Appeal No. UKEAT/0150/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 November 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

JOHN BOURNE & CO — APPELLANT

MR K WEEDON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR IAN WHEATON (of Counsel) Instructed by: RBS & Natwest Mentor Services plc Employment Law Litigation Department 4th Floor 250 St Vincent Street Glasgow G2 5SH
For the Respondent	MS LESLIE MILLIN (of Counsel) Instructed by: OH Parsons LLP Churchill House Chalvey Road East Slough Berkshire SL1 2LS

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

The Employer Appellant closed a lorry depot and asked the Employee Claimant lorry driver to move to another depot. He refused and took out a grievance. The employer found a new place for him to keep his lorry which was closer to home and generally acceptable to him but also said that as a "quid pro quo" he should sign a new standard contract of employment. He indicated he would not sign the new contract and the employer said he could carry on working (from the new place) on the old contract for three months while the new terms were discussed; he agreed to that proposal. A month later he resigned saying that the terms and conditions associated with the new place were unsuitable. The Employment Judge expressly found that he was prepared to work from the new place.

The Employment Judge found that (a) the requirement to move workplace may not be a fundamental breach of the employment contract but that with the new contractual terms it amounted to a fundamental breach of contract, (b) the Claimant had resigned in response to the breach making it clear that he could not accept the new terms, (c) there was accordingly a constructive dismissal, and (d) the dismissal was by reason of redundancy (i.e. because the employer had ceased to carry on business at the closed depot) and fair, so that (e) the Claimant was entitled to a redundancy payment.

In reaching conclusions (a) and (b) the Employment Judge had not taken into consideration the fact that the Claimant had agreed to work for three months while discussing the new terms: this fact may have led to a conclusion that there was no outstanding breach of contract in relation to the new terms at the time of the resignation and/or impacted on the finding that he resigned in

response to any breach. In reaching conclusion (d) she had failed to consider whether the main reason for the constructive dismissal she had found was the requirement to work under new terms rather than the closure of the depot (which was arguably merely the occasion giving rise to the attempt to impose that requirement) and had simply elided the two issues.

Appeal allowed and the whole claim remitted to a new Employment Tribunal. It was recognised that this might result in a worse outcome for the employer, who may be found to have constructively dismissed the Claimant "for some other substantial reason" but unfairly.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by John Bourne & Co, who were the Respondents below, against a Decision of Employment Judge Wallis sent out on 17 January 2017 to the effect that the Claimant, Mr Weedon, was constructively dismissed by reason of redundancy and that he was entitled to a redundancy payment accordingly.

2. The Claimant was a lorry driver, his job entailing picking up and delivering chalk, aggregates and soils. He originally started work in that capacity for John Bourne & Co's predecessor on 17 September 1993. He worked for them under a contract of employment which was silent as to his place of work or anything relating to mobility. When John Bourne & Co took over the Claimant's employment, they offered him a new contract which he refused and he continued on his original contract of employment. It is not expressly stated, but I infer that the new contract offered was the same standard contract which later features in this story.

3. The Respondent's lorries were for a time based at a quarry in Detling and the Claimant's lorry and other equipment were kept there. In 2009, operations were moved to a quarry in Charing. The Claimant agreed to move to that new base in exchange for reimbursement of his increased travel costs for a period of six months.

4. In March 2016, John Bourne & Co decided, according to paragraph 11 of the Judgment, to sell the operation at Charing. (I am told today by Mr Wheaton that that is not quite what happened and that, in fact, the only operation carried on at Charing was the keeping of the lorries there and that their lease came to an end). In any event, the Claimant was written to in a letter of 30 March 2016 by John Bourne & Co in which they said "*we will therefore no longer*

be able to base your lorry there [that is at Charing] and would ask that from that date you base your lorry at our Sevenoaks depot". For whatever reasons, the Claimant objected to that proposed relocation, pointed out there was no mobility clause in his contract, and he enlisted the help of his trade union.

5. That led to a grievance meeting held on 14 April 2016. The Judge accepted that at that meeting John Bourne & Co genuinely wanted to assist the Claimant. After the grievance meeting, a letter was written on 20 April 2016 in which John Bourne & Co notified the Claimant that they had found a location on a farm in Snodland, which is about five miles from his home, where his lorry could be parked.

6. The Claimant had some concerns about the suitability of that venue, particularly in winter months, and apparently there was no office or other facility for storage of equipment. However, in any event, the employer also required him, as "a quid pro quo" of allowing him to base his lorry at Snodland, that he sign and return the standard contract to which "*all of our other drivers are signed up*". There is no doubt that the new standard contract involved different terms to those that the Claimant was working under - some disadvantageous to him - and that if the Respondents had truly insisted that he signed them as a condition of continuing to work, that would have involved a repudiatory breach of contract.

7. The Claimant responded on 22 April 2016 expressing appreciation for the arrangement of the new location at Snodland, but explaining that he could not sign the contract because some of its terms were unacceptable. Mr Bourne, presumably the eponymous owner of the Respondent Employer, acknowledged his letter promptly on the same day and suggested that he continue to work on the old contract for three months while the new terms were discussed. The

A Employment Judge records at paragraph 20 that the Claimant agreed to that proposal. I infer from the following paragraphs that he either actually started or agreed to start to work from Snodland on that basis.

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8. He then took advice about his position. He was told that there was a potential redundancy situation and that he would therefore have to make up his mind within a month. He therefore wrote to the employer on 17 May 2016 saying this: "*I do not find what has been put to me as the intended terms and conditions associated with the alternative location as being suitable and therefore I reserve my right to claim redundancy pay with Friday 20 May being my last day of employment*". He duly resigned by email on 19 May 2016, repeating those words.

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9. The Judge found that in those circumstances he was constructively dismissed and that the reason for the dismissal was in effect the closure of Charing, or the sale of Charing, and hence redundancy.

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10. I remind myself of section 139 of the **Employment Rights Act 1996**. It says:

> **"(1) For the purposes of this Act an employee who is dismissed [and that includes constructive dismissal] shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -**
>
> **(a) the fact that his employer has ceased or intends to cease -**
>
> **…**
>
> **(ii) to carry on that business in the place where the employee was so employed, …"**

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11. The Judge's reasoning is at paragraphs 50 to 53. The Judge said at paragraph 50 that she had to decide whether a requirement that the Claimant work elsewhere was a fundamental breach. In paragraph 51, she said this:

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> **"51. I concluded that there was a fundamental breach here. The location was closer to the Claimant's home, and thus not a disadvantage, although it had some drawbacks as it was a farm yard with no office; nevertheless, he was prepared to try it. However, it came with new**

terms including a mobility clause that the Claimant could not accept. I concluded that the location itself could not be considered in isolation without the new terms, because the Respondent had made it clear that the new terms were an essential part of the offer; a 'quid pro quo'. A requirement that the Claimant move his workplace was a breach; it may not have been fundamental because it was closer to his home, had it not been underpinned by the new, less favourable terms. I accepted that that was what the Claimant had tried to explain in cross-examination. I concluded that there was a fundamental breach.

52. I concluded that the Claimant resigned in response to the breach, and that he did not delay in so doing. He made it clear to the Respondent at an early stage that he could not accept the new terms.

53. Accordingly, there was a constructive dismissal. The next issue is whether it was fair or unfair in all the circumstances, having regard to the reason for dismissal and other relevant circumstances. I concluded that the reason that the Respondent acted as they did was because they no longer carried out their business at Charing. I considered that those circumstances fell within the definition of redundancy. Accordingly, I concluded that the reason was redundancy."

12. Mr Wheaton argues two grounds of appeal which correspond to grounds 1 and 2 in the Notice of Appeal. Grounds 3 and 4 for various reasons have, in effect, fallen away.

13. The first ground raised by Mr Wheaton is to say that the Employment Judge in effect ignored in her conclusions the fact that the Claimant had agreed, as she expressly found at paragraph 20, to carry on for three months at the new location but working under the old contract while the new terms were discussed. It is right that in her conclusions she simply does not really advert to that fact which could arguably have meant either that at the time of the resignation there was no repudiatory breach or that it could not be said that the resignation was in response to anything then being insisted upon. It could have been concluded that, at that stage, there were simply discussions. In a nutshell, Mr Wheaton's point is that the Claimant "jumped the gun".

14. I am, albeit only just, prepared to accept that this point was before the Employment Judge and ought to have been considered by her. I say that because it was a clear finding of fact that "jumped off the page" at me as I read the Judgment the first time, and also because Mr Wheaton has shown me his further submissions for the Respondent (at page 35 in my bundle)

at paragraph 7 which refer to the Claimant resiling from an agreement to try Snodland Farm for three months as a place for his lorry and so on.

15. I am also just prepared to accept that the point is raised by the Notice of Appeal which says that the Claimant resigned because he did not want to accept the new terms and conditions of his employment *offered* to (as opposed to imposed on) him, and that no fundamental breach had occurred on the part of the Respondent Employer. As I have said, it is clear the Employment Judge does not really address this issue.

16. Ms Millin says in response that paragraphs 51 and 52 contain clear findings of fact that there was an existing fundamental breach of contract because the move to Snodland came with new terms including the mobility clause etc. and that the Claimant resigned in response to the breach. She also says, as a matter of fact, although it is not recorded in the Judgment, that the Claimant knew that ultimately the new terms would be insisted upon and imposed, and I suppose it follows from that that there was no point in the discussions over the following three months that are referred to at paragraph 20.

17. It seems to me that the finding at paragraph 20 does not sit easily with the findings at paragraphs 51 and 52 and that the Judge ought to have at least given some analysis and taken some account of that part of the history when finding that there was an existing fundamental breach and that the resignation was in response to that existing fundamental breach.

18. The second point argued by Mr Wheaton is that the identification of the reason for the dismissal in paragraph 53 does not sit with the conclusions in paragraph 51. He says that the Employment Judge clearly found that the real reason for the resignation was the Claimant's

unwillingness to accept new terms and that it had nothing to do with the move to Snodland which was the consequence of the closure of Charing. In particular, in a number of places, including paragraph 50, which I do not think I have mentioned, it is noted by the Employment Judge that the Claimant was prepared to work from Snodland. It was his inability to accept the new terms and conditions that was the problem that led to his resignation.

19. Again, Ms Millin says that at paragraph 53 where the Judge says "*that the reason that the Respondent acted as they did was because they no longer carried out their business at Charing*" is a finding of fact and a perfectly permissible finding of fact because there is no doubt that the start of all this was the proposed move to Snodland which gave rise to the employer suggesting as "a quid pro quo" that the Claimant should sign the standard contract.

20. With some hesitation, I agree with Mr Wheaton that the Employment Judge should have addressed this issue in her findings. I say that because on the face of it what was important so far as the resignation, and therefore the constructive dismissal, was concerned, was the fact that the Claimant just did not want to accept the new terms. The move, which was caused by the closure of the old place, was really just the occasion rather than the cause of the employer proposing the new terms. It may be that further consideration by another Employment Judge will reach the same result, but it seems to me just that some more thought and analysis should have been given to the question of what the main reason for the putative dismissal was.

21. I have therefore come to the view that the Employment Judge did go wrong in law by failing to properly consider (a) the consequences of her finding about the Claimant's agreement to continue on his old terms for three months, and (b) the reason for the constructive dismissal.

22. The matter will have to be remitted to be heard all over again by a different Employment Judge. Mr Wheaton recognised that his success may result in his client being worse off in the end because it may be found that there was a constructive dismissal for some other substantial reason - namely, that they were trying to rationalise their contractual terms - but that that was unfair, which would result in Mr Weedon being entitled to compensation for unfair dismissal which might be more than the redundancy payment.

23. The appeal is allowed on those two grounds and the matter will be remitted to a different Employment Judge to start all over again.