Appeal No. UKEAT/0553/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 May 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR G N PEARCE — APPELLANT

RECEPTEK — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR N SIDDALL (of Counsel) Instructed by: Bridge McFarland Solicitors 1-9 Tentercroft Street Lincoln LN5 7DB
For the Respondent	MS L LANSON (of Counsel) Instructed by: Citation Plc Citation House 1 Macclesfield Road Wilmslow SK9 1BZ

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

Employment Judge set out a series of questions (both of primary fact and of assessment of fact) in his Judgment, but did not appear to give clear answers to them when dismissing a claim for unfair constructive dismissal. Appeal allowed, and case remitted to a different Judge.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This is an appeal against a decision of Employment Judge Shulman sitting at Leeds, reasons for which were delivered on 21 August 2012.

The facts

2. The Claimant resigned on 17 August 2011 from his job as operations manager for the Respondent. The question was whether he was constructively dismissed or chose to resign and if dismissed, whether unfairly, so as to be in breach of section 98 of the **Employment Rights Act**.

3. The Claimant's case was that events had occurred during the course of his employment in the last year, which strongly suggested to him that he was no longer welcome as an employee in the Respondent's employ, although he had, as the Tribunal found, been a good employee with no disciplinary record over the four years prior to his resignation. It may be, although the Tribunal made no direct reference to it, that concerns began before 30 January 2011, when the Claimant referred to having had plans regarding early semi-retirement, which plainly had been shared with the Respondent, and indicated that he would have to probably keep going until he was 65.

4. He complained that the lack of confidence which his employer had in him was demonstrated by a number of matters, which could be taken cumulatively: the appointment of a general manager over his head without any consultation with him in May 2011; a re-evaluation of his job description, again without consultation in mid-June, at a time when he was absent, having suffered injuries in a motorcycle accident; that there had been no response to his offers whilst convalescing to help from home; that having returned to work, he had no access to a

computer for four weeks, and found that the office had been reconfigured to his disadvantage; that he had no longer the duties to perform after returning to work in July which he had earlier.

5. All of that was when he was not yet fully fit. He was signed off fully fit after his accident on 10 August 2011. He then was about to face a period of time when Mr King, the general manager, was absent and he would be the operations manager (presumably, in charge) when on 12 August, a Friday, late in the afternoon, the managing director, Mr Glass, required him to come to see him. The Tribunal found, at paragraph 4.8, that he:

> **"4.8 ... wished to resolve the Claimant's apparent unhappiness by reaching what was called 'an amicable solution.' … "**

6. He raised performance issues; there was a discussion about the intention of the Claimant as to retirement. Mr Glass said to the Claimant that he:

> **"4.8 … 'did not want to go down the disciplinary route, but wished to resolve the matter by mutual consent.' "**

7. At paragraph 4.9, the Tribunal said this:

> **"4.9 The Claimant says that Mr Glass asked what the Claimant wanted to leave the employment of the Respondent and suggested that the Respondent was prepared for the Claimant to continue in the Respondent's employment for up to six months whilst the Claimant looked for alternative employment. On the other hand, Mr Glass says, he suggested looking at a revised role within the Respondent organisation, but not taking the Claimant's role away from the Claimant or, if not, the Respondent being prepared to work with the Claimant for a period of time whilst the Claimant found alternative employment. Whichever version is correct, we find that at no time during this conversation did the Respondent dismiss or threaten to dismiss the Claimant. This was accepted by the Claimant in his evidence."**

8. That is a surprising comment to make if the finding of fact in the first sentence of paragraph 4.9 is accurate, for that sentence effectively says that the Respondent, in being prepared for the Claimant to continue in employment for up to six months, implicitly was saying that he could not continue for any longer.

9. The Claimant was taken aback. On the Sunday he emailed Mr Glass and spoke to him again on the Tuesday following, 16 August. Having reflected upon what had been said to him at that meeting, at which again there was some discussion about leaving, some discussion about performance but, as the Tribunal found, no evidence that there would be a dismissal, the Claimant went home. The next day, having come to work, he wrote a letter of resignation. The letter of resignation clearly attributes his resignation to the chapter of events which I have just set out.

10. The Respondent's case, as presented to the Tribunal, was (I am told) that the Claimant having indicated that he might wish retirement at the start of 2011, the Claimant had become somewhat disengaged from proactively pursuing the business as was needed for a company in financial straits. There were, therefore, performance issues which had been raised by others about him, and which needed to be raised with him. He had been a good and valued employee previously. With those two matters in mind, Mr Glass' approach on the Friday in August was intended to give the Claimant a choice which it was thought he might value having. The employer did not anticipate that he would be dismissed. It was intended as the actions of a benevolent employer exploring possibilities with someone whose heart was no longer in the job, and the purpose was to explore mutually beneficial solutions.

11. If one applies the approach deriving from the way in which Lord Steyn put it in **Malik v BCCI** [1997] IRLR 462, and asks the question, did the Respondent without reasonable or proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the Respondent and the Claimant, it is possible to see that on these facts there were two potential answers.

12. On one view, the circumstances might amount to a breach of the implied term of trust and confidence. It has always to be borne in mind that such a breach is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of **Eminence Property Developments Limited v Heaney** [2010] EWCA Civ 1168:

> **"So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."**

13. That has been followed since in **Cooper v Oates** [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of **Tullet Prebon Plc v BGC Brokers LP** [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

14. On the other hand, what had happened might be viewed as the employer, with reasonable and proper cause (to adopt the words of Lord Steyn) acting in a manner which was not so calculated. All depends upon the view which the Tribunal might take in the light of all the evidence and circumstances, and its view of the witnesses before it.

The Tribunal decision

15. The judge, as Ms Lanson pointed out, set out as an issue whether there had been a breach of the contract of employment. When asked where the judge had found a breach, she paused

and admitted to some difficulty. The difficulty arises, in my view, because in a number of respects the judge found facts, but in a number of other respects he asked questions as to what the facts were which he did not determine; he raised issues which he did not determine; and he came to a conclusion which is so condensed that it does not clearly indicate which fact led to what conclusion.

16. Thus, having posed correctly for himself the test propounded by Lord Steyn, he said this at paragraph 5.2:

> **"The Claimant was summoned to a meeting at the end of the day at the end of a week with no warning and with no idea what the meeting was about. Performance issues and the Claimant's future were raised and his future employment, although not terminated, was called into question. On the other hand, the Claimant was not threatened with dismissal; he was given the opportunity to discuss a revised role and he could have, unpalatable as it was, called the Respondent's bluff and taken the disciplinary route."**

I am not entirely sure what the "bluff" refers to.

> **"5.3 It is clear that the Claimant was not presently intending to retire, but did the Claimant see this as an opportunity to go and go on terms which he certainly asked for?**
>
> **5.4 I find that the relationship between the Claimant and the Respondent was damaged, but was it seriously damaged? Resignation and a surrender of rights is a big step for an employee to take.**
>
> **5.5 Was this step taken in response to a significant breach going to the root of the contract of employment, which showed that the Respondent no longer intended to be bound by the contract? I find not. I find that the Claimant went too early; he should have stuck it out and he would either have been rewarded by a revised contract or some other consequence.**
>
> **5.6 In all the circumstances, I do not find that the Claimant terminated his contract by a reason of the Respondent's conduct in circumstances entitling the Claimant so to do and I dismiss the claim."**

17. I invited Ms Lanson to give her submissions in response to the skeleton argument and grounds of appeal which Mr Siddall, for the Claimant, was advancing. It would seem to me that there were here a number of questions posed by the judge which he simply did not answer. Mr Siddall had put it on the basis that he was abdicating responsibility for making the necessary findings. Ms Lanson, although confessing the difficulty to which I have referred, argued that

the judge had not found a breach on the facts (see paragraphs 4.10 to 4.12); there was no requirement upon him to set out a verbatim account of the evidence; and that he was indicating in what he said that there had been no breach, either actual or anticipatory. By his reference to the Claimant going too early, this was in reference to there being no anticipatory breach. She submitted that the grounds of appeal were met by findings of fact and that the overall conclusion could not be said to be perverse.

Discussion

18. I did not find it necessary to call upon Mr Siddall on the merits of the appeal.

19. A judgment should not be so long as to overburden the reader with unnecessary facts. The difficulty with parts of this decision is that it is so concise, by contrast, that the reader cannot know precisely what is being found and, more importantly, why. The latter problem is compounded by asking questions which are given no answer in the text.

20. Thus, in paragraph 5.4 the judge, although focusing upon the wrong question, whether there was damage, when the legal question is whether the Respondent's conduct was likely to destroy or seriously damage, did not link that finding to the test. More importantly, the judge did not decide whether there was here reasonable and proper cause. It might be that, implicitly, the judge was finding there was here a breach of the implied term, but in a case in which there were the two rival viewpoints, neither of which is clearly articulated in the decision, the judge needed to examine and address that question and set out his findings upon it.

21. By referring to the lack of intention to retire, at paragraph 5.3, and the observation that resignation and surrender of rights was a big step for him to take, it might be thought that the judge was indicating that the resignation had to be in response to something which the

employee perceived that the employer had done. That brings one to the reasoning central to that case at paragraph 5.5. The first sentence condenses three issues. First, was there a breach of contract? Without that, there could be no constructive dismissal (see **Western Excavating (ECC) Limited v Sharp** [1978] QB 761 (CA)). But was it a significant breach or one going to the root of the contract or which showed that the Respondent was no longer intending to be bound?

22. Those are all matters of necessary evaluation once there is a breach, the next question being whether it is such a breach as entitles the innocent party to decline to perform his own obligations under the contract any further.

23. The third matter is whether the resignation was responsive to that breach. When the judge said in three words, "I find not", he did not say why, unless the reason is contained in the next sentence. It appears to be, but if so, the reason chosen is not a valid or appropriate reason in law. The judge, in finding that the Claimant went too early was making an observation about the Claimant's conduct that was irrelevant to the issue he had to determine. The issue was not the timing of his resignation but (a) the reason for it and (b) if the reason was the conduct of his employer, whether that conduct amounted to a fundamental breach of contract.

24. Similarly, the observation that the employee should have stuck it out and the observation as to the likely consequence of that, was by the by. Yet the judge appears, in that paragraph, to have thought that it had a relevance to his determination. The fact that he did so is emphasised by the condensed nature of his reasoning. It is not at all clear why, having emphasised the lack of intention to retire and the major step that resignation was, the judge should then have found that the step was not taken in response to a breach.

25. It may have been that the judge intended to say that the step was responsive but that there was no breach. If so, that is not clear and indeed, at paragraph 5.2 he had ducked the issue. The approach at 5.2 is very similar to the approach taken at 4.9 quoted above, where the judge set out two rival versions of what had happened at the single most significant meeting in the chronology of events, and had simply failed to determine which was correct by observing, "Whichever version is correct ...", a finding which sits uneasily with one version of those events.

26. Paragraph 5.6 does not illuminate matters further. It is capable of being read as finding that the Claimant terminated his contract for another reason. If so, one would expect the judge to say, even concisely, what that other reason was, but he did not do so. It may be that he was referring to circumstances not entitling the Claimant to do so, in which case one would have expected some brief reasoning why the circumstances did not entitle him to do so.

27. Essentially, taken overall, this case required a finding as to which of the two rival contentions, taken broadly, was correct. The judge did not grapple with it. Ms Lanson was right, in the light of that, to have taken the realistic approach she did in recognising the difficulties in her submissions.

28. For the reasons I have given, the case is one in which the reasons were inadequate. The approach, however, was also wrong in taking into account, apparently, in paragraph 5.5, irrelevant matters in focusing upon the conduct of the Claimant rather than the conduct of the Respondent. The judge would have perhaps done well to have had regard to the clear statements of principle in the constructive dismissal field set out in the judgment of Keene LJ in **Meikle v Nottinghamshire County Council** [2005] ICR 1 CA.

Consequential order

29. It was submitted by Mr Siddall that I could and should determine that there had here been a breach of contract which was one which demonstrated an intention to abandon and altogether refuse to perform the contract. He cited the matters which I have set out earlier in this judgment as requiring any court to conclude that here there had been a breach of the implied term of trust and confidence. I do not accept that I am in a position to do so. I might have been had the facts clearly been found and established. I am not confident that they have been.

30. There is, in the bundle before me, a tranche of correspondence which I have little doubt featured in the evidence before the judge, but in respect of which no comment is made. The evidence is capable of being understood in support of either of the two essential cases which I have identified. I do not think that I either can or should determine the issue of breach for myself. That is best determined by a fact-finding tribunal which hears the evidence and evaluates the individuals and, importantly in this case, comes to some conclusions about the essential parts of the story.

Remission

31. The matter must therefore be remitted. Here again, there is a disagreement between the parties. Mr Siddall, by reference to **Sinclair, Roche and Temperley v Heard & Fellows** [2004] IRLR 763, paragraph 46, argues that proportionality (see paragraph 46.1), the flawed nature of the decision (46.4), the danger of a second bite of the cherry (46.5), argue despite Tribunal professionalism (46.6) in favour of remission to a fresh judge.

32. Ms Lanson, for her part, argues that the problems here are not essentially problems of a flawed legal approach, they are problems of insufficient expression. This is a case in which the judge, having heard the matter relatively recently will, with the benefit of his notes, be able to

determine such arguments as arise. It is not one where the evidence needs to be heard again and afresh.

33. In my view, this is a case in which I should, in my exercise of my discretion, order that the matter be heard by a fresh judge. I do so bearing in mind that the hearing is likely to be a short hearing. I am concerned by the extent of the flaws in the approach to fact-finding and analysis which this judgment has revealed in this particular case. The danger of a second bite is I think here realistic. Mr Siddall emphasised that in all his experience of this judge, he has had no and has no reason to query his dedicated and professional approach, and I am happy to accept that entirely. Nonetheless, it seems to me that in this particular case, it is one which requires a fresh rehearing with the central issues clearly in mind, and that is best performed before a different judge. Whilst acknowledging Ms Lanson's points, therefore, I find against them.

34. For those reasons, this appeal is allowed and the matter will be remitted to be heard entirely afresh on the same pleadings before a different Employment Judge.