Appeal No. UKEAT/0142/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 October 2017
Judgment handed down on 21 November 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR L RAWLINSON — APPELLANT

BRIGHTSIDE GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LARRY RAWLINSON (The Appellant in Person)
For the Respondent	MR STEPHEN WYETH (of Counsel) Instructed by: Shoosmiths LLP Russell House 1550 Parkway Solent Business Park Whiteley Fareham PO15 7AG

SUMMARY

CONTRACT OF EMPLOYMENT - Notice and pay in lieu

Notice and pay in lieu - breach of the implied term of trust and confidence - application of the ***Johnson*** *exclusion zone*

The Respondent had determined to dismiss the Claimant due to concerns regarding his performance. To "soften the blow" for the Claimant, who the Respondent wanted to work through his three month notice period to ensure a smooth handover of work, the Respondent did not tell him the real reason for its decision but told him there was to be a re-organisation of his work, which would be carried out by an external service provider. The Claimant thought this was a service provision change under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") and that the Respondent had acted in breach of its information and consultation obligations. He duly resigned, claiming (relevantly) he had been constructively dismissed. In rejecting the Claimant's claim for damages for his notice period, the ET found the Respondent had not breached the implied obligation not to act in such a way as would be likely to destroy or seriously damage the relationship of trust and confidence ("the implied term"); it further considered that the Claimant's complaint really related to the manner of his dismissal. The Claimant appealed.

Held: *allowing the appeal*

In considering whether there had been a breach of the implied term, the ET had erred in approaching this by only considering the absence of a duty to tell an employee of the reason for dismissal and/or to dismiss in good faith in general terms. It had failed to consider the position where, as here, the Respondent had chosen to give a reason for the dismissal to the Claimant. That had - pursuant to the implied term - given rise to an obligation not to mislead the Claimant. Moreover, it was incorrect to characterise the Claimant's complaint as relating to the manner of his dismissal. Although an employee could not claim common law damages

allegedly suffered as a result of the manner of a dismissal (see **Johnson v Unisys Ltd** [2001] IRLR 279 HL), this was a case where the complaint was in respect of financial loss suffered as a result of the Respondent's breach of the implied term that preceded and stood apart from the dismissal; indeed, it arose at a time when the employment relationship was intended to continue (**Eastwood and Anor v Magnox Electric plc, McCabe v Cornwall County Council** [2004] IRLR 733 HL applied).

In the circumstances, the ET's dismissal of the Claimant's notice pay complaint would be set aside and a decision substituted that this claim was to be upheld. If the parties were unable to agree remedy, that question would need to be remitted to the ET.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns a claim for damages for loss of notice pay, in circumstances in which it is said that the employer acted in breach of the implied obligation to maintain trust and confidence by giving a misleading reason for the employee's dismissal; the appeal further raises a question as to the scope of what is called the "**Johnson** exclusion zone" (**Johnson v Unisys Ltd** [2001] IRLR 279 HL).

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Reserved Judgment of the Bristol Employment Tribunal (Employment Judge Harper, sitting with members Mrs Meehan and Ms Cusack on 24 June 2016; "the ET"), by which it dismissed his claims for compensation for breaches of the information and consultation requirements under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") and the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") and for constructive wrongful dismissal, but upheld the Respondent Employer's contract claim. Both parties were represented by counsel below but the Claimant appears in person on this appeal.

3. The Claimant's appeal was initially considered on the papers, by The Honourable Mrs Justice Simler DBE (President), to disclose no reasonable basis to proceed. After exercising his right to an oral hearing under Rule 3(10) **EAT Rules 1993**, the Claimant's appeal was permitted to proceed to a Full Hearing by His Honour Judge Hand QC, on the question whether, notwithstanding the ET's finding that he had resigned his employment for the wrong reason (his mistaken belief that **TUPE** applied and the Respondent was in breach of its information and

consultation obligations thereunder), there was in fact a good reason (the Respondent's breach of the implied obligation to maintain trust and confidence) on which the Claimant might rely to claim that he had been constructively wrongfully dismissed.

The Background

4. The Respondent is an insurance broking business. As from 1 December 2014, it employed the Claimant as its Group Legal Counsel, pursuant to a contract which provided for a three month notice period. Prior to the Claimant's employment, the Respondent had no in-house Group Legal Counsel and used the services of various firms, depending on the nature of the advice needed. When the Claimant started, he was responsible for providing and managing legal advice to the group on a broad range of commercial, contractual and general corporate matters, albeit external firms of solicitors continued to be used as and when required.

5. At the time of the Claimant's appointment, the Chief Executive Officer of the Respondent was a Mr Williams. Mr Williams was, however, dismissed on 2 December 2014; he was replaced from the beginning of January 2015 by Mr Wallin.

6. From early on Mr Wallin had concerns regarding the Claimant's capabilities. The Claimant was aware that the Respondent considered certain matters needed to be addressed but detailed concerns were not raised with him. In March 2015, the Respondent's Group Risk Director and Company Secretary, Mr Johnston - who was also the Claimant's line manager - emailed various colleagues for feedback on the Claimant and communicated that to him on 25 March 2015. On 31 March 2015, however, the Claimant had a meeting with Mr Wallin and on 2 April, Mr Wallin emailed Mr Johnston advising that they needed to speak about the Claimant's future. He identified what he described as three "red card" mistakes and advised

that, in his view, the Claimant's position was untenable. Shortly after this, it was determined that the Claimant's employment should be terminated because of his performance and, on or about 5 April 2015, the Respondent began to investigate how it would deal with its legal services requirements after the Claimant's employment was ended; the need to replace the legal services supplied by the Claimant arising from the decision that he should be dismissed.

7. On 8 April 2015, Mr Johnston obtained advice from Human Resources as to the Claimant's notice entitlement; it was the Respondent's intention that in due course the Claimant would be given his contractual three months' notice, be required to work his notice period and conduct a hand over of his work to his successor during that period.

8. On 14 April, the Claimant attended another meeting with Mr Johnston but was still not advised of the Respondent's intention that he should be dismissed. During that meeting, the Claimant asked whether any further feedback had been received about him and was told it had not; Mr Johnston said nothing about the further "feedback" received from Mr Wallin.

9. By 5 May, nothing had been communicated to the Claimant and Mr Wallin was frustrated that little progress had been made in terms of contingency plans. He communicated his concerns to Mr Johnston and sought urgent action. Mr Johnston responded by dismissing the Claimant at the end of their next scheduled meeting on 14 May 2015, informing him that the Respondent had reviewed its approach to managing its legal service requirements, had taken feedback from stakeholders and concluded that the current arrangements were not working, so wanted to take a different approach. He advised that the legal services function would change through reporting lines from the Chief Reporting Officer to the Chief Executive Officer and the Respondent would utilise more external legal expertise. The Claimant was told he was being

given three months' notice and his dismissal would be confirmed in writing. He was not told that he was being dismissed due to concerns regarding his performance. That was a deliberate decision by the Respondent; as the ET records:

> **"23. … Although Mr Wallin, Mr Johnston and Mrs Banks [the Respondent's HR People Officer] were clear that the reason for terminating his contract was performance Mr Wallin in discussion with Mr Johnston, directed that to soften the blow, the claimant would be told that the reason for his dismissal was a review of legal services and not solely his performance. As an industrial jury we are fully aware that in many similar situations employers give employees an incorrect reason for terminating their employment to make the news more palatable."**

10. The Claimant was shocked by what Mr Johnston had told him and his immediate reaction was that if the Respondent was going to outsource legal services this would be a relevant transfer and he would be covered by **TUPE**. Duly informing Mr Johnston of this view, the Claimant asked when the services were to be outsourced and to whom; Mr Johnston declined to comment. In response, the Claimant said he considered the Respondent was acting in breach of contract and he would therefore not work his notice. He took a day's leave and then, on 15 May, emailed Mr Johnson summarising the meeting and indicating he would collect the letter of confirmation of his dismissal and the reasons for it; in response Mr Johnston invited the Claimant to a meeting on 18 May.

11. On 18 May, however, the Claimant emailed Mr Johnston declining to meet until he had a letter confirming his dismissal and the reasons for it and the identity of the transferee. He expressed his view that the Respondent was in breach of contract and that he was resigning in response to the Respondent's conduct in relation to advising him that his employment was terminated because there was a **TUPE** transfer, which the Claimant said he considered to amount to automatic unfair dismissal. Thereafter, in further email correspondence, the Claimant made clear his belief that **TUPE** applied and the Respondent was in breach of the information and consultation obligations thereunder.

12. Following the Claimant's email of 18 May, the Respondent had initially threatened him with disciplinary proceedings but it was subsequently agreed that his employment had terminated as of 18 May 2015.

13. By 4 June, the Respondent had determined to refer any commercial contract work to a particular firm of solicitors, albeit no retainer was put in place and the Respondent continued to use preferred firms as and when required. The ET was, in any event, satisfied that the Claimant was not dismissed due to redundancy and, although there were some redundancy dismissals around this time, at no point did the Respondent propose to terminate the employment of 20 or more employees by reason of redundancy.

14. It was only after his employment had terminated that the Claimant began to learn, through disclosure from the Respondent under a subject access request, of the real reason for the termination of his employment.

The Claims before the ET and the ET's Conclusions and Reasoning

15. The Claimant had pursued claims before the ET, pursuant to regulations 13, 15 and 16 **TUPE**, for breaches of the duty to inform and consult on a service provision change, and, under sections 188 and 189 **TULRCA**, for breach of the consultation requirements on a collective redundancy. He also claimed damages for constructive wrongful dismissal, contending he resigned in response to a fundamental breach of contract, namely the implied obligation to maintain trust and confidence. The Respondent denied the claims and lodged its own contract claim, in respect of a £1,046.36 overpayment made to the Claimant after his resignation had taken effect and he was no longer working.

16. The ET rejected the Claimant's **TUPE** claims, finding there was no relevant transfer. It also rejected the claim under **TULRCA**, the Claimant had not been dismissed for redundancy but performance. As for the breach of contract claim, the ET found as a fact that the reason the Claimant had resigned was because he genuinely believed, from the information he was given, that **TUPE** applied and that the Respondent, in failing to inform and consult him, was acting in breach of contract. The ET, however, observed:

> **"38. … There was no obligation on the respondent to give him a reason for the termination of employment. It provided him with the contractual notice to which he was entitled namely three months. It was not required by law to give him feedback that existed and it was not required to forewarn him of its intention to dismiss him."**

17. The ET found that the Claimant had acted prematurely:

> **"39. … Had a period of reflection taken place the claimant might have understood, in due course, that there was no service provision change contemplated which amounted to a TUPE transfer. … Unfortunately, it was the explanation given to him by Mr Johnston that sowed the seeds for his misunderstanding at the time. It pointed him towards the direction that TUPE might arise."**

18. The ET considered the Claimant's complaint was really about the manner of his dismissal:

> **"40. His complaint is, essentially, in relation to the manner of dismissal. Although the claimant now seeks to rely on an earlier alleged breach of the implied term of mutual trust and confidence, namely, the meeting of 14 April and what he was told and the failure to disclose to him feedback received, we find that this was not the reason for his resignation. Neither were any of the earlier matters … contributory reasons for his resignation."**

19. As to whether the Respondent's failure to disclose feedback about the Claimant, or to forewarn him of any performance concerns and the potential of dismissal, amounted to a breach of the implied obligation to maintain trust and confidence, the ET concluded:

> **"41. … In this particular set of circumstances we conclude that although the claimant genuinely, and with some cause, considered that he was unfairly treated, the respondent had no legal obligation to provide the information to him. Well before the 14 April it had decided that it was going to terminate his employment for performance reasons. Its only obligation was to give him his contractual notice which it provided in due course. We find that nothing in the way that the respondent conducted itself can amount to a breach of the implied term of mutual trust and confidence. …"**

20. That being so, the ET rejected the Claimant's complaint of wrongful dismissal. Moreover, as the Claimant was not entitled to resign and treat himself as dismissed, he had been in breach of contract in refusing to work his notice and the Respondent was entitled to reclaim the overpayment of £1,046.36 for days not worked.

The Appeal

21. At the hearing of the Claimant's application under Rule 3(10) **EAT Rules 1993**, HHJ Hand QC identified the point at the heart of this case as being that the Claimant had "*resigned for the wrong reason*", he "*was not told the right reason*"; HHJ Hand QC observed:

> **"13. … This, the Employment Tribunal seems to have thought, was perfectly acceptable, but their decision at paragraph 41 of the Reasons … seems to me to confuse two things: the obligation to give information and the obligation - whether one describes it as arising from an implied duty of good faith or from the implied term as to mutual trust and confidence or whether these are the same thing - not to mislead or misinform the employee."**

22. HHJ Hand QC considered it was arguable that the conduct of the Respondent in suggesting that the Claimant was to be dismissed because of a reorganisation - a completely untrue statement - was a breach of the implied term. The Claimant had not resigned in response to the Respondent having lied to him - he did not know of it - but that had provided him with a good reason for resigning and treating himself as dismissed, by analogy with the approach taken in **Boston Deep Sea Fishing v Ansell** [1888] 39 ChD 339 (pages 352 and 364) and **Denmark Productions Ltd v Boscobel Productions Ltd** [1969] 1 QB 699 (page 772). On that basis, the appeal was permitted to proceed to a Full Hearing.

Submissions

The Claimant's Case

23. The Claimant sought to develop this reasoning in his arguments at the Full Hearing. He had been complaining of a course of conduct; that had culminated in his dismissal but the real

issue arose from the Respondent's decision to terminate his employment for performance reasons but to give a misleading explanation as to its reason. The Claimant stressed he was not saying the Respondent had been required to give him a reason for his dismissal (for the purposes of his common law claim, it was not) but when it elected to provide a reason, it was obliged to be honest (see the decision of the Supreme Court of Canada in **Bhasin v Hrynew** [2014] 3 SCR 494, where it was held there was a general duty of honesty in contractual performance). At the least, under domestic law, this was properly to be characterised as a duty to act in good faith or not to mislead an employee, and the breach arose when the prescribed conduct occurred (**Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462 HL); here, there had been a plan not to explain the accurate reason for the dismissal quite early on (albeit the Claimant had not known that at the time and only learned of the real reason for his dismissal after he had left his employment). The Claimant had, however, accepted what he had been told at the time (that there was to be an outsourcing of legal services) and that had led to his belief that his rights under **TUPE** were not being respected.

24. The ET had a duty to look at all the circumstances (again, see **Malik**) but had wrongly focused on whether the Claimant had a right to be told the real reason for his dismissal and thereby failed to have regard to the fact he had been lied to or misled, and it was this feature of the case that distinguished it from **Johnson v Unisys Ltd** [2001] IRLR 279 HL. The Claimant's cause of action had accrued when he was lied to on 14 April and the Respondent had then continued the lie, deliberately engaging in a course of conduct designed to keep the Claimant in place until his replacement had been found. Although the Claimant had not left because of the lie (he did not then know he was being given a false reason for his dismissal) that was not fatal, he could still rely on the Respondent's conduct as justifying his resignation, regardless of his reason for resigning at the time (see **Tullett Prebon plc and Ors v BGC**

Brokers LP and Ors [2010] IRLR 648 QBD at paragraphs 77 to 80 and **Boston Deep Sea Fishing v Ansell** [1889] 39 ChD 339). As, however, the breach he was relying on arose prior to his dismissal - it was an antecedent breach - his claim did not fall within the "**Johnson** exclusion zone" (see **Eastwood and Anor v Magnox Electric plc, McCabe v Cornwall County Council** [2004] IRLR 733 HL)

25. The loss caused by the Respondent's breach of contract in this case was the Claimant's loss of the balance of his notice pay. Should the appeal be allowed but the matter remitted to the ET, it should be to a different ET: it was the error of the previous ET had led to the current appeal; moreover, the ET had already declined to review its decision.

The Respondent's Case

26. The issue for the EAT was whether the ET had erred in law. Here the ET had been concerned with a claim of constructive wrongful dismissal; there were two issues: (1) whether the Respondent had acted in repudiatory breach of contract? (2) If so, was the Claimant entitled to rely on that breach in his wrongful dismissal claim?

27. Addressing the first of those questions, the Claimant had not been aware of the breach relied on at the relevant time but it was accepted that was not determinative; the test was an objective one (see **Malik**). In determining whether there had been a breach of the implied term of trust and confidence, the ET needed to look at all the circumstances (**Malik**); ultimately the question was a factual one for the ET and it had been entitled to look, objectively, at what had been the Respondent's intention (to protect and retain the relationship of trust and confidence), see **Tullet Prebon plc and Ors v BGC Brokers LP and Ors** [2011] IRLR 420 CA).

28. Even if the Respondent's conduct had amounted to an antecedent breach of the implied term, the second question was fatal for the Claimant: his claim could not overcome the clear line of authority, making clear there was no common law right not to be unfairly dismissed (see **Johnson** and **Eastwood and Anor v Magnox Electric plc, McCabe v Cornwall County Council** [2004] IRLR 733 HL). Here the Respondent's conduct was inextricably linked to the decision to dismiss and thus fell within the "**Johnson** exclusion zone". The Claimant was really saying he had a contractual right to be dismissed fairly and told the true reason for his dismissal but there was no such right.

29. Turning to causation, although the Respondent was not saying it was fatal that the Claimant did not know of the breach he now alleged, he did have to show that his loss was caused by the breach, whereas the ET had found that the reason for the Claimant's resignation (his belief that there was an obligation owed to him under **TUPE**) was not the reason he now sought to rely on (see **Nottinghamshire County Council v Meikle** [2004] IRLR 703 CA).

The Relevant Legal Principles and Approach

30. It is common ground that implied into the Claimant's contract of employment was a term that required the Respondent, absent reasonable and proper cause, to conduct itself in a manner not calculated or likely to destroy or seriously damage the relationship of trust and confidence that is necessary between employer and employee ("the implied term"), see **Malik v BCCI** [1997] IRLR 462. An employer's breach of the implied term can entitle an employee to claim that they have been constructively dismissed and thus pursue a complaint of unfair or wrongful dismissal. The present case is concerned with the latter possibility: the Claimant's complaint that he was constructively wrongfully dismissed as a result of the Respondent's breach of the implied term.

31. Here, the Claimant did not leave in response to the breach of the implied term of which he now complains. It is, however, accepted that need not be fatal to his claim for damages: the Claimant would be entitled to rely on a repudiatory breach by the Respondent even if that had not been the reason he had left his employment at the time. As it was put by Jack J at first instance in **Tullett Prebon plc and Ors v BGC Brokers LP and Ors** [2010] IRLR 648 QBD:

> **"79. … This is an application of the general principle that a party who refuses to perform a contract, giving a wrong or inadequate reason, may subsequently justify his refusal if there were facts in existence at the time of the refusal which would have provided a good reason for it. … Turning to the situation with which I am concerned, the converse of that in *Boston Deep Sea Fishing*, it follows that an employee may justify his refusal to perform his contract of employment by any grounds which existed at the time of his leaving. So, if he simply walks out without apparent justification, but later discovers that his employer was fraudulently deducting from his pay on account of tax more money than he should, his employer would fail in any action brought against him, whether for damages or for an injunction to restrain him on the basis that the employment was continuing. Likewise, taking some of the facts in *Malik*, if the employees had left to work for another bank before they were free to do so, and BCCI had sought to restrain them from doing so, it would have defeated BCCI's claim for the employees to show that the bank was run in a dishonest and corrupt manner even though the employees did not know that when they left."**

32. The Claimant does not seek to suggest that the implied term gave him a right to be afforded a fair procedure for his dismissal or even to be told the real reason why he was being dismissed; he contends, however, that there was a duty on the Respondent to be honest or, at least, not to mislead him: if it decided to provide him with a reason for his dismissal then it would be a breach of the implied term if it then lied as to the real reason.

33. To the extent the Claimant contends that the implied term imports an obligation upon an employer to act in good faith and not to mislead, that seems to me uncontroversial in so far as it relates to a continuing employment relationship (see **Malik**; **Eastwood and Anor v Magnox Electric plc, McCabe v Cornwall County Council** [2004] IRLR 733 HL; and first instance decisions such as **Cantor Fitzgerald International v Bird** [2002] IRLR 867 QBD). As to whether there has been a breach of the implied term, that will always be a highly context-specific question to be answered objectively by the ET as the first instance tribunal, looking at all the circumstances objectively and asking - from the perspective of the reasonable person, in

A the position of the innocent party - whether the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract, see **Tullett Prebon plc and Ors v BGC Brokers LP and Ors** [2011] IRLR 420 CA. In **Tullett Prebon**, the context was distinguished from that of **Malik**: in **Malik**, the breach had not arisen from the way in which the employer had treated its employees but from the way it conducted its business; in **Tullett**, on the other hand, the objectively assessed intention of the alleged contract-breaker towards the employees had been of paramount importance (see per Maurice Kay LJ at paragraph 26).

34. The further question arising in this case is, however, whether the Claimant's complaint arose from the breach of the implied term during his employment or whether it is properly to be understood as relating to his dismissal. The significance of the point arises from what is known as the "**Johnson** exclusion zone", the reference being to the case of **Johnson v Unisys Ltd** [2001] IRLR 279 HL, in which a claim for damages allegedly suffered as a result of the manner in which the employee had been dismissed was struck out as disclosing no cause of action at common law: the implied term importing no common law obligation upon an employer to exercise a contractual right to dismiss fairly or in good faith. Further definition has since been provided, in terms of identifying the boundaries of the "**Johnson** exclusion zone", in the combined appeals in **Eastwood and Anor v Magnox Electric plc, McCabe v Cornwall County Council** [2004] IRLR 733 HL, in which Lord Nicholls observed:

> **"27. *The boundary line***
>
> **Identifying the boundary of the '*Johnson* exclusion area' … is comparatively straightforward. The statutory code provides remedies for infringement of the statutory right not to be *dismissed* unfairly. An employee's remedy for unfair dismissal, whether actual or constructive, is the remedy provided by statute. If before his dismissal, whether actual or constructive, an employee has acquired a cause of action at law, for breach of contract or otherwise, that cause of action remains unimpaired by his subsequent unfair dismissal and the statutory rights flowing therefrom. By definition, in law such a cause of action exists independently of the dismissal.**
>
> **28. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal does not of itself cause the employee financial loss. The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area.**

> **29. Exceptionally this is not so. Exceptionally, financial loss may flow directly from the employer's failure to act fairly when taking steps leading to dismissal. Financial loss flowing from suspension is an instance. Another instance is cases such as those before the House, when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. …**
>
> **…**
>
> **31. … the existence of this boundary line means that in some cases a continuing course of conduct, typically a disciplinary process followed by a dismissal, may have to be chopped artificially into separate pieces. In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the *Johnson* exclusion area, the loss flowing from the dismissal itself is within that area. …"**

35. The Respondent also raises the question whether the Claimant's loss (the loss of pay over the notice period he would otherwise have worked) can be said to have been caused by the breach he now seeks to rely on, accepting that the breach in question need not have been the only reason why the Claimant resigned from his employment without working his notice period, see **Nottinghamshire County Council v Meikle** [2004] IRLR 703 CA.

Discussion and Conclusions

36. The first obstacle for the Claimant arises from the ET's finding that the Respondent did not act in breach of the implied term (paragraph 41, ET Reasons). The Claimant does not seek to suggest the implied term meant the Respondent was under an obligation to forewarn him of his dismissal or to tell him why he was being dismissed; he does, however, object that the Respondent was under an obligation not to mislead: once it had chosen to provide him with a reason for his dismissal, it was incumbent upon the Respondent not to give an untrue reason. He complains that the ET failed to consider the Respondent's conduct in this light; limiting its assessment to a context in which there was no obligation rather than one in which an obligation had been assumed.

37. There is a difficulty for the Claimant's argument in that the ET did not characterise the Respondent's conduct as wholly negative. It saw the decision not to tell the Claimant the true reason for his dismissal in context: the Respondent had determined to "*soften the blow*", an approach the ET, as industrial jury, was familiar with (many employers choosing to give an incorrect reason for a dismissal to make the news "*more palatable*"). That said, the Respondent's decision was not entirely altruistic; after all, it wanted to keep the Claimant in its employment for his notice period so it could organise his replacement and allow for an orderly hand-over. Indeed, for the Respondent it is this that can thus be seen as consistent with an intention to maintain the Claimant's trust and confidence: it wanted the relationship to continue for the notice period, it was not seeking to abandon the contract altogether.

38. For my part I agree with the Claimant: in all but the most unusual of cases, the implied term must import an obligation not to deliberately mislead - after all, how can there be trust and confidence between employer and employee if one party has positively determined to mislead the other? That does not mean an employer is necessarily placed under some broader obligation to volunteer information, but where a choice has been made to do so, the implied term must require that it is done in good faith. And, even if I allow that there may be particular cases in which the operation of the implied term would permit some element of deceit (the white lie that serves some more benign purpose), I cannot see how that was so in this instance. More particularly, I accept the Claimant's point that in this case the ET's decision fails to demonstrate it had regard to this relevant aspect of the context: that is, the Respondent's decision to provide the Claimant with a reason for its action and the obligation that then arose as a result of the operation of the implied term.

39. That, however, is not the only difficulty for the Claimant. The ET apparently concluded that his was a complaint "*essentially, in relation to the manner of dismissal*" (ET, paragraph 40). Although the ET did not expressly refer to the "**Johnson** exclusion zone", given that finding the Claimant has to further address the ET's characterisation of his case as one that fell the wrong side of the **Johnson** boundary.

40. On this issue, I do not think the answer is as straightforward as either party suggests. Given the ET's findings, I do not consider the Claimant can simply rely on there having been an antecedent breach arising from the Respondent's earlier failure to inform him of Mr Wallin's feedback and the further performance concerns. More specifically, the ET was clear: there was nothing the Respondent did before communicating the fact of his dismissal to the Claimant that contributed to his decision to resign (see paragraph 40 of the Reasons); put simply, he suffered no loss as a result of the failure to tell him about Mr Wallin's feedback on 14 April or any other failure to volunteer the decision that had been taken, or the reasons for it, prior to 14 May 2015.

41. Equally, however, I do not agree with the Respondent that it is right to simply characterise the Claimant's claim as one that assumes that, as a matter of common law, the power of dismissal must be exercised fairly and in good faith. The complaint is specifically directed at the Respondent's deception on 14 May 2015, which led the Claimant to resign from his employment a few days later.

42. As was recognised in **Eastwood** (see paragraph 28), if an employee suffers loss as a result of an employer's breach of the implied term in the steps leading to a dismissal, they have a common law cause of action that precedes, and is independent of, the subsequent termination of their employment. In this case, the conduct of which the Claimant complains was the

communication of a reason for his dismissal that was untrue. Normally that would give rise to no loss of itself: the employee would only suffer loss at the point when the dismissal came into effect. On the particular facts of this case, however, the Claimant's response to the false reason was to walk out, giving rise to a loss of earnings over the notice period. In these circumstances, I consider the Claimant is correct: he suffered a financial loss as a result of a breach of the implied term that preceded and stood apart from his dismissal.

43. The correct characterisation of the case becomes clearer in all respects when one considers what the Respondent's conduct was intended to achieve. Here, the decision to tell the Claimant a false reason for why his employment was to be terminated was not so as to give effect to his dismissal but was intended (on the Respondent's own case) to ensure the relationship would continue for the notice period. Viewed objectively, by thus misleading the Claimant, the Respondent was demonstrating an intention to abandon and altogether refuse to meet its obligations under the implied term. It was doing so, not as part of its dismissal of the Claimant, but, on the contrary, as part of its attempt to keep the employment relationship alive during the notice period. The Claimant's complaint is thus not to be characterised as relating to the manner of his dismissal but to the way in which the Respondent breached the implied term at a time when the employment relationship was intended to continue.

44. In those circumstances, I consider the Claimant is correct that the ET erred both in its failure to find that the Respondent had acted in breach of the implied term and in its characterisation of the complaint as relating to the manner of the Claimant's dismissal. The ET erred in failing to see that, by deciding to give the Claimant a reason for the termination of his employment, the Respondent had assumed an obligation not to mislead - an obligation it then breached. The ET further erred in failing to see that the complaint did not relate to the

dismissal but to the falsehood told to the Claimant with a view to keeping the relationship alive for the notice period. I therefore allow the appeal and set aside the ET's dismissal of the Claimant's claim for damages for notice pay, substituting my own finding that his claim succeeds.

45. Without prejudice to any consequential applications that might arise in respect of this Judgment, I direct the parties to agree the precise terms of the order for disposal (which should include the amount of any award to be made to the Claimant) within seven days from the date this Judgment is handed down. If the parties are unable to reach agreement as to the level of award due to the Claimant, the question of remedy will need to be remitted to the ET.