in the lead up to the Claimant's dismissal that cumulatively and/or individually involved fundamental breaches of her contract of employment; culminating in the dismissal itself which, had it stood, would have been both unfair and wrongful.**
>
> **…**
>
> **169. We considered that the charge of four incidents of gross misconduct in January 2008 was in breach of contract. No steps had been taken under the Conduct Procedure. Further, the Respondent was in breach of contract by seeking to move to the Capability Procedure without having gone through any of the earlier stages to it.**
>
> **…**
>
> **171. We do accept that there was a breach of contract in suspending the Claimant in circumstances in which the Respondent was purporting to act under the Capability Procedure which included no provision for suspension. The Respondent sought to adopt the final stage of the Conduct Procedure in a capability case.**
>
> **…**
>
> **174. However, as set out above, the key breach was in summarily dismissing the Claimant, purportedly under the Capability Procedure, in circumstances where none of the initial stages had been undertaken. In effect, the Respondent improperly elided the capability and conduct procedures without going through their proper stages."**

20. No claim of unfair dismissal was launched following the dismissal on 28 May 2008. But the circumstances leading to that dismissal were invoked in the current proceedings giving rise to this appeal. So the Tribunal was required to consider the legal effect of what happened thereafter. It came to these conclusions:

> **"176. If the Claimant had at the stage of her dismissal brought a claim of unfair dismissal and/or wrongful dismissal she would have had a very strong claim. However, the Claimant chose to appeal. What was done on appeal was not within the terms of the appeal process in that the Claimant was 'reinstated' into employment with the Trust, including rights to payment and to full back pay, but was not 'reinstated' into her job. In addition she was put on a three year final warning. This outcome fell outside the terms of the appeal procedure. However, the Claimant was prepared to accept that position in that she accepted the very substantial sums of back pay that were paid to her. In doing so she accepted a new contractual basis of her relationship with the Respondent under which she was, effectively, suspended on full pay pending an agreement of the terms of a return to work, including retraining; and was subject to a three year final warning.**
>
> **177. On an alternative analysis, if the appeal outcome simply revived her contract, she waived any prior breaches, and accepted the varied terms on which, she was 'reinstated' into the employment of the Respondent, including the fact that she was to be retrained and subject to a three year final written warning.**
>
> **178. Thereafter, we do not consider that the return to work programme was unfair, disproportionate or set the Claimant up to fail. It was substantial but it reflected the major concern that the Respondent had as to the Claimant's capability and her historical**

unwillingness to accept the failures in her performance and the need for retraining. The Claimant was not asked for the details of her new employment until after she had resigned.

179. In the circumstances, in the period after the Claimant's 'reinstatement' we do not accept that the Respondent was guilty of any action that involved any breach of the Claimant's contract.

180. What is more, we would not accept, even if a breach capable of acceptance could be established, that the Claimant resigned in response. The reality was that the Claimant was not prepared to undergo the period of retraining and reassessment that was required by the Trust and would not return to work on that basis. That is the real reason why she was not prepared to agree terms on which she would return to work."

21. Lest it were wrong on those findings and the application of the law to them, it went on to make a further finding which would relate to remedy:

"181. If we were wrong on those points, and the Claimant was constructively dismissed, we do not consider that her employment would have continued for a significant further period of time as she was not prepared to agree satisfactory terms of retraining to return to work for the Respondent. On cross-examination the Claimant's position remained that she did not accept that there was anything that she had done wrong that could properly lead to any investigation or retraining."

The issues on appeal

22. Five distinct grounds have been sent to this hearing, in that the Tribunal:

"(i) Determined that the Claimant had accepted 'a new contractual basis of her relationship with the Respondent' by accepting the very substantial sums of back pay that were paid to her (para. 176);

(ii) In the alternative, determined that the Claimant had waived any prior breaches of her existing contractual relationship with the Respondent (para. 177);

(iii) Failed to consider or to consider properly whether the return to work programme imposed by the Respondent amounted, in all the circumstances, to a 'last straw' entitling the Claimant to resign;

(iv) Determin[ed] that the Claimant did not resign in response to a breach of contract by the Respondent capable of acceptance;

(v) Determin[ed] that the Claimant was not prepared to agree satisfactory terms of re-training to return to work for the Respondent."

The parties' contentions

23. We will deal with the contentions on each side of this case in the sequence of the above grounds of appeal.

(i) The new contract

24. Mr McIlroy contends that the operation of an appeal procedure pursuant to contract is not an affirmation of prior breaches but is seeking the Respondent's agreement to reconsider. Since the Tribunal found the procedure and the appeal fell outside the Respondent's agreed policies, they could not remedy the breaches leading to the unfair and wrongful termination on 28 May 2008. The references to back pay and reinstatement are consistent only with the continuing relationship and this is consistent with the Respondent's submissions in writing to the Employment Tribunal which were to the effect that reinstating an employee on appeal pursuant to an agreed policy revives the contract. It would be wrong for an employee who took advantage of her contractual right to appeal to lose all her rights of challenge if the employer operates outside the relevant procedure.

25. Even if the Tribunal were right in its analysis of the contractual position, the Tribunal erred in holding that by accepting the back pay she had accepted the new contract between 3 and 6 December 2008 when the money went in her bank account; she took no unequivocal step which constitutes acceptance of the new contract.

26. Ms Criddle contends that if the contract was terminated by dismissal on 28 May 2008 it could only revive if a decision had been taken to reinstate the Claimant in accordance with the terms of the appeal procedure. If a decision was taken outside of that procedure, the previous contract remained terminated. Thus a new contract came into being when the Claimant accepted the payment of the money which had attached to it the conditions relating to her return to work. The inevitable conclusion is that the Claimant did not have one year's continuous employment on acceptance of the new contract prior to her resignation on 6 December 2008, taking effect on 13 January 2009. If s.212(c) of the 1996 Act applied to rescue the Claimant it was not capable

of amounting to an arrangement or custom. Further, breaches of the first contract of employment, on this thesis, could not contribute to her decision to resign from the second.

(ii) Waiver

27. Mr McIlroy contends that asserting a contractual right to appeal is not a waiver; on the contrary, it is affirmation of the contract which provides a specific right of challenge for breaches of it, or unfairness in its operation. Acceptance of "back pay" is not a waiver nor is it affirmation. In any event, affirmation or waiver does not deprive an employee of the right to add those matters to later matters when relying on the last straw doctrine.

28. Ms Criddle contends that there was a new contract, but if not, the decision to reinstate was in accordance with the terms of the Respondent's policy. There was no dismissal and the key feature of the Claimant's case i.e. the earlier breaches fell away. On this footing, the payment of "back pay" was a voluntary payment which was accepted by the Claimant.

(iii) Last straw

29. Mr McIlroy submits that on the basis that the Tribunal erred in respect of its first and second findings, its conclusion that there was nothing the Respondent did wrong following 14 October 2008 is flawed. The whole of the history is relevant to a consideration of the last straw doctrine. In particular, the return to work programme was onerous and in any event was in the hands of Alison Pointu, who personally had wrongly and unfairly dismissed the Claimant. It had been submitted on the Claimant's behalf in writing at the Employment Tribunal that the programme for return to work was unfair and yet the Tribunal did not consider it nor did it consider this point when raised on an application for review. Essentially, the Tribunal failed to make a decision in relation to the whole of the history.

30. Again, Ms Criddle responds by submitting that the matters leading up to the dismissal were effectively expunged by the acceptance of the return to work terms.

(iv) The reason for resignation

31. The Tribunal found that the Claimant did not resign in response to a breach. Again, Mr McIlroy submits that, in the light of the errors in respect of points (i) - (iii) above, there was a breach and the Claimant resigned in response to it. By not recognising that there was a breach of the Claimant's contract the Tribunal did not properly address the issue as to whether she resigned in response to it. The auxiliary finding in paragraph 180 does not pay attention to the arguments in relation to the last straw. As a matter of chronology, the Claimant resigned after she received the extensive programme for return to work.

32. Ms Criddle submits that this is a re-argument of the issues before the Employment Tribunal which were decided as matters of fact.

(v) Retraining

33. Mr McIlroy submits that the decision was vitiated by the Tribunal's earlier errors and that the return to work programme was onerous and she did not accept it. On the contrary, it constituted the last straw in a series of events. Ms Criddle did not in terms address this argument but it is implicit in her arguments in relation to points (1) - (iv) above.

Discussion and conclusions

34. We prefer the arguments of Mr McIlroy and announced our decision in the Claimant's favour at the hearing. We will deal with the arguments in the same sequence as we have set out above.

(i) The new contract

35. Paradoxically, the solution to this ground of appeal is found in the Respondent's written submissions to the Employment Tribunal. With we think some justifiable indignation, Mr McIlroy points to them as follows:

> **"The short but important point to be made at the outset is that the Claimant was reinstated on appeal. The Respondent positively affirmed the contract and told the Claimant it wanted her to return to employment with the Trust. It paid her outstanding back pay without knowing whether she would in fact return to work.**
>
> **…**
>
> **The effect of reinstating an employee on appeal pursuant to an agreed disciplinary procedure is to revive the contract of employment. It is not an offer which it is open to the employee to accept or reject: Roberts v West Coast Trains Ltd [2005] ICR 254 [emphasis in original]."**

36. That position was adopted by Mr McIlroy himself in indicating that there had been no new contract but simply reinstatement of the old relationship. On this basis he submits that the Employment Tribunal made a decision against the Claimant on a ground which was not advanced by the Respondent. We respectfully agree. *Affirmation* of the contract by the Respondent may not be the right way to put it. It had broken it, so could not affirm its own wrong. Yet it was entitled by the contract unilaterally to set aside its own otherwise repudiatory conduct on appeal and so to restore the Claimant to employment. She asked the employer to reconsider and it did. The repudiatory breach found by the Employment Tribunal in the form of dismissal was not open to be accepted by the Claimant, the innocent party, since it was set aside. It was not open to her to affirm the contract as it revived once that decision was made.

37. Paragraph 133 of the Tribunal's Judgment (above) correctly summarises the juxtaposition which emerges plainly from the construction of the correspondence. That is to draw a distinction between the reinstatement of the Claimant to the status of its employee on the one hand, and on the other her actual return to work, which would involve what was expressly

described as reintroduction into the workforce following her extensive period of absence. This matter can be decided free of authority by reference to the documents alone.

38. Although we have laboured the use of the word reinstatement by emphasising it in the relevant correspondence, the distinction which Mr McIlroy argues for and which the Tribunal diagnosed in paragraph 133 is there in the documents and represents the objective intention of the parties. Whatever may be the defects in the capability procedure and possibly in the appeal procedure, the clear intent of the Respondent on 14 October 2008 was to set aside the decision of Ms Pointu to dismiss the Claimant. That in our judgment is automatic following what is described as the decision of the panel. Going with it is the decision to set *en train* payment of the Claimant's back pay for the months when she had been without, and to continue to pay her from 14 October 2008. The Employment Tribunal described this as suspension pending agreement on the return to work terms (paragraph 176). This is apt. So is the alternative holding, that the contract revived. By whichever route, the point is she is now an employee on full pay, with "tenure" as the letter put it, while disputing aspects of her relationship specifically retraining, supervision and the imposition of a final written warning not permitted under the contractual capability procedure.

39. In our judgment the whole point of the creation of the detailed programme for re-training and assessment was that it was directed to, on this footing, a currently serving but long time absent employee. The same is true of the written warning which would not be of any relevance to a former employee. You cannot give a warning that next time she will be dismissed to an ex-employee. The distinction could not be clearer than that expressed in the final paragraph of the 14 October 2008 letter. The *contract* is to be reinstated and actual return to work details depend on the Claimant meeting certain conditions. The Claimant's reinstatement onto the payroll before her unequivocal acceptance of the conditions indicates again the continuing status of the

employment relationship. As Ms Bennett said, if the Claimant did not accept the conditions there would need to be further discussion about how to proceed. You do not discuss how to proceed with an ex-employee. Such a discussion is only meaningful as between an employee and an employer seeking to control her future conduct.

40. This analysis corresponds with the judgment we gave in **London Probation Board v Kirkpatrick** [2005] IRLR 443:

> **"14. It seems to us that whether or not there was reinstatement is a question of fact for the Employment Tribunal. It here had the documents, it had live evidence from the Claimant and the Respondent, and written evidence from the Claimant's then Counsel to whom it was confirmed that reinstatement would be effected. The procedure in place at the relevant time was highly sophisticated, had been agreed with the relevant trade union and provided for, as here, representation by counsel and attendance by an officer of ACAS. It must also be recalled that the Respondent is engaged in the enforcement of justice and the Claimant was engaged in a senior position of trust within its establishment. Nevertheless, it is not clear that the appeal board was applying the definition of reinstatement contained in section 114(1) which concerns an order made by a tribunal and which has the effect that "the employer shall treat the complainant in all respects as if he had not been dismissed". Rather, it seems the appeal board was using reinstatement in its ordinary sense as found by the Tribunal (paragraph 8 of its Reasons).**
>
> **[…]**
>
> **20. The consequence of the decision to reinstate the Claimant as a matter of *contract* was that he was not regarded as having been dismissed, he was entitled to his ordinary wages, he must repay the element of his pay in lieu of notice which represented tax and national insurance not deducted therefrom, and he was entitled to restoration to the rights as a serving employee in the pension fund. During the gap he was entitled to pay in lieu of notice and to exercise his contractual rights of appeal. Thus during the gap his contract lived on for certain purposes and after the gap his contract was fully restored."**

41. That case is relied on by both counsel to resolve an issue as to its jurisdiction which arises as a result of the Tribunal's decision that the Claimant was subject to a new contract. Insofar as it is authority for the proposition that an arrangement under s.212 of the **Employment Rights Act 1996** may be made after the dismissal, there remains a difference of opinion at EAT level and if this were critical to our decision we would be minded to give permission to appeal: see the judgment of Langstaff J (President) in **Welton v Deluxe Retail Ltd** [2013] ICR 428. However, it is not necessary for the purpose of this decision because we accept the submission made by Ms Criddle to the Employment Tribunal as being correct.

Invoking an agreed appeal procedure where the appeal body has power to set aside the dismissal constitutes a prior arrangement. Further, the contract stays alive for a number of purposes specifically including the right of the Claimant to operate the appeal procedure, the payment of notice money if dismissal is with notice and the right to notice money if the dismissal was wrongful, and of the course the operation of post-termination restrictive covenants. This particular contract was recognised by the Respondent as requiring payment of back pay to the Claimant and resumption of normal pay on successful resolution of her complaint that the dismissal was unfair and wrongful. That in our judgment is sufficient for the Claimant to have continuous employment of one year, either side of the May 2008 dismissal so as to entitle her to bring the claim. She is on this footing employed since 1988. That complication was not noticed by the Employment Tribunal as a consequence of its decision that the Claimant had a new contract but was raised before us as an issue of jurisdiction on appeal and we have considered it.

42. According to the findings of the Employment Tribunal, the appeal procedure is available to an employee who has been dismissed through the conduct procedure or the capability procedure. The outcome of an appeal procedure can include the imposition of a lesser sanction. Here what was proposed was a final written warning (which cannot be in place for a capability dismissal) and imposition of a rigorous training programme. The Claimant is entitled to say from her status *qua* employee that while back in employment she does not accept the unilateral imposition of the warning or the re-training programme and is entitled to enter grievances about them or to have the matter fully determined. She does not forsake her status as an employee during the time that she is doing this.

43. In our judgment this is an illustration of the rule in **Roberts v West Coast Trains Ltd** (above). This is to the effect that where a contractual procedure permits the employers on

appeal to impose a different decision in place of that of dismissal the decision does not involve termination of the existing contract and the entering into of a new contract. It is to revive retrospectively the contract of employment terminated on the first occasion. The Court of Appeal held that these matters depend on the construction of the contract and in our judgment the construction of the contract as determined by the Employment Tribunal allows the Respondent to set aside its unfair dismissal and to take some lesser step. Since the Respondent was moving along the capability procedure route and the final written warning does not occur in that procedure, it would remain wrong for the employer to insist on that lesser sanction but nevertheless it had the power to impose different sanctions. The training programme may not aptly be described as a sanction, in the same way as a warning, but it too is open to debate with the Claimant as to whether it was properly imposed. It seems to us that the particular form of the sanction does not direct the application of the rule in **Roberts** provided some lesser form of sanction is available to the Respondent once it has unilaterally set aside its decision to dismiss. Here, as in **Roberts**, the correct interpretation is that the decision had been made to set aside the dismissal. She was not being offered the choice of continuing with the contract which she could accept or reject, but was being reinstated as an employee with further discussions as to the date of return to work and into what position. It follows that the Tribunal erred in holding that a new contract of employment was created. It did not apply its finding as to the distinction between reinstatement to the contract and to the workplace. She was reinstated to the employment. There are in any event certain practical difficulties in that there is no date given as to when the new contract was formed, and by what action of the Claimant, and what its terms were.

(ii) Waiver

44. It follows from the above that the Claimant was unarguably employed from 1988 until 14 October 2008 when the dismissal was rescinded. What about the period up to 13 January 2009

when her resignation dated 6 December 2008 took effect? The Respondent contends the Claimant by some action following her reinstatement waived her right to complain of the breaches up to the 28 May 2008 dismissal, and her right to include those matters whether they be breaches or not to build up a case of repudiatory conduct by the Respondent up to 6 December 2008. Put in a practical way, could the Claimant add the finding by the Tribunal that she had been wrongfully and unfairly dismissed in May 2008 to the continuing dissatisfaction she felt about the way she was treated by being given a final written warning and being required to attend further training?

45. Given our finding that the contract continued it seems to us that she does not lose her right to invoke the unfair and wrongful dismissal and the matters leading up to it when complaining of a series of events in aggregate amounting to repudiation, and her acceptance of that series on 6 December 2008: **Lewis v Motor World Garages Ltd** [1985] ICR 157 at 170 A-C. Further, following **J V Strong & Co Ltd v Howell** UKEAT/1179/99 it cannot be said that an employee who continued to work must be regarded as having waived breaches in any permanent sense so as to prevent her relying upon them. There are countless examples: in **Bashir v Brillo Manufacturing Co Ltd** [1979] IRLR 295 EAT it was held that the drawing of sick pay following an alleged repudiation for some 2.5 months constituted affirmation. This was rejected. Further, in **Royle v Greater Manchester Police Authority** [2007] ICR 281 it was held that continuing to work after an adverse act does not necessarily prevent permanently the employee relying on that as, or as part of, repudiatory conduct: see paragraph 65.

46. On the evidence, the Claimant had actually done nothing after the unilateral decision to reinstate her. The Respondent decided to make full reparation of her back pay and to resume current payments. This was not set out in an itemised pay slip to her but went into her bank by 3 December 2008 pursuant to the letter of 14 October 2008. Neither she nor her union

representative gave agreement to the conditions set out in the letter. A realistic analysis of what was happening was that she remained an employee having made successful complaints about her wrongful and unfair dismissal and continued to be unhappy about other aspects of her employment including the terms of her return to the workplace. None of this in our judgment constitutes waiver of the breaches of the contract up to 28 May 2008. True, the dismissal was set aside but what led up to it were breaches, as the Employment Tribunal found, and the Claimant did not accept or waive them. The very fact that her union representative continued to raise issues about the 14 October 2008 letter, itself dealing with the consequences of the May dismissal. demonstrates just that.

(iii) The last straw

47. We hope it follows from our above explanation, that the Claimant was entitled to add together all of the events which she found unsatisfactory about her relationship with the employer as at the time of her resignation on 6 December 2008. None of these needs in itself to be a repudiatory act, but in aggregate they must be. See **Omilaju v London Borough of Waltham Forest** [2005] IRLR 35 at paragraphs 21 and 22. The Claimant's case was that she did not accept the return to work programme and this was a last straw in a series of unsatisfactory conduct by the Respondent. Her detailed case was put in writing as to the unfairness of the return to work programme. It is not dealt with by the Tribunal nor by Employment Judge Tayler's refusal to review it on this ground. This matter was squarely before the Employment Tribunal and ought to have been the subject of a finding. The failure of the Tribunal to address the argument about a last straw was based upon its failure to understand the nature of the earlier breaches as continuing to found a last straw argument.

(iv) The reason for resignation

48. It is contended by the Claimant that the Tribunal erred in holding that she did not resign as a result of a repudiatory breach by the Respondent (paragraph 180). Her case on appeal is that because the Tribunal did not understand the nature of the earlier conduct, it incorrectly found that she had not resigned as a result of it. In our judgment the chronology is telling. The Claimant received the Respondent's last letters to herself and to her union representative dated 20 November and 3 December 2008. Her acceptance of the retraining programme was required by 9 December 2008. Whether or not the programme was unfair to her does not affect the decision as to what triggered the resignation. She wrote that it was the refusal to allow her to return to work in her original role since 2006. The Employment Tribunal found it was because she would not return to work on the basis of the retraining programme. Although that is a question of fact, they are the same thing. The evidence of the Claimant in the form of the oral evidence and her letter of resignation all point to the conclusion that she resigned as a result of the imposition of the programme, the culmination of what she saw as a two-year refusal to allow her to work as before. She was given until 9 December 2008 to accept the terms set out in the correspondence from 14 October 2008, and before that deadline she resigned. The only conclusion is that it was a response to that. The finding by the Tribunal that the Claimant resigned because she would not agree to the re-training programme is really only another way of putting her dissatisfaction at the conduct of the Respondent which in aggregate constituted repudiation.

(v) The re-training programme

49. The comments in paragraph 180 by the Employment Tribunal may be invoked in terms of any issues on unfairness under s.98(4); and if the decision is that the dismissal was unfair also as to remedies, see for example **Polkey v A E Dayton Services** [1988] ICR 142 HL. This would include the matters considered by the Employment Tribunal and those put forward by the

Claimant which were not dealt with i.e. the length and content of the programme, and its supervision by Ms Pointu who had unfairly and wrongly dismissed her. Those however are different matters from the primary question on this appeal which is whether the Employment Tribunal was correct to find there was not a dismissal.

Disposal

50. We were invited by Ms Criddle to make the decision on dismissal ourselves, and by Mr McIlroy the decision on dismissal *and* unfairness. It is proportionate that we accede to the joint submission: in our judgment the Claimant was constructively dismissed. Issues as to whether the terms were fair, as part of whether the dismissal was fair, are properly to be left to the Employment Tribunal and cannot be decided by the EAT. So is the claim that the dismissal, now found, was wrongful. If it finds for the Claimant, the Employment Tribunal will have to decide whether or not she was prepared to accept the terms at all. However, as counsel invited us to, we have decided that there was repudiatory conduct by the Respondent dating from before the time of the dismissal in May 2008 up to the resignation letter, that she resigned in response to that, and did so promptly, and she is entitled to have her case of unfair and wrongful dismissal tried. It goes without saying that she had continuous employment sufficient to raise a claim of unfair dismissal. We will consider written submissions on whether to remit to the same Employment Tribunal.