Appeal No. UKEATS/0014/16/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 8 August 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

PENTLAND MOTOR COMPANY LIMITED — APPELLANT

MR DONALD McKENZIE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr C Bennison (of Counsel) Instructed by: Empire Limited Empire House 117 Grandholm Drive Aberdeen AB22 8AE
For the Respondent	Mr C Howie (Solicitor) Howie & Co Smiddy Brae Kingswells Aberdeen AB15 8SL

SUMMARY

UNFAIR DISMISSAL - CONSTRUCTIVE DISMISSAL

The claimant had been employed by the respondent's predecessor for some 47 years but was TUPE transferred to employment by the respondent in 2015. The terms and conditions of his employment stated clearly that he would be entitled to full pay when absent from work due to sickness or injury. The respondent refused to acknowledge that entitlement and, when he was absent through illness, wrote to him stating that he would be paid only Statutory Sick pay. The claimant resigned and claimed constructive unfair dismissal. The respondent appealed.

Held : Appeal dismissed because

(1) There was no force in the respondent's first ground of appeal, that the tribunal misunderstood or misapplied the UK Supreme Court decision in **Autoclenz Ltd v Belcher and Others** *[2011] UKSC 41*. The respondent had failed to articulate a proper basis on which the clearly expressed contractual term had come to differ from the parties' understanding. The tribunal had not focused merely on a "sham" situation but also on the absence of any argument of error or variation, in finding that the contractual terms prevailed.

(2) The second ground of appeal was misconceived. The Tribunal had not failed to carry out an objective assessment of all of the circumstances before deciding whether the respondent was in fundamental breach and had followed correctly the approach required by the case of **Eminence Property Developments Limited v Heeney** *[2010] EWCA Civ 1168*. It had been entitled to find that the respondent's actings illustrated an intention not be bound by a fundamental term of the contact in relation to pay.

A cross appeal in relation to arithmetical error was well founded and was allowed.

THE HONOURABLE LADY WISE

Introduction

1. The claimant, Donald McKenzie was employed by the respondent's predecessor, Frank Ogg, who held the local Landrover Dealership in Elgin from 3 April 1967 (initially from a garage in Aberlour). He was employed latterly as Service Manager at the Elgin garage and was TUPE transferred to employment by the respondent on 3 August 2015.

2. In a written judgment promulgated on 25 May 2016 the Employment Tribunal at Aberdeen (Judge J Hendry) upheld the claimant's contention that he had been unfairly (constructively) dismissed by the respondent on 14 October 2015, when he resigned due to the respondent making clear that his contractual entitlement to sick pay would not be honoured. The respondent has appealed against that judgement. For convenience I will refer to the parties as claimant and respondent as they were in the tribunal below. The claimant was represented both before the tribunal and on appeal by Mr Howie, Solicitor. The respondent was represented on both occasions by Mr Craig Bennison of Counsel.

The Tribunal's findings in fact

3. Having set out the background of the claimant's employment by the respondent's predecessor Frank Ogg, with whom the claimant was on good terms, the tribunal made the following findings pertinent to the issues of appeal:-

> "9. **The claimant received particulars of his main terms of employment in 1987 (JB43) at a later date (JB44), on the 23 September 1997 (JB45) and on the 1 June 2000 (JB46) and on one other occasion (JB47). In terms of these documents the claimant was entitled to "full pay while absent from work due to sickness or injury". The claimant regarded this as an important benefit of his contract.**
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> **10. The claimant was given a further statement of terms and conditions of his employment on the 10 July 2012. He was working in the Elgin garage at this time and responsible to Frankie Ogg. The contract was signed by Mr Ogg and Mr McKenzie (JB29). Clause 10 of**

the terms and conditions dealt with absence due to sickness or injury. It stated: *'you'll be paid in full for any absence due to sickness and injury'.*

11. The claimant was ill in 1990 because of back problems and was absent from work for a period of seven weeks. During this time he was paid his full salary.

12. He was later absent in about 1992 for seven or eight weeks again through back problems and once more he was paid his full salary.

13. Because of pressures in the business and following an incident at work involving Mr Frankie Ogg's son the claimant became upset and distressed. He did not realise initially but he had begun to suffer from stress. This stress was exacerbated by the fact that the dealership had run into difficulties with Land Rover and there were rumours regarding the sale of the business. The claimant was not told by his then employers that the company was being sold until about August 2015 although he had heard rumours from his contacts at Land Rover that this was the position.

14. In about July the respondent company received, through their lawyers, copies of employee contracts including the claimant's most current statement of terms and conditions. These were passed to Ms Julie Stewart to consider.

15. The claimant began to become increasingly unwell. His mood was low and he began suffering increased agitation. He contacted his General Practitioner who was keen to sign him off work but the claimant wanted to continue working until the business was transferred. The claimant received a sick note from his GP signing him off work from the 31 July 2015. However, he did not leave work but continued in his employment. He was keen to make a good impression on the new owners.

…

17. On the day of the transfer, the 3 August, the claimant told his new employers that he was unwell and handed them the sick note. He then left work. On the 5 November 2015 when he was certified fit to work by his General Practitioner.

…

19. The claimant was initially paid his full salary when he left work through illness. The clause in his terms and conditions dealing with sick pay was an unusual one. The majority of the other employees who had worked for Frank Ogg Limited were only paid full pay for the first two weeks. A long serving manager the Parts Manager also had a similar provision in his terms and conditions to that of the claimant entitling him to full pay whilst absent through illness.

20. The payment of full salary to the claimant caused the respondent's management concern. On the 23 September Alan McIntosh a Manager wrote to Mr Frank ('Frankie') Ogg in the following terms:

" … it would be really useful to know if & how any such extended absences ideally for Donnie but also and/or other colleagues) were historically handled in terms of sick pay arrangements). Statutory sick pay only or some form of employer supported payment up to full salary? If at full wage/salary then for how long? Are there any precedents of say full pay for 1/2/3 months & then statutory SSP only after this. Whilst we continue to seek certified medical report feedback, having knowledge of your historical treatment of any such similar absences would be another potentially valuable piece of the jigsaw to seek resolution".

…

22. The respondent did not remind Mr Ogg of the claimant's terms and conditions, they carried out no further investigations and did not put Mr Ogg's comments to the claimant for comment.

23. Following the e-mail exchange Julie Stewart wrote to the claimant on the 28 September 2015 (JBp31).

24. Ms Stewart intended meeting the claimant on his return to work to discuss his ongoing health difficulties. The company had resolved not to pay him full salary while absent through sickness.

…

27. The claimant was distressed at the position taken by the company. He believed he was entitled to payment of his full salary as provided for. He believed that failure to pay him was a breach of contract. He wrote to Ms Stewart on the 14 October (JBp34).

"I refer to your letter of 20th September and your subsequent letter of 8th October to my solicitors. I was advised by my solicitors that I am entitled to payment in full for any absence due to sickness and injury and to my employment contract and had no agreement with Mr Frank Ogg that I was only entitled to receive Company Sick Pay for a for a maximum of two weeks. As you are aware, I am currently signed off work due to work-related stress. You have made it clear that you will not pay my salary in full and that you will only pay me statutory sick pay from 30th September. This is an anticipatory and fundamental breach of my employment contract.

As you are also aware I raised a grievance with Mr Ogg concerning a threat of violence made against me by his son Jason Ogg in front of other staff members which was not dealt with by Mr Ogg. I also raised this matter with you and with Mr Miller during my introduction interview but still no action was taken to deal with this grievance. The threat against me and the company's failure to deal with the grievance was a continuing cause for anxiety which contributed towards the stress I have been suffering from. Your refusal to pay me for a period of absence that has been caused by the company's actions is intolerable I am very disappointed to have been treated this way after 48 years' unblemished service with the company.
I am resigning my employment with immediate effect due to your breach."

28. The claimant was 63 years old at the date of termination of his employment.""

The Tribunal's Reasoning

4. The tribunal, having found the claimant to be a straightforward and honest witness in contrast with the respondent's HR Officer who was unimpressive, summarised the parties' submissions in relation to the issues in dispute. In essence, those issues were

(1) Whether there was a proper basis for contending that the contractual situation in relation to sick pay was anything other than that contained in the claimant's written terms and conditions, and

(2) Whether, if the contractual position was that set out in the written terms, the respondent's contrary position had been an honest misapprehension and so not just justifying a claim of repudiation.

5. The material parts of the tribunal's reasoning in relating to those issues are in the following terms:

> **"42. The key issue in this case was what did the claimant's contract provide for by way of sick pay? I had no hesitation in concluding that the clause set out in the statement of terms and conditions (JB3) dated July 2012 and signed both by the claimant and Mr Frankie Ogg set out the parties' true intentions in relation to payment of full salary during absence. There was nothing whatsoever to cast any doubt on the clear terms of the clause at issue (clause 10). It reflected the terms of previous statements of terms and conditions going back to the statement issued in 1987 (JB p43). This was the position before the opening of the garage in Elgin and before the claimant worked directly under Mr Frankie Ogg. The clause also reflected the claimant's understanding of his entitlement and indeed he received full salary during lengthy absences in 1990 and 1992.**
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> **43. At the outside of the case I queried with Mr Bennison whether the respondent's position was that the contract term had been varied in some way. He indicated that this wasn't their position (and indeed there was no suggestion in the ET3 that this was their position). I noted that there was also no suggestion that the contract was in some way a sham. Against this background I struggled somewhat to understand why then express written terms were called into doubt. Mr Bennison suggested that the Tribunal should always be mindful of the 'reality' of the situation but I found it difficult to understand what the trigger was that first raised the suggestion that the written terms were not the in fact the 'reality' of the situation.**
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> **44. Although it was denied by Ms Stewart I have no doubt that the respondent were concerned about the unusually open ended nature of the liability that the clause provides for. It was odd that during the run up to the transfer that this was not identified when Ms Stewart allegedly reviewed the contracts of senior staff such as the claimant and others.**
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> **45. The Tribunal had to have regard to whether the claimant was entitled to resign. It considered the terms of Section 95(1)(c) of The Employment Rights Act 1996 (hereinafter the 'Act') which is in the following terms:-**
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> **"Circumstances in which an employee is dismissed**
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> ***(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subjection (2) …, only if) –***
>
> ***(a) …***
> ***(b) …***
> ***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."***
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> **47. The Tribunal considered the guidance contained in well known case of <u>Western Excavating (ECC) Ltd v Sharp</u> [1978] IRLR 27 Court of Appeal to which both parties referred) which has laid down time honoured and helpful guidance on this matter. The nub of the matter is to be found in the judgment of the Master of the Rolls, Lord Denning, where he says at page 29, paragraph 15:-**
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> ***"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."***
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> **50. In this case there was no attempt to argue that the dismissal would in any event have been fair. No such case was pled as an alternative.**

51. **The position of the claimant in the present case put simply was that although the claimant was unhappy that his 'grievance' about Jason Ogg had not been dealt with either by his former or new employers he resigned because of the anticipated failure to pay sick pay. It seemed to me that Mr Howie's submission that the respondent had, when they wrote to the claimant, a settled intention not to pay him full salary as provided for in clause 10.**

52. **The respondent argued that in some way the written terms of clause 10 did not apply and that the Tribunal should look at the 'true' position which was set out in Mr Ogg's response. Mr Bennison suggested that the only test was the reality of the situation. Although he referred the Tribunal to the case of Autoclenz for this somewhat sweeping proposition he did not take the Tribunal through the reasoning in that case. It should be borne in mind that the issue in that case was whether, irrespective of the written contractual terms, certain workers were properly employees and not independent contractors in other words the written 'contract' was in some sense a sham. It is interesting to note that their Lordships in the Supreme Court addressed the question of what regard should be had to the written terms at an early point in the Judgment. At paragraph 20 onwards Lord Clarke dealing with 'ordinary' commercial contracts and contrasting the approach with employment contracts wrote:**

> ***20.*** ***The essential question in each case is what were the terms of the agreement. The position under the ordinary law of contract is clear. It was correctly summarised thus by Aikens L J in the Court of Appeal:***
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> ***87. … Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any additional oral terms to it, then those written terms will, at lease prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract: see eg L'Estrange v F Graucob Ltd [1934] 2 KB 394. If a party has not signed a contract, then there are the usual issues as to whether he was made sufficiently aware of the clauses for a court to be able to conclude that he agreed to the terms in them. That is not an issue in this case.***
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> ***88. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.***
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> ***89. Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, [48] to [66], in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 with whom all the other law lords agreed. …"***
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> ***21.*** ***Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken. Again, Aikens L J put it correctly in the remainder of para 89 as follows:***

"But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?"

53. This leads us back to the written terms and why it was suggested they did not reflect the true agreement. I queried what the circumstances were which suggested that the written terms were in some way not reflective of the agreed contractual position, perhaps through mistake or error, or if they had been varied at some point. Mr Bennison was unable to do anything other than to refer to the email from Mr Ogg which he suggested encapsulated the 'reality' of the situation. Considering the terms of that exchange it was not clear if Mr Ogg was suggesting that the written term was varied at some point or was included in the statement in error. He seems unaware of the written terms and that he had signed the statement. Incredibly these matters were never put to him nor were the previous incarnations of the clause contained in numerous such documents going back to the 1980s. Mr Ogg was not called to give evidence.

54. I have no doubt that the claimant and his employer for many years were aware and had agreed that this important benefit should be reflected in the statement of terms and condition and that both parties expected that it should be honoured and that it accurately reflected that agreement.

55. Mr Bennison argued that even if I found that the true contractual position was as stated in that clause there was no breach as the respondent had an honest misapprehension as to the true nature of the contract. He referred the Tribunal to the case of the Eminence Property Developments Ltd which in turn cited the words of Lord Wright in the case of R T Smyth and Co Ltd: ' … ***a mere apprehension, especially if open to correction, will not justify a charge of repudiation*****" I would suggest that there is a difference between an assertion and the situation where a party to a contract goes further as the respondent have here by taking a fixed position on the matter at issue. I find it difficult in the current circumstances to hold that there was in any event what could be classed as an honest belief given the failure to investigate the matter thoroughly after receiving Mr Ogg's email.**

56. As Lord Wilberforce put it in Woodar Investment Development Ltd v Wimpey Construction UK Ltd. (supra), at page 283 " ***… Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations".***

57. Here in Scotland the decision in Woodar Investment Development Ltd v Wimpey Construction UK Ltd. (supra), was approved by the Second Division of the Court of Session in Blyth v Scottish Liberal Club. The issue was considered by Lord Hamilton in the Outer House in the case Edinburgh Grain Ltd v Marshall Food Group Ltd. At page 22 he noted: "*What, in my view, is required for repudiation is conduct demonstrative of an intention not to perform fundamental contractual obligations as and when they fall due.***"**

58. The position in Scotland seems to be reflected in the case of Robert supra to which I was referred by Mr Howie. In that case an employee was entitled to generous sick pay if he was absent through injury. The employer interpreted this as applying only to a physical injury and told the employee that his sick pay was going to be reduced because he was absent because of stress and depression and not a physical injury. The contract properly interpreted was held to cover psychological injury. At paragraph 18, after reviewing the authorities The Honourable Mrs Justice Slade writes:

> ***"18. … A pay term is, as was explained in Callaghan, a term which goes to the route of the contract. As Judge L J explained in that case, it may not be a fundamental breach of contract for an employer not to honour a pay term if that arose from an error or a simple mistake.***
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> ***However, where an employer intends to reduce pay to a material extent and that intention does not arise from an error or a simple mistake, it is likely to be otherwise.***
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> ***19. In our judgment, on the facts found by the Employment Tribunal and the material before it and the Judgment of Employment Judge Tickle, the Respondent was indicating an intention to pay half pay. This was found by the Employment Tribunal to be a settled intention. Since the date of the proposed reduction was two days away from the date of resignation, it was an anticipatory breach of contract. The Respondent did more than insist that its view of its contractual obligations was the correct one. It is plain from the findings of fact by the Employment Tribunal, which are not appealed, that the employer had a settled intent to implement the reduction in pay, which would take effect two days after the resignation. In our judgment, the reduction in pay by half was a significant reduction. However, we do not accept that whether such a reduction is fundamental depends on its effect on employees. If that were so, whether or not the reduction in pay was a fundamental breach of contract would be different for different employees arising out of the same reduction in pay carried out by the employer."***

> **59. The issue is whether in all the circumstances the employer, or any party to a contract, is indicating that they will not be bound by a material term. The clause relating to sick pay is a material term. The employer made it clear that they would not be paying the claimant his salary when absent through illness even after their position was challenged by the claimant's lawyers.**
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> **60. This is not a case where the issue revolves around the proper interpretation of a clause in a contract. The written term is clear. Rather it is a situation where the employer denies the whole effect of a written express term and in doing so repudiates the contract. It is difficult to accept that the respondents had when he described as an honest misapprehension of the situation given the clear terms of the clause. I regret that my view was that Mr Bennison's approach to these matters and his interpretation of the law was misconceived.**
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> **62. It is my conclusion that the claimant was entitled to resign from his employment because of the respondent's actions in stating that they would not be honouring the terms of his written terms and conditions of employment and by doing so committing an anticipatory breach of contract. I then had to consider if the dismissal was fair or unfair in terms of section 98(4) of the Act. I had no hesitation in finding the dismissal unfair. There was no pressing business need to change the claimant's contractual entitlement, no consultation, and this was not in any event the reason the respondent acted this way. A clear written term was overridden without a clear reason for doing so and following virtually no investigation of the matter. The claim for unfair dismissal therefor succeeds as does the claim for unpaid salary/sick pay.**

The Arguments in the Substantive Appeal

6. The appeal as initially framed raised allegations of a lack of fair hearing and apparent bias but all grounds relating to that aspect were withdrawn after a response to the allegations

had been received from the Employment Judge. Two grounds remain and those relate to the issues already identified as those that the tribunal required to determine. The respondent contends that the tribunal misapplied the law in relation to both issues and so erred.

7. Mr Bennison argued first that the tribunal had erred in its approach to the application of the judgment of the UK Supreme Court in **Autoclenz Ltd v Belcher and Others [2011] UKSC 41 ("Autoclenz").** He submitted that the Employment Judge had been wrong to regard Autoclenz as authority for the proposition that only if there was cause to question contractual terms as a "sham" would it give parties the right to look at the reality of the situation between them. Further, the decision in **Autoclenz** made clear (at paragraph 30) that the court or tribunal must consider whether or not the words of the written contract represented the true intentions or expectations of the parties "not only at the inception of the contract but, if appropriate, as time goes by". This was important recognition by the Supreme Court that contracts of employment evolve through their lifetime. In the present case the respondent had argued that the words of the written contract did not represent the true intentions or expectations of the parties and that the reality of the obligation on sick pay was that only two weeks at the full rate was payable.

8. In support of that argument the respondent had sought clarification of the position from the previous owner of the business, Frank Ogg, who had confirmed in an email that the agreement with the claimant was that ***" … the first couple of weeks would be at full pay and would then change to SSP for longer periods of sickness …"*** (paragraph 21 of the Judgment). Accordingly there was a basis for contending that the terms were other than those recorded in the written contract, but the tribunal had regarded the Contract of Employment as a "fixed commodity". Unless it was a sham or other ulterior motive was suggested the tribunal considered that only the written terms mattered. That approach was erroneous because **Autoclenz** required consideration of the

reality of the situation between the parties. What had to be examined was the actual operation of the terms of the contract as it evolved with time. Mr Bennison was critical of the tribunal's statement that there was no basis on which the respondent queried the clause on sick pay. The trigger for the query was the unusual nature or the term and the fact that the respondent was not a party to the contract. The tribunal's own findings in fact reflected that – paragraph 19. The tribunal had been wrong to dismiss the importance of the email from Mr Ogg and to reject that without good reason. The HR employee Ms Stewart had explained that she had sought clarification from the predecessor employer because the term in the written contract was unusual and the respondent had not framed it. Reference was made to the case of **Consistent Group Limited v Kalwak and Others [2008] IRLR 505** although it was accepted that the Employment Judge (at paragraph 53) had acknowledged the contrary evidence of Mr Ogg.

9. So far as the second of the two remaining grounds of appeal was concerned, Mr Bennison submitted that the tribunal had misunderstood the position in relation to repudiatory breach of contract. In the case of **Eminence Property Developments Limited v Heeney ("Eminence") [2010] EWCA Civ 1168** the Court of Appeal emphasised that the test was whether, looking at all the circumstances objectively, namely from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and completely refuse to perform their obligations under the contract. The court went on to confirm that " … *all of the circumstance must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker.*"

10. In the present case the actions of the respondent in contacting the previous employer and then writing to the claimant to explain the position in addition to correspondence with his legal representatives did not illustrate any intention not to be bound by the Contract of Employment.

These had been reasonable steps taken by the current employer. The facts were indicative of a genuine dispute as to the operation of the contractual term on sick pay, not of an intention on the part of the respondent to step away from the contract. Even if the respondent was wrong in its interpretation of the position on sick pay, any misapprehension was honest and accordingly could not justify a charge of repudiation – **Ross T Smyth & Co Ltd v T D Bailey and Son and Co [1940] 164 LT 102** at 107 per Lord Wright (cited in **Eminence** at paragraph 29). Accordingly the correct interpretation and application of **Eminence** to the facts of this case ought to have led to a conclusion that there was no repudiation of the Contract of Employment. The tribunal had failed to carry out the objective assessment of all the circumstances required on the authority of **Eminence.** Had an objective assessment been undertaken, the actings of the respondent in clarifying the matter with Frank Ogg would be seen to have led at worst to an honest misapprehension that the contractual sick pay position was as he set out. Mr Bennison contended further that the Employment Judge's narrow approach to the contractual terms had influenced his subsequent failure to look objectively at all the circumstances for repudiation. Mr Bennison contended further that the Employment Judge's narrow approach to the contractual terms had influenced his subsequent failure to look objectively at all the circumstances for repudiation as required by **Eminence**.

11. Reliance was placed in this context on the case of **Haberdashers Monmouth School for Girls v Turner UKEAT 0922/03/RN** where it was confirmed by the EAT that an assertion in relation to the interpretation of a contract that was wrong was not enough for repudiation in the absence of intention not to comply with the contract when properly construed. In the present case what was present, at best for the claimant, was an incorrect interpretation of the contract by the respondent and that was insufficient for repudiation. If there had been straightforward refusal to pay on the part of the respondent matters might be different.

However because the Employment Judge failed to take account of all the considerations he should have as directed in **Eminence**, he was not entitled to conclude it was a fundamental breach. What the tribunal had done was to make an inappropriate leap from there being a breach of contract to there being a fundamental breach of contract and that leap was not justified on the evidence. There had been no proper and objective analysis of the material circumstances and the outcome was therefore unsustainable. At paragraph 26 of the **Haberdashers** case it was said that the tribunal had to conclude whether the appellant was prepared to comply with its obligations, as and when and if properly construed. The tribunal had not done so in this case. Further, at paragraph 30 of **Haberdashers** the EAT confirmed that it was not enough for fundamental breach that an employer such as the respondent had been highhanded in correspondence. Finally, reference was made to the case of **Sawar v SKF (UK) Ltd UKEAT/0355/09/DM.** That provided a good example of the decision of a tribunal being upheld when it made a finding of no repudiation even against a background of certain failings on the part of an employer.

12. Mr Bennison submitted that for these reasons the tribunal decision could not stand and the appeal should be allowed and the matter remitted for a fresh hearing to a differently constituted Employment Tribunal.

13. For the claimant Mr Howie addressed each of the two remaining grounds of appeal in turn.. In relation to the argument that the tribunal had erred in the approach required by the decision in **Autoclenz,** he submitted that the issue in that case had been correctly summarised by paragraph 52 of the tribunal judgement as being " … whether, irrespective of the written contractual terms, certain workers were properly employed and not independent contractors in other words the written contract was in some sense a sham."That was indeed the broad issue for

determination in **Autoclenz**, but it did not form the basis for any conclusion on the part of the tribunal that an employment contract fixes the term such that only where there is a sham or other mischief can the court or tribunal leap to the position of the party.

14. In this case the Employment Judge had, as he notes at paragraph 53, made specific enquiry as to the whether the written terms were not reflective of the agreed position or had been varied. Reference was there made to other circumstances in which the written contract might not prevail such as mistake or error and variation. The respondent had emphasised the passage in **Autoclenz** that spoke of the party's intentions or expections "*not only at the inception of the contract but, if appropriate, as time goes by*". However that passage and the one immediately following it (both citations of Smith LJ in **Szilagyi**) clarify that the reference to "as time goes by" means that what the court or tribunal must consider is not simply the true intentions of the parties at the inception of the contract but also "*… at any later stage where the evidence shows that the parties have expressly or implied they varied the agreement between them.*"

15. The Employment Judge in this case has addressed squarely the absence of any credible evidence showing express or implied variation of the written terms. He had noted the terms of Mr Ogg's email but concluded that it was not clear if it was being suggested that the written terms had been varied or included in the contract in error. The tribunal's conclusion that Mr Ogg's email assertion was unclear and wholly untested was a reasonable one. The tribunal had before it on the one hand the unclear and untested email and on the other the credible and reliable evidence of the claimant. The email was contradicted by evidence that the claimant had been paid his full salary for extended periods of absence in 1990 and in 1992. Accordingly, on the basis of the available evidence the tribunal was entitled to conclude (at paragraph 54) that

the claimant and his employer were aware of and had agreed that this important sick pay provision should be reflected in the written terms and conditions and that both expected that it should be honoured. Accordingly, the tribunal's decision on this aspect of the case was entirely in line with the legal principles as set out in **Autoclenz** and no error of law had been made. Further, it was for the respondent to show the basis on which there had been a deviation from the express terms of the contract. There was no evidence that there was agreement or even acquiescence on the part of the claimant to variation. There was no evidence in relation to the time which any agreed variation to the contract might have taken place. The hearsay evidence provided by Mr Ogg was flimsy at best and was insufficient to discharge the onus on the respondents to prove a departure from the written terms.

16. The second remaining ground of appeal was also said by Mr Howie to be misguided. The issue clarified in **Eminence** is clearly that a party to a contract will have repudiated that contract if, but only if, by its conduct it clearly intimated an intention to abandon and altogether to refuse to perform its obligations. Whether a party has done so is a matter of fact, to be considered objectively, that is to say from the perspective of a reasonable person in the position of the innocent party, looking at all the circumstances and the repudiating party's entire conduct.

17. The tribunal had correctly identified that, applying that to the circumstances of this case, the issue was whether the respondent had indicated that it would not be bound by a material term of the contract. Having found that the clause relating to sick pay was a material term, the tribunal then concluded (at paragraph 59) that the respondent had made it clear that it would not be bound by that term because the claimant had been told that he would not be paid . his salary when absent through illness. The correspondence reproduced at paragraph 25 and 26 of the

judgment made the respondent's position very clear. That stated intention did not change after it was challenged by the claimant's solicitors who had intimated that failure to pay would constitute a material breach of contract. The Employment Judge had been entitled to infer (at paragraph 60) that this was not an honest misapprehension on the part of the respondent given the clear terms of the clause on sick pay in the written contract. The respondent's actions were not just highhanded. There was a clearly stated intention that they would not be paying sick pay as per the contract.

18. In any event, even if the respondents had made an honest mistake in interpretation of the contract, the law does not excuse a party from the consequences of their actions merely because the misapprehension is honest. Reference was made to the case of **The Nanfri [1979] AC 157,** a Judgement of Lord Denning, the following passage of which is reproduced at paragraph 35 of **Eminence:**-

> *"I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension. Nor can he excuse himself on those grounds from the consequences of a repudiation."*

Mr Howie accepted that an honest misapprehension on interpretation does not of itself amount to a fundamental breach of contract. The point being made in **The Nanfri** and subsequently cited with approval in **Eminence** was that if a misapprehension was honest that did not excuse the consequences of a party's action if they had also committed a fundamental breach.

19. Mr Howie referred also to the case of **Roberts v The Governing Body of Whitecross School UKEAT/0070/12.** There the EAT had allowed an appeal against an Employment Tribunal's decision that an honest though mistaken view of the meaning of a relevant contractual term did not amount to a fundamental breach. Slade J had emphasised that an

honest belief makes no difference to the character of the breach. An intention to reduce pay to a material extent other than through error is likely to be a fundamental breach. Similarly in the case of **Cantor Fitzgerald International v Callaghan and Others [1999] ICR 639 CA ("Callaghan")** Judge LJ in the Court of Appeal confirmed that in the context of a non-payment of agreed wages the distinction was between technology or accounting error, illness, accident or unexpected events on the one hand and a deliberate refusal to pay on the others. If the non-payment fell into the former category, it would be open to the court to conclude that the breach did not go to the root of the contract.

21. Where, as in the present case, the respondent's refusal to pay was maintained even when the terms of the contract were highlighted, the tribunal's finding that the contract had been repudiated was in line with the legal principles set out in **Eminence** and **Roberts** and so no error in law had occurred. The Employment Tribunal gave consideration to all of the circumstances including the refusal to pay once the contractual terms were pointed out. The **Haberdashers** case relied on by Mr Bennison was easily distinguishable. The issue in that case was whether there was a Contract of Employment or a Contract for Services. The employer had stated an honest misapprehension in relation to its conclusion on that issue but did not follow that through by breaching the contract. So there had been no fundamental breach. An insistence on a view is not enough for a fundamental breach without a stated intention not to comply. That was why the case of **Roberts** was in point in this case and the **Haberdashers** case was not. In conclusion, no errors of law had been identified by the respondent in the appeal and the appeal should be dismissed.

Cross Appeal

22. Mr Howie presented his cross-appeal in brief terms. At paragraph 65 of the judgment the claimant had been held entitled to a basic award of £14,250 and a compensatory award of £85,293.34. The tribunal had subsequently (at paragraph 67) capped the monetary award to the claimant's gross annual salary of £73,482. It was contended that this was an error in law. Section 124 of the **Employment Rights Act 1996** provides, so far as relevant:-

> "**(1) The amount of ……. (b) a compensatory award to a person calculated in accordance with Section 123, shall not exceed the amount specified in sub-section (1ZA).**
>
> **(1ZA) The amount specified in this subsection is the lower of -**
>
> **(a) £8,541 and**
> **(b) 52 x weeks pay of the person concerned "**

Mr Howie submitted that the cap should only have been applied for the compensatory award and not to the basic award. The total monetary award should have been £87,732 made up of a basic award of £14,250 and a compensatory award, capped at the amount of the claimant's gross annual salary, of £73,482.

23. The background to the cross appeal is that the claimant had sought reconsideration of the judgment in respect of this error but it had not been addressed. Mr Bennison, very fairly, conceded that the claimant's argument appeared to have force and that he did not wish to respond to it. Mr Howie, for his part, accepted that it would be appropriate to grant the cross appeal only if the substantive appeal was being dismissed. If the judgment could not stand in other respects then clearly all matters would require to go back to the tribunal.

Discussion

24. As already identified the first of the two remaining grounds of appeal goes to the issue of whether the respondent had a proper basis for contending that the contractual situation

relating to sick pay for the claimant was something other than that contained in the claimant's written terms and conditions. The respondent argues that the tribunal misunderstood and misapplied the decision of the UK Supreme Court in the case of **Autoclenz Ltd v Belcher and Others [2011] UKSC 41.** That case is a recent decision of the highest authority on the issue of the circumstances in which written documentation may not reflect the reality of a contractual relationship. The context was whether the claimants were employees or engaged under a contract for services. Lord Clarke, in the leading judgment from which there was no dissent, referred to three particular cases in which the courts have held that the Employment Tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship. One of those was the case of **First Loan Limited (t/a Protectaquote (v Szilagyi) "Szilagyi" [2009] ICR 835**. In **Szilagyi,** Smith L J emphasised that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but also at any later stage where the evidence shows that the parties have expressly or replied they varied the agreement between them. The relevant passages are reproduced by Smith L J in the Court of Appeal stage in **Autoclenz** and quoted with approval by the Supreme Court in that later decision.

25. In the present case the Employment Tribunal was faced with a dispute about whether a particular term of the claimant's Contract of Employment represented the true intentions and expectations of the claimant and the respondent. The issue was rather different from that which arose in **Autoclenz,** in that there was no suggestion that any other term of the claimant's contract did not represent the true position and the nature of the employment relationship was not contentious. The tribunal was accordingly correct in noting (at paragraph 52) that **Autoclenz** was, in contrast, dealing with whether a written contract was a "sham". The

question is whether the Employment Tribunal in this case adopted too narrow an approach by excluding from consideration other bases on which contractual terms may not reflect the parties' intentions and expectations. Reading the relevant passages of the judgment together, I have concluded that the tribunal did not err by taking the narrow or overly restricted approach suggested by Mr Bennison for the following reasons. First, having recorded that what the court must do is identify what contractual terms the parties actually agreed, the tribunal started quite properly with the written terms as *prima facie* evidence of what the agreement contained. Secondly, (at paragraph 53) the possible ways in which those written terms might not be reflective of the agreed contractual position are postulated. Specific reference is made to mistake or error and variations. Thirdly, the references to "sham" contractual terms are dealt with separately from the consideration of mistake or variation. Accordingly, there is nothing in the judgment to support the proposition that the Employment Tribunal regarded the absence of a contention that this material term was a "sham" as an end to the matter.

26. I do not consider that the Employment Judge can be criticized for regarding the expressed terms and conditions as strong *prima facie* evidence of the contractual position between the parties on sick pay and then discount on the basis of the evidence led and the submissions made, the various possible reasons for the position being other than that expressed in writing. The evidence accepted by the tribunal almost all pointed in one direction. The claimant, who was a wholly credible and reliable witness, gave evidence that his understanding of the position on sick pay was that expressed in his written terms and conditions. Significantly, the tribunal found that the claimant had been absent from work through illness for considerable periods (seven or eight weeks each) in 1990 and again in 1992 and during both periods he had been paid his full salary. The only adminicle of evidence that arguably contradicted the claimant's full testimony was the email from Mr Ogg, the previous employer,

who in response to specific questions being put to him claimed that there was an agreement with the claimant, *"always verbal"*, that only the first couple weeks would be at full pay and then changed to SSP for longer periods of sickness. The email continues *" … but I am sure he will have forgotten or denied this. Donnie has never been off for an extended period before."* Even leaving aside the rather pejorative remark about the claimant, what the tribunal was rightly critical of was the respondent's failure to ascertain whether there was any basis for Mr Ogg's assertions. In other works, no consideration was given by the respondent as to whether the other party to this alleged verbal agreement had something to say about the matter before the rather strident position was taken that the sick pay provided for in the written contract would not be paid.

27. Where there is a very clear, unequivocal contractual term coupled with an assertion that there was some separate verbal agreement in direct contradiction to that term, the respondent required to try to understand what the parties' true intentions and expectations were. The failure to point out to Mr Ogg the contradiction between his emailed comments and a formal contract that he had signed as employer and the subsequent failure to put the comments made by him to the claimant were aspects of the factual matrix considered by the tribunal in assessing whether there was any basis for the respondent's assertion that the written terms did not in fact reflect the "reality of the situation".

28. Mr Bennison was critical of the Employment Judge's statement (at paragraph 43) that he found it difficult to understand what the trigger was that first raised the suggestion that the written terms were not in fact the "reality" of the situation. The answer, it was submitted, was in the judge's own findings that (a) the sick pay provision was an unusual one (paragraph 19) and (b) that the respondent was not a party to the terms and conditions having become the

claimant's employer only as a result of a TUPE transfer. However, it seems to me that this argument ignores other pertinent findings. In particular, the respondent's HR Representative had received the Employee Contract including that of the claimant and had not raised any issue prior to transfer about the sick pay term (paragraph 14). The respondent's concerns appeared to arise only once the open ended nature of the liability came to their attention (paragraph 44). Further, Mr Bennison submitted to the tribunal that the respondent's position when they examined the clause was that it *"… did not believe that this clause meant that …"* and so investigated the situation. What the tribunal concluded, correctly in my view, was that there was no room for any alternative interpretation of the sick pay clause; it was in very clear terms. It is against that background that the tribunal is sceptical of the "trigger" for the investigation; it appeared that the respondent was concerned only about the consequences of the written terms.

29. I have concluded that there is no force in the respondent's submission that the Employment Tribunal in this case misunderstood or misapplied **Autoclenz.** The respondent did not articulate a proper basis on which a clearly expressed written term had come to differ from the parties' understanding. There was no agreed variation, no suggestion that the written contract was erroneously expressed or had never been intended to reflect the true position. The Employment Judge was entitled to reach the conclusion on the evidence before him that the claimant and his employer had agreed a generous sick pay regime as reflected in the written terms.

30. The second remaining ground related to whether the ratio in the case of **Eminence Property Development v Heeney** was misunderstood and misapplied by the tribunal such that it went too far in regarding the respondent's letter to the claimant's agents (reproduced at paragraph 26) as a fundamental breach of contract amounting to repudiation. This argument

was addressed by the tribunal at paragraphs 55-60 of the judgment. The Tribunal there summarised some of the authorities on this issue and then concluded that, in the circumstances of this case, it was difficult to accept that the respondent had honest belief that there was no requirement to pay the claimant throughout his sick leave. The Tribunal cited with approval passages from **Roberts v The Governing Body of Whitecross School UKEAT/0070/12/ZT** where Slade J emphasised that it makes no difference to the character of the breach in terms of it being fundamental or not whether it is actual or anticipatory. The nature of a pay term as one which goes to the root of a contract was also highlighted, with Slade J contrasting an error or simple mistake with a stated intention not to pay in terms of the contract. The Tribunal in the present case, applying those principles to the facts, concluded that the respondent's communication to the claimant represented a stated intention not to pay that was not based on erorr or simple mistake. The terms of the respondent's letter to the claimant did not invite dialogue or discussion on the matter. It stated *"..I can confirm that Mr McKenzie will be paid at the Statutory Sick Pay rate only from the period 30th September and ending 21 April 2016. I trust that this clarifies the company's position on the matter."* It was that letter and the surrounding circumstances that led the tribunal to conclude that the respondent had acted in a manner illustrative of an intention not to perform a fundamental contractual obligation, namely to pay the claimant his full salary as and when it fell due. The question is whether the Tribunal's analysis somehow fell foul of the approach directed by the Court of Appeal in **Eminence.**

31. In my view, the argument advance by the respondent on this point is misconceived. There is no conflict between the position as stated in **Eminence** and the conclusion reached by the tribunal in this case. At paragraph 36 of **Eminence** the following clear direction appears ;-

" The question is not what the owners wanted or wished in the recesses of their minds, but did they by their conduct evince an intention no longer to be bound by the contract or to perform it only in a way inconsistent with their obligations under the charter"

Applying that to the facts of this case, as found by the tribunal, the respondent had made clear that they would perform their obligation to pay the claimant only in a way inconsistent with their obligations under the written contract. It is clear that such actions were capable of being regarded as an intention to refuse to perform an essential term of the contract. The tribunal was entitled to look at all of the circumstances and conclude that the intention of the respondent was not to perform. The case of **Haberdashers Monmouth School for Girls v Turner** does not assist the respondent's argument because in that case the employer had not acted upon its honest misapprehension. In the present case there was more than an assertion in relation to the interpretation of a contract, there was a formal statement in the letter that the respondent would not be paying sick pay in terms of that contract but would be paying only Statutory Sick Pay. The tribunal acknowledged the distinction between the two situations, stating that *"….there is a difference between an assertion and the situation where a party to a contract goes further as the respondent have (sic) here by taking a fixed position on the matter at issue."* (paragraph 55). It was for the tribunal to examine the respondent's actings as part of the whole circumstances and decide whether they went beyond mere assertion and amounted to a stated intention to breach the contract. There was no discernible failure to carry out the sort of objective assessment required by **Eminence.** Accordingly, as the tribunal's analysis demonstrates no error of law and the conclusion (at paragraph 62) that the respondent had committed an anticipatory breach of contract was one that it was entitled to reach on the available evidence, the second ground of appeal must also fail.

32. So far as the cross appeal is concerned, as already indicated, Mr Bennison very fairly did not seek to mount a challenge to the proposition that there had been an error in the calculation of the monetary award in that the statutory cap should not have been applied to the basic award. There had been an attempt to rectify this by reconsideration but the point seems to have been overlooked by the tribunal. Accordingly, I will allow the cross appeal and substitute a total award of £87,732.

Disposal

33. For the reasons given above, I will dismiss the respondent's appeal, but allow the cross appeal, such that the total monetary award is now increased to £87,732.