Appeal No. UKEAT/0076/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 October 2017

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR M CHINDOVE — APPELLANT

MORRISON SUPERMARKETS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER ISAACS (of Counsel)
For the Respondent	MR PHILIP CROWE (Solicitor) Shoosmiths LLP West One 114 Wellington Street Leeds LS1 1BA

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

An Employment Tribunal failed to identify the reasons for its finding that the Appellant (the Claimant below) had affirmed his contract of employment in circumstances in which he was on sick leave, submitting sick notes and receiving sickness pay, and resigned six weeks after the date of the repudiatory breach. The matter had already been remitted to the Employment Tribunal by the Employment Appeal Tribunal following an earlier decision which had failed to give adequate reasons.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the Full Hearing of an appeal which was permitted to go ahead by an Order of His Honour Judge Peter Clark at a Rule 3(10) Hearing, which took place on 22 March 2017. I shall refer to the parties as the Claimant and the Respondent, as they were below.

2. This case has a lengthy history. I shall summarise it only to the extent necessary to deal with a very limited point which remains live following the Order made by His Honour Judge Clark at that Rule 3(10) Hearing.

3. The Claimant has hitherto been represented by a lay representative. At the Rule 3(10) Hearing he was represented by Mr Oliver Isaacs of counsel under the aegis of the ELAAS Scheme. To his great credit, Mr Isaacs has represented the Claimant here today pro bono and I am grateful to him for his careful and succinct submissions. The Respondent is represented by Mr Philip Crowe, a partner in the firm of Shoosmiths who has had conduct of this case from the outset. As such, he has a considerable knowledge of aspects of the case and its chronology which do not appear from the papers, and which proved of great use today. His skeleton arguments and oral submissions were also succinct and I express my thanks to him too.

4. The Claimant was employed by Morrison's as a warehouse operative from 2003 until his resignation in October 2011. He is black, the relevance of that being that he brought a claim alleging that he had been discriminated against and harassed on grounds of race by a fellow employee in 2010 and again in 2011. An Employment Tribunal in Liverpool chaired by Employment Judge Reed found in late 2012 that the acts complained of amounted to a repudiatory breach of contract by the Respondent. That finding has never been challenged.

A The first ET also found that the Claimant had affirmed the contract, such that he had not been constructively dismissed as he maintained.

B 5. A division of the Employment Appeal Tribunal presided over by Langstaff J (then President) held on 26 March 2014 that the first Tribunal had failed properly to deal with the affirmation point. There was a second point which was remitted, dealing with a question whether there had been a continuing act of discrimination such that the discrimination had been lodged in time.

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D 6. A second Tribunal presided over by Employment Judge Buzzard, who sat with lay members, heard the matters which had been remitted by the EAT at a series of hearings which began in November 2014 but concluded only in March 2016. A brief Judgment was sent to the parties on 31 March 2016, dismissing both claims. Full Written Reasons were sent on 31 May 2016. I shall refer to those Reasons as those of the "Buzzard Tribunal".

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F 7. In remitting the case to the ET, the EAT was critical of the lack of reasoning given by the first Tribunal in respect of both its relevant findings. At paragraphs 21 to 27, it set out the reasons for its criticism and summarised the state of the law in relation to affirmation of contract, specifically in the context of an employment relationship:

> **"21. A Tribunal is both advised and obliged as to the way in which it deals with its judgment. A Tribunal Judge is advised by guidance of the President of Employment Tribunals that the judgment should set out the issues between the parties. This judgment did not. It is a particular pity that the guidance was not followed here. The ET1 required focus. One of the helpful aspects of setting out a list of issues at the start is that the agreement of both parties, who may very well be lay people, can be secured at the start. They then know where they are, and, from our perspective, should the matter ever subsequently come to us, we know where they were and where they were not. Mr Robinson observed that, in his experience, it was almost inevitable that a Tribunal would set out the issues at the outset. We agree that that coincides with our own. The President's guidance is well recognised. It is a pity that it was not so here. If it had been, we suspect that there would have been set out as an issue whether the act was one which continued until either the date of resignation on 7 or maybe 9 September. If so, the Tribunal would have made the decisions which it simply did not.**

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22. Another aspect of that which a Tribunal is obliged to do, by rule 30(6) at the time of this decision, is to set out the necessary facts and also the law which it intends to apply. Rule 30, headed "Reasons", includes at (6) as follows:

> **"(6) Written reasons for a judgment shall include the following information -**
>
> > **(a) the issues which the tribunal or employment judge has identified as being relevant to the claim [this one did not save as could be inferred];**
> >
> > **(b) if some identified issues were not determined, what those issues were and why they were not determined; [this did not];**
> >
> > **(c) findings of fact relevant to the issues which have been determined;**
> >
> > **(d) a concise statement of the applicable law;**
> >
> > **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues …"**

23. (d) and (e) are of particular relevance when we come to consider the constructive dismissal claim. Though the Employment Judge might be excused for considering that the law of constructive dismissal is trite, it is a fact that there is nothing in the judgment which shows what principles of law he was applying in order to determine that claim. It may be inferred that the Judge had in mind he was looking for a fundamental breach of contract. It may be inferred that he thought that delay in itself could defeat a claim for constructive dismissal. And it could be inferred that he thought there was some significance in there being a "last straw". But it has to be inferred because it is not stated. The wording in paragraph 35 is particularly condensed. Brevity is a virtue. It is one which we would welcome being observed more than it is by Employment Tribunals. But it can be taken to extremes. This struck us as being if not at, then close to, that boundary.

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of *Western Excavating Ltd v Sharp* [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:

> **"Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."**

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of

> ***Buckland v Bournemouth University Higher Education Corporation*** **[2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.**
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> **27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go. All the more so, since there seems, on the short findings of fact of this Tribunal, that there was no reason other than the employer's conduct towards him for his choosing to go. We simply cannot say whether this Tribunal had in mind these necessary factors. It did not set out the law. It did not set out the facts which caused it to apply the law. It did not honour rule 30(6). It did not deal with the detailed statement which the Claimant produced in respect of his constructive dismissal though this may be unduly critical of the Tribunal's judgment. The reference to time looks as though the Tribunal simply thought that the passage of time was sufficient in itself. The decision is, effectively, unreasoned. Mr Robinson said what he could, as best he could, but acknowledged the great difficulties that lay in his way. We have no doubt that the appeal on this ground, too, has to be upheld."**

8. The Buzzard Tribunal set out its findings in relation to the issue of affirmation at paragraphs 2.2 to 2.2.6:

> **"2.2. <u>Unfair Dismissal</u>**
>
> **2.2.1. The first Tribunal found that there had been a fundamental breach of the claimant's contract of employment, which ended on 7th September 2011. The finding was not disturbed by the EAT. This breach arose from the same '*mistreatment*' which the claimant argues was a continuation of the discrimination.**
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> **2.2.2. The first Tribunal found that nothing after the 7th September 2011 constituted any part of any breach of the claimant's contract of employment which he had relied on in his claim that of unfair constructive dismissal.**
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> **2.2.3. The issue remitted to this Tribunal is whether the claimant affirmed his contract of employment after 7 September 2011. The first Tribunal found that the claimant had affirmed his contract, a finding which appeared from their reasons to be based solely on the [length] of time that elapsed before the claimant resigned.**
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> **2.2.4. The guidance given by the EAT, in upholding the claimant's appeal on this point, is clear. The effluxion of time, although relevant, is not enough, on its own, to amount to an affirmation of contract.**
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> **2.2.5. The determination of the question of affirmation is one of fact for a Tribunal. In *Bournemouth University Higher Education Corporation v Buckland* [[2010] ICR 908 CA], Lord Justice Jacob gave guidance that given the pressure on the employee whose contract has been fundamentally breached by their employer, the law looks very carefully at the facts before deciding whether there really has been an affirmation. In [*Cantor Fitzgerald International v Bird and ors* [2002] IRLR 867 QBD], Mr Justice McCombe described affirmation as "*essentially the legal embodiment of the everyday concept of 'letting bygones be bygones'*".**

2.2.6. In the present case the evidence regarding the circumstances, actions and omissions of all those involved between 7th September 2011 and the claimant's resignation on 18th October 2011 must be taken into account. Based on this evidence the question of affirmation must be determined."

9. Its finding of fact in relation to this issue appears at paragraphs 5.6 to 5.13:

"5.6. <u>Findings relating to the claimant's Unfair constructive Dismissal claim</u>

5.6.1. This only remaining issue in this claim is if the claimant affirmed his contract of employment between 7th September 2011 and 18th October 2011 when he resigned.

5.6.2. This is a period of around six weeks. During this period the claimant was off sick. He was submitting sick notes and he accepted sick. These facts are not in dispute. They are not, however, decisive factors in determining if the claimant affirmed his contract.

5.6.3. The claimant's further and better particulars clearly state, referring to the time after 7th September 2011:

I spoke to the new General Manager who sympathised with me very much and indicated she was keen to have me back at work, to be honest I was very delighted at her approach and meant it when I said to her I would certainly return to work when my health improved and of course after the sanitisation of the work environment.

5.7. These further and better particulars were prepared by the claimant with the advice and assistance of his representative. The claimant's case was that this comment about his potential return to work was conditional upon his work environment being "*sanitised*".

5.8. Elsewhere within the documents before the Tribunal the claimant referred to '*drawing a line in the sand*' suggested that '*resigning would be jumping the gun*'.

5.9. The claimant's trade union representative presented evidence on the claimant's behalf relevant to this issue, which was not challenged. He had been unable to attend the 7th September 2011 meeting with the claimant, who was accompanied by another trade union representative on that date. The replacement representative did, however, telephone the claimant's main trade union representative on the 7th September 2011 for advice. During that phone call he was informed that the claimant was thinking about resigning. His evidence was that there followed a conversation the outcome of which was that the claimant chose not to resign.

5.10. It is noted that all the events that occurred after the 7th September 2011, in particular a letter that was sent to the claimant around 11th October 2011, have been found not to amount to mistreatment in any way at all. This finding was not disturbed by the EAT.

5.11. Considering the claimant's six week delay before resigning, the claimant's comments, his further and better particulars, his actions in claiming sick pay and his submission of sick notes, it is clear that the claimant did, positively, affirm his contract of employment.

5.12. Mr Nyati made submissions that the claimant chose to resign when he did because that was when he exhausted his sick pay entitlement, and he would, thereafter, [be] better off on benefits. This submission was not related to any evidence presented, and did not follow any argument or suggestion previously made. For this reason it was disregarded. However, if true, it would suggest that the claimant resigned for a reason other than the respondent's delay, namely to obtain access to benefits. This would be consistent with a finding that he had affirmed his contract.

5.13. Given the finding that the claimant affirmed his contract, his resignation cannot be a dismissal. Accordingly, not being dismissed his claim of unfair dismissal must fail."

10. On behalf of the Claimant it is submitted that the reasons do not grapple with the law as expanded by the EAT on remitting the matter back. First, the issue of leave, sick pay and the submissions of sick notes are set out as a set of facts not in dispute. The comment "*They are not, however, decisive factors in determining if the claimant affirmed his contract*" (paragraph 5.6.2) is said to infer that they are, nonetheless, positive factors pointing in the direction of affirmation.

11. The case of **W E Cox Toner (International Ltd) v Crook** [1981] IRLR 443, the leading authority on the question of affirmation of contract, makes clear (see paragraph 13) that mere delay by itself does not constitute affirmation, but if it is prolonged it may be evidence of implied affirmation.

12. Paragraph 5.6.3, it is said, on the Claimant's behalf, makes reference to a document which was produced considerably after his resignation in the course of the litigation and was written by his lay representative. It has argued that, in any event, the conditional nature of the comment referring to a return "*after the sanitisation*" of the workplace can only fairly be taken as a factor pointing against affirmation.

13. I also note that although paragraph 5.6.3 refers to this as being a reference to the time after 7 September 2011, that is not what the relevant passage of the document says (paragraph 153, page 79 of the bundle) "*There is a time after the 2nd of September*"; therefore, 2 September, not the 7th.

14. The comments at paragraph 5.8 - referring to drawing a line in the sand and resigning would be jumping the gun - are said on the Claimant's behalf to be matters which are, at best,

neutral but, on one view, point against affirmation. The relevance and what the Tribunal drew from the comments are left unexplained.

15. Paragraph 5.9, it said was a statement by the Claimant to his union representative. Self-evidently, the Claimant subsequently changed his mind. A statement to a trade union representative at an early stage, not communicated to the employer and clearly not representing the eventual outcome, should not, it is argued, have any weight.

16. Paragraph 5.10 is simply irrelevant to a relevant question which the Tribunal had to ask itself. Finally, paragraph 5.11, it is said, simply aggregated the points raised with no attempt to separate them, analyse them or point to the Tribunal's view of each of them. It is impossible to know why they formed the view that they did.

The Respondent's Submissions

17. Mr Crowe had the great advantage of having been present at all stages of the hearing, which plainly was beset by difficulties. It is evident that he made submissions of law to the Buzzard Tribunal, which seem not to have found their way into the Decision. His submissions today boiled down to this: whilst it did not produce a lengthy exposition of the law, the Buzzard Tribunal set itself the correct test. It referred to the cases of **Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908 and **Cantor Fitzgerald International v Bird** [2002] IRLR 867, which themselves made reference to the **W E Cox Toner** case. Whilst brief, he argues, the findings of fact were findings which were open to the Tribunal on the evidence and their decision should be upheld.

Conclusions

18. It seems to me unarguable that the Tribunal's agglomeration of the six weeks' delay during which the Claimant was on sick leave, his receipt of sick pay and submission of sick notes, together with comments and a document prepared long after the event and further un-particularised comments, was a clear error of law. Each of those matters could have been a factor pointing towards affirmation, against it, or simply neutral. The Buzzard Tribunal simply failed to set out how it viewed each of those factors and why.

19. In an EAT Judgment remitting the matter, the then-President - Langstaff J - commented that it seemed to the EAT that six weeks for an employee who had worked in the steady job for a large company for eight or nine years is a very short time in which to infer from his conduct that he had decided to exercise his right to go. That was, of course, not to suggest that the ET hearing of the matter should find in a similar way; but one might have expected that, particularly given the criticism of the first Tribunal, the Buzzard Tribunal would have separated each of the factors which they found relevant to their decision, explained whether they found that a negative, neutral or positive act so far as affirmation is concerned, and then carry out a balancing exercise explaining the conclusion that they reached. It is simply not possible to glean from the decision the thought process leading to the conclusions.

20. I have considered whether this is a case which I could resolve myself; see **Jafri v Lincoln College** [2014] IRLR 544. I had in mind the comments of His Honour Judge Peter Clark at the Rule 3(10) Hearing when he said:

> **"11. … The question in the context of the present case is perhaps this: did the Claimant's conditional desire to return to work make it clear that he was reserving his rights in relation to the earlier repudiation as found? If so, it is difficult to see that this is a case in which it can properly be found as a matter of law that he affirmed the contract."**

A Despite this, it does seem to me that it remains possible for an ET to find, on a proper analysis of the evidence, that the Claimant did affirm the contract.

B 21. I would recommend that the ET to which this case is remitted study carefully the comments of Langstaff J in the passages which I have set out above when considering the task before it.

C 22. I do not need to deal with the issue of perversity in light of my conclusion set out above. Accordingly I must remit this matter to the ET.

D 23. In so doing, I have to have regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. It seems to me that precisely the same considerations are in play as was the case when the matter was before Langstaff J. As the ET made its ultimate findings in an unequivocal way but, for reasons which are not apparent, it seems to me that the matter should be dealt with by a new Tribunal. Even if I were wrong to draw that conclusion, it seems to me that, given the lapse of time and the potential difficulties in assembling the same Tribunal members, it would in any event, on balance, be better that a different Tribunal determine the case.

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G 24. It is with considerable regret that this matter will inevitably, as a consequence of this Judgment, grind on further. I would urge the parties to give consideration to a settlement of the matter to avoid that.

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