

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

At the Tribunal
On 7 December 2012

Before

HIS HONOUR JUDGE PETER CLARK

MS K BILGAN

MR J MALLENDER

FIVE ELMS MEDICAL PRACTICE

APPELLANT

(1) MRS S HAYES
(2) MRS L J TILLEY

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR MALCOLM J CAMERON
(Representative)
Bibby Consulting and Support
Brunswick Court
2-4 Brunswick Street
Newcastle-under-Lyme
Staffordshire
ST5 1HH

For the Respondents

MR NICHOLAS EDWARDS
(Representative)
(Free Representation Unit)

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

Employment Tribunal finding breach of implied term of mutual trust and confidence leading to constructive dismissal. No error of law shown. Appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

Introduction

1. At the time of their resignations in July 2011, Mrs Hayes was the Practice Manager employed by the partners of the Five Elms Medical Practice, the Respondent, and Mrs Tilley was the Assistant Practice Manager. Both then brought claims of constructive unfair dismissal which were resisted by the Respondent. The Claims were combined and heard by a full Employment Tribunal chaired by Employment Judge Andrew Allen sitting at the East London Hearing Centre on 16 January 2012.

2. By a reserved Judgment with reasons dated 13 February both claims were upheld and the question of remedy was adjourned to a further hearing. Against the finding of unfair dismissal in Mrs Tilley's case, but not that of Mrs Hayes, the Respondent now appeals.

The facts

3. Although both claims were heard together, each required separate consideration by the Tribunal. Since this appeal relates only to Mrs Tilley we shall necessarily focus on her case. It seems that on 20 April 2011, Angela Comer, a secretary, raised an informal complaint with Dr Bhatia, who was shortly to take over the role of staff lead from Dr Randhawa, about Mrs Hayes management style. This was followed by a five-page typed document dated 21 April which she gave to Dr Bhatia on 3 May. Ms Comer then produced a six-page document dated 22 April setting out further complaints about Mrs Hayes and suggesting that staff members had left the practice due to the management style of Mrs Hayes and Mrs Tilley. The Tribunal also noted in paragraph 9 that a receptionist, Ann Ward, had resigned on 14 March 2011 and upon leaving the practice had been critical of the management style of both Mrs Hayes and Mrs Tilley.

4. Dr Bhatia held a grievance meeting with Ms Comer on 1 June 2011 at which she said that both Mrs Hayes and Mrs Tilley were managing the staff poorly and that she felt bullied in the work place by both of them. She gave general examples and wanted disciplinary action to be taken against both Mrs Hayes and Mrs Tilley for bullying in the work place. She gave specific examples in a further written complaint dated 1 June, provided to the Respondent on 6 June.

5. The same day Dr Bhatia wrote to Ms Comer informing her that she would be carrying out an investigation into her grievance. Meanwhile, Lisa Johnson, a receptionist, resigned in May 2011 complaining in writing about Mrs Tilley's management style. In those circumstances the Respondent required both Mrs Hayes and Mrs Tilley to attend meetings on 9 June. Both had started work at 7.00 am that day. Mrs Hayes was seen first by Dr Bhatia; also present was Agbo, a representative of external consultants, Bibby; he kept notes. Mrs Tilley was seen later, her meeting began at about 5.30 pm and lasted for an hour. Neither Claimant was given advance notice of the meeting, nor provided with copies of the written complaints by Ms Comer and Ms Johnson before the meeting.

6. During the respective meetings both Claimants were shown the written complaints and asked to respond there and then. They were not permitted to take away copies after the meeting, although Mrs Hayes asked for copies.

7. The Tribunal record that both Claimants were upset to learn of the fact of the allegations made against them and the way in which the meetings were taking place. Mrs Tilley told the Tribunal that in the car park of afterwards Agbo told her that he would be recommending no further action and that she had nothing to worry about. That message does not appear to have been communicated to her by any partners in the practice before her resignation with notice on 8 July, taking effect on 5 August.

8. Between 9 June and 5 August the following chronology applied in the case of Mrs Tilley. She worked until 13 June when she went on sick leave, returning to work the next day until 26 June. On 15 June the partners met with both Claimants. Dr Randhawa spoke on behalf of the partners saying that the Respondent was following Bibby's advice as to how to manage Ms Comer's grievance. Mrs Tilley was upset and left the meeting early. Dr Randhawa acknowledged in evidence to the Tribunal that more support could have been offered to the Claimants during the meeting. Although the Tribunal recognised the Respondent's difficulty, being a small organisation, in managing the investigation into two senior employees, nevertheless the Tribunal noted that that meeting was not successful in calming the situation.

9. Both Claimants raised informal grievances with the Respondent; Mrs Hayes on 22 June and Mrs Tilley on 24 June. Neither grievance was dealt with prior to the termination of the Claimants' employment; Mrs Tilley on 5 August and Mrs Hayes on 15 August. However, the relevant dates are the dates on which the Claimants resigned for the purpose of considering the constructive dismissal question.

10. Mrs Tilley was on annual leave between 27 June and 1 July as she then worked between 2 and 7 July. Following her notice of termination on 8 July, she continued working until 14 July and she took annual leave on 15 July, worked between 16 July and 19 July and was then on sick leave from 20 July until the end of her employment on 1 August 2011.

11. Meanwhile, on 17 June Ms Comer produced another document dated 9 June relating to her grievance against the Claimants. This was not copied to either of them. Ms Comer resigned on notice on 27 June, citing financial reasons as the primary reason for leaving.

The Tribunal decision

12. The Tribunal dealt first with Mrs Hayes (paragraphs 43 to 49) finding that the Respondent was in breach of the implied contractual term of mutual trust and confidence in her case. In reaching a similar finding in the case of Mrs Tilley, the Tribunal expressed their reasoning at paragraphs 50 to 51 in this way:

“50. Similarly the Tribunal felt that inevitably the allegations made against Mrs Tilley by Angela Comer did need to be investigated and however presented would have been likely to cause distress and upset to her. Tribunal again accepted that many grievances would involve an informal meeting at an early stage. However, again the lack of notice of the meeting on 9 June, the time of day in which it took place, given her start time of 7.00 am, the presence of the Legal Adviser (Agbo), the absence of sight of the lengthy documents presented by Angela Comer prior to the meeting and the absence of any documents being given to Mrs Tilley after the meeting, added to the failure by the Respondent to address Mrs Tilley’s grievance of 24 June 2011 in a timely manner cumulatively amounted to a breach of the implied term of trust and confidence entitling Mrs Tilley to resign and claim constructive dismissal.

51. Mrs Tilley, as the Assistant Practice Manager, needed to feel confident that her employer had trust and confidence in her. The Respondent had a difficult task in dealing with Angela Comer’s grievances, however the way in which it went about doing so was such that the implied term of trust and confidence was breached. In particular the manner in which the meeting on 9 June 2011 was conducted was such that taken with its subsequent actions, the Respondent acted in a manner that indicated that it was not adhering to this essential requirement of the contract.”

The law

13. As Lawton LJ observed in the constructive dismissal of **Pedersen v London Borough of Camden** [1981] ICR 674, the question as to what are the relevant terms of the contract of employment is one of law, however questions as to whether the employer was in breach of contract and, if so, whether the breach was repudiatory, a fundamental breach, are essentially mixed questions of law and fact.

14. The EAT and Court of Appeal cannot intervene because they disagree with the Tribunal’s conclusion. That approach was later endorsed first by the EAT and then the Court of Appeal in **Woods v WM Car Services** [1982] IRLR 413 to which we have been referred. That guidance, we would add, has been recently been repeated by the Court of Appeal in the conduct unfair dismissal case of **Bowater v North West London Hospitals NHS Trust** [2011] IRLR 331 in

which Longmore LJ at paragraph 19, warned the EAT not to substitute its view for that of the Employment Tribunal; that principle we are satisfied applies in this constructive dismissal case.

15. Thus, the first question is what is relevant term of the contract? It is common ground that it is the implied term of mutual trust and confidence and it is now well established that breach of that term is necessarily a repudiatory or fundamental breach of the contract.

16. The Tribunal so direct themselves at paragraph 39 of their reasons by reference to the House of Lords decision in Malik v BCCI [1997] IRLR 462. The Tribunal also there refer to the EAT decision in Aberdeen v McNeill [2010] IRLR 374.

17. We pause to deal with criticisms of the Tribunal's approach to the trust and confidence term, first by Mr Cameron for the Respondent. Mr Cameron points to the formulation of the implied term in Malik and submits that this Tribunal failed to consider whether the Respondent's conduct identified at paragraph 50 of the reasons in the case of Mrs Tilley was without reasonable and proper cause. We are not persuaded that this is so since the Tribunal directed themselves in accordance with Malik and we do not believe that the two matters set out in paragraph 50, the circumstances of 9 June meeting and the failure to deal with Mrs Tilley's grievance before her resignation and subsequent termination of her employment can be said to have been conduct on the part of the Respondent Employer with reasonable and proper cause. That is ground 1 of the Notice of Appeal.

18. Mr Edwards takes a different point. He contends that the without reasonable and proper cause test to be found in Malik does not apply to the question of whether there has been a fundamental breach of contract, by reference to the leading judgment of Sedley LJ in the Court of Appeal decision in Buckland v Bournemouth University [2010] IRLR 445. It applies, he
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submits, to the reasonableness of the dismissal once constructive dismissal and a potentially fair reason for dismissal have been found.

19. In our opinion that is a misunderstanding of **Buckland**. In **Buckland**, in the EAT, [2009] IRLR 606 we ventured to suggest that the earlier EAT decisions in **Abbey National Plc v Fairbrother** [2007] IRLR 320 and **Claridge v Dale Rowney** [2008] IRLR 672 had taken a wrong turn in light of the House of Lords decision in **Malik** by importing the concept of reasonableness into the constructive dismissal question as opposed to the fairness question under section 98(4).

20. Giving the leading judgment in the Court of Appeal, Sedley LJ agreed with that analysis at paragraphs 24 to 46 of our Judgment and endorsed our conclusion at paragraph 47, in these terms:

“22. The EAT considered this issue in great detail. The need for such consideration arose from the proliferation of recent authority and dicta on the subject, not all of it consistent. With both gratitude and relief this court can refer the reader to the detailed description and thoughtful analysis of these in the judgment of the EAT [2009] ICR 1042, §24-46. For my part I would respectfully endorse both EAT's reasoning and its conclusion at §47:

“In summary, we commend a return to settled authority, based on the following propositions.”

(1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Mahmud test should be applied.

(2) If, applying the Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed.

(3) It is open to the employer to show that such dismissal was for a potentially fair reason.

(4) If he does so, it will then be for the Employment Tribunal to decide whether dismissal for that reason, both substantively and procedurally (see Sainsbury v Hitt [2003] IRLR 23), fell within the range of reasonable responses and was fair.”

21. It follows that whereas Mr Edwards is correct to submit that the range of reasonable responses test applies at the fairness stage in the process, nevertheless the expression to be found in **Malik** as to the employers conduct without reasonable and proper cause is itself

referable only to the constructive dismissal question; that being the issue before the House of Lords in Malik.

22. In our judgment, having reminded themselves that the question as to whether the employer was in breach of the implied term, as formulated by the House of Lords in Malik, is to be answered objectively, the Tribunal correctly direct themselves as to the law and applied the law to the facts found.

23. Thus, the real question for us in this appeal is whether, based on the factors recited at paragraphs 50 to 51, the finding of a breach of the implied term was a permissible option open to the Employment Tribunal. It is a perversity point.

24. We return to the case of Woods; the EAT there would have found, sitting at first instance, that based on the primary facts found by the Industrial Tribunal Mrs Woods was constructively dismissed, yet they dismissed her appeal. That decision was upheld in the Court of Appeal. It was not for the Appellate courts to substitute their view for that of the Industrial Tribunal. We find ourselves in a similar position in the present case. Mr Cameron has advanced a respectable argument that the Respondent was following normal industrial practice in holding a meeting on 9 June without prior notice to the Claimants in order to investigate the grievance raised by Ms Comer. The Tribunal recognise that process but formed the judgment, as Mr Edwards point out, that the way in which the Respondent went about it in the respects identified at paragraph 50 undermined Mrs Tilley's trust and confidence when taken with the Respondent's subsequent actions which included the unsuccessful meeting on 15 June and the failure to address Mrs Tilley's informal grievance of 24 June before her resignation on 8 July.

25. Mr Cameron referred us specifically to the evidence of Dr Bhatia at paragraph 64 of his witness statement as to the reasons why no action was taken during that short period of time and complains that no reference is made by the Tribunal to that evidence in their reasons. However, the Tribunal is not required, in order to achieve **Meek** compliance in accordance with ET rule 30(6), to refer to every point raised in the evidence. We are not prepared to assume that they overlooked that evidence in stating their conclusion that a failure to address Mrs Tilley's grievance in a timely manner contributed to the cumulative picture which they formed that objectively the Respondent's conduct from the 9 June onwards destroyed the necessary trust and confidence. In these circumstances, whilst we individually might not have reached the same conclusion had we been sitting at first instance, that is not sufficient to cause us to interfere with the Tribunal's conclusion. In short, we can find no patent misdirection in law nor is the result so clearly wrong that the high hurdle of perversity is crossed. Accordingly, this appeal fails and is dismissed.