Case No: 2601771/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondents**
Mr D Royal **v** **(R1) Loughborough College and 7 Others**

RECORD OF AN OPEN ATTENDED PRELIMINARY HEARING

Heard at: Leicester **On: Wednesday 26th and Thursday 27th July 2017**

Before: Employment Judge Britton (sitting alone)

Appearances
For the Claimant: In Person
For the Respondents: Mr J Searle, of Counsel

JUDGMENT

1. The Claimant is ordered to pay within (28 days) of the promulgation of these orders a deposit of £10.00 per each the four heads of claim as I have analysed them to be in each case the claim having only little reasonable prospect of success. Thus:

1. £10.00 deposit on the unfair dismissal.

2. £10.00 deposit on the breach of contract (notice pay).

3. £10.00 deposit on the Section 15 Equality Act 2010 (EQA) unfavourable treatment claim.

4. £10.00 deposit on the Section 20-21 EQA, failure to make reasonable adjustment, claim.

2. Notice as to what that entails accompanies.

3. The covert telephone recording made by the Claimant at the internal appeal is excluded from the future hearing of this matter, it being inadmissible.

3. The claims relating to disability discrimination permitted to proceed are s15 and s20-21 Equality Act only. All other claims are dismissed as misconceived at law and thus as having no reasonable prospect of success.

4. The application by the Claimant to amend to include a claim based upon whistle blowing is refused. The entry therein in the Scott Schedule is to be deleted.

5. Subject to compliance with the deposit order, this case is to be listed for a further case management discussion by telephone, time estimate one hour, first available date 8 weeks' hence.

REASONS

Introduction

1. I heard a first lengthy attended preliminary hearing in this case back on 9 December 2016. Summarised, although I was allowing the Claimant's case to proceed, including against the 7 lay Respondents as well as Loughborough College (the College), I required him to prepare a Scott Schedule of his claims having, I thought, helped him to identify what I saw his disability related claims to be about which was Section 15 (unfavourable treatment) and Section 20-21 (failure to make reasonable adjustment) Equality Act 2010 (EQA) discrimination; also a claim of unfair discrimination pursuant to s98 of the Employment Rights Act 1996; finally a claim for wrongful dismissal/ breach of contract (failure to pay notice pay). The intention was then to have a resumed Preliminary Hearing. This was duly listed for 24 April 2017 my intention being that I should hear it. But it got listed before a colleague who spotted what I had directed and faced with Mr Royal being very upset if I wasn't dealing with the matter, agreed to adjourn it out so that I could hear it; hence this hearing scheduled to run for 2 days.

2. As to why there is the Preliminary Hearing, it is encapsulated in the Respondent's letter of application following upon the Scott Schedule and dated 15 March 2017 and is also very helpfully set out in the skeleton submissions of Mr Searle.

Issues for determination

Without prejudice offers

3. The College[1] had applied that I strike out references to without prejudice offers made by it set out in the Scott Schedule by the Claimant. That application is now withdrawn by Mr Searle for the obvious reason that in fact to waive the without prejudice rule and therefore for the Tribunal to see what was being offered to the Claimant by the College in fact may very well assist the Respondents if my analysis so to speak of this case as it now is, comes to fruition.

Covert tape recording

2. In essence at Item 44 in the Scott Schedule the Claimant seeks to rely upon comments made in a conversation between the members of the appeal panel at the first day of the appeal hearing which was 23 May 2016 and when the panel had retired to have a break between 10:58 and 11:12 am. He wants at the main hearing to play

[1] It acts for the other respondents for whom it accepts vicarious liability were the claims against them proven.

the recording and the transcript he has made of what was said. The Respondents object.

3. Now the first observation that I make, which is self evident from the documentation before me on this issue and I have listened both to the Claimant's digital tape recording[2] and read the appeal transcript note, is that the Claimant was asked, as was everybody else at the start of the hearing by the Chairperson, Heather MacDonald (HM), first of all to agree that there would be no tape recording of the matter; and she asked first that everybody therefore ensure that their phones were switched off and placed on the table. I can hear that happening. And then she requested "the meeting was not electronically recorded and all participants agreed". The Claimant says that he said nothing, but I have noted that Mr Tim Turner (TT) who was in his words "a companion", agreed. TT is an ACU Representative, albeit he was not there as a trade union official for the Claimant because the Claimant wasn't a member of the ACU. The Claimant says I cannot rely upon what TT said as also being a commitment to comply by him. I do not agree. TT took an active part in that meeting, raising various points for the Claimant. He was clearly in reality acting as his representative; and the Claimant did not gain say TT when he confirmed that nobody on his side of the table, so to speak, was recording the hearing.

4. Despite giving that assurance, the Claimant covertly recorded both that hearing and the continuance of the appeal hearing the following day on 24 May. He had a recording device concealed in the documentation in front of him. I also note that into the second day's proceeding, and I suspect because HM had her suspicions, the Claimant was again categorically asked if he was recording the proceeding. He says he didn't reply. But that is disingenuous. Also this is not an inadvertent tape recording by the Claimant. I simply don't believe him when he tries to suggest it was. As is by now obvious, this was deliberate.

5. The Claimant has long been on notice that there was this application today. Indeed it was on the agenda for Employment Judge Evans back at the April Preliminary Hearing to which I have already referred. In support of his application I have his submissions submitted for the aborted hearing before EJ Evans and in which relies upon **Punjab National Bank (International) Limited and Others v Gosain Limited** UK EAT/003/40/SM, 7 January 2014. He has not brought me or Counsel a copy of the same[3]. Mr Searle has been able to read it up on his G-phone and has been able to impart to me the gravure of that case. The scenario in that case explains why the covert recording was determined to be admissible. It was a case of race discrimination in which the respondent denied any discrimination, but the extract from the covert recording showed this was untrue because it provided clear evidence of discriminatory remarks. That is not the case here.

6. The panel in its break expresses sentiments which I would describe as letting off tension because of exasperation at the way the hearing has been going and in particular as to Mr Royal. I can understand in many respects why because the Claimant is obsessed with his case. He is a master of every aspect of it including the minutia. He deploys a great deal of documentation. He is resolute in wishing to deploy all of it. He is therefore immune to entreaties to edit or focus his submissions such as on the issues at the appeal. And for a lay panel in particular this would try its patience.

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[2] He did not bring it on the first day despite being on clear notice that it would need to be listened to in order to rule on admissibility.

[3] He also cites a decision at first instance: "P Burton v Nottinghamshire County Council ET 2010 whereby the judge allowed video recording as part of substantial and convincing evidence which allowed natural and fair justice to apply." He has not supplied a copy, and of course it would not be binding upon me.

And it is well known to me as an experienced tribunal Judge that when members of a panel stop for a coffee break they may, thinking they have the privacy of the retiring room, express comments about how things are going. That is a wholly different thing from their making remarks showing they are biased and have a closed mind or hold discriminatory views and in this case as to the Claimant and his mental health disability. No such remarks are made. The Claimant refers to a reference to Hillsborough. But he cannot have his cake and eat it. He had in his submissions in the period prior to the break said that he would be deploying "recent case law concerning Hillsborough disaster". Understandably HM in a firm exchange queried the relevance, eventually telling him to move on. Prima facie I cannot see the relevance of Hillsborough. Thus it is understandable that in the break this topic was raised; seen to have been in poor taste; hence the reference from HM that "she nearly lost it at that point." None of this goes to discrimination such as to justify the admission of a covert recording.

7. And so I am guided by and indeed adopt **Mr ACW Williamson v The Chief Constable of the Greater Manchester Police, Greater Manchester Police Authority UK EAT// 0346/ 09/ DM** per His Honour Judge Birtles, in which he reaffirmed the dicta in particular of Mr Recorder Luba QC **in** the **Chairman and Governors of Amwell View School v Dogherty** [2007] IRLR 198 EAT. Thus:-

> Paragraph 22 quoting from the Recorder Luba QC judgment:
>
> *"73. In our judgment there is an important public interest in parties before disciplinary and appeal proceedings complying with the "ground rules" upon which proceedings and question are based. No ground rule could be more essential to ensuring a full and frank exchange of views between members of the adjudicating body (in their attempt to reach the "right" decision) than the understanding that their deliberations would be conducted in private and remain private. How, otherwise, could a member of that body confidently expose for discussion a doubt concerning some evidence about which he or she was unsure? The failure to maintain respect for the privacy of "private deliberations" in this context would have the important consequences of (1) inhibiting open discussion between those engaged in the task of adjudicating and (2) giving rise to a good deal of potential satellite litigation based on "leaks" by particular members of the adjudicating body or from the clandestine or unauthorised recruitment of such proceedings.*
>
> *74. We are far from suggesting some new broad class of common law public interest immunity in the law of evidence. Rather we confine ourselves to the particular circumstances of this case: a claim for unfair dismissal of an employee which raises issues as to the reasonableness of (and the conduct of) the procedures leading to that dismissal and the confirmation of it. More particularly, a case in which, in the course of those procedures, the employee has agreed in advance (with no suggestion of any prejudice or duress) to withdraw whilst the relevant panel deliberated in private, that the panel having undertaken to give (and having subsequently given) full reasons for its decision. The balance between the conflicting public interest might well have fallen differently if the claim had been framed in terms of unlawful discrimination, where the decision was taken by a panel which gave no reasons for its decision, and where the inadvertent recording of private deliberations (or the clear account of one of the panel members*

> *participating in those deliberations) had produced the only evidence – and incontrovertible evidence – of such discrimination."*

8. This of course was not a deliberation. But even so the principle is clear. And there is no evidence from what I have heard and indeed read in the Claimant's transcript of the panel's conversation that there was any discussion of his disability. Thus there is no"incontrovertible evidence of such discrimination"".

9. It follows that I exclude the covert recording in relation to any discussion by the panel when it may have withdrawn; and I bear in mind that the only extract that I am asked to permit was as per the Scott Schedule, Paragraph 44.

10. That brings me on to whether or not the entirety of these recordings should be excluded. I gather he also covertly recorded the dismissal hearing. This would mean a considerable amount of time would have to be spent by the Tribunal panel listening to the recordings of what were extensive hearings. I also observe that the Claimant having disclosed he had made these tape recordings back in June 2016 was repeatedly asked by the College to provide it with, at the very least, a transcript of the same and a copy of the recordings. This it has never had and indeed it is only today, the second day of this hearing, that for the first time the Respondents have been able to listen to the tape recordings. I say this; cross referenced to the minutes of those meetings that I have read as taken by the note taker who is no longer in the employ of the College, there are very few differences and those there are, immaterial. I therefore do not consider in accordance with the overriding objective that it is necessary for the tape recordings to be heard. Thus I rule accordingly.

The Whistle blowing Claim

11. In the Scott Schedule at item 36 is pleaded a set of events commencing with the words "Claimant submitted whistle blowing complaint". This is said to be in December 2015 with a promise by the College to complete its investigation and answer the complaint within 2 weeks as per the procedure. He pleads that it in fact took a year, ie circa December 2016. The Claimant was of course dismissed in April 2016. Inter alia he pleads that the whistle blowing investigation *"was not independent and confidential as documents were passed to employers involved in the disciplinary and appeals process… the investigator … was not independent and had a conflict of interest".* This is the only claim in the extensive Scott Schedule which relates to whistle blowing.

12. So a claim first made in the Scott Schedule circa March this year, the dismissal having been in April 2016 and the claim having been presented to the Tribunal on 23 September 2016. The time limit for bringing such a claim is three months from the last act complained of. Thus it is significantly out of time. That is not necessarily fatal, albeit it is a factor to be considered in what becomes a need for the Claimant to be granted the necessary amendment to the current claim. That is because whistle blowing is an entirely knew new head of claim, thus it cannot proceed unless I grant the deemed necessary application to amend. Thus I apply the principles as set out by Mr Justice Mummery, as he then was, in **Selkent Bus Co Ltd v Moore 1986 ICR 836 EAT**. My overview on this having heard at length from the Claimant and read further documentation, albeit not having before me anything relating to the whistle blowing, including the Claimant's whistle blowing letter, albeit he has known about this issue as being on the strike out list, so to speak, since at least March, is as follows.

13. By 10 December 2015 the Claimant had been in two days of disciplinary hearing. I have of course already referred to that today in relation to the covert recording issue. And of course I have already referred to the Claimant having the assistance of TT. I have learnt today that he is, or was at the material time, an accredited representative of the ACU for the purposes of the College. He is highly experienced in relation to employment maters. Of that I have no doubt from listening to the recording and reading the transcripts, and that he knows his way round the College's procedures.
So what had happened here is that at the beginning of the disciplinary hearing the Claimant and TT had asked that the panel be aware that there were 25 grievances. I read within that that they expected that the disciplinary panel would therefore bow to the tactical manoeuvre so to speak, because in my experience this approach is frequently taken by trade union representatives as it has the effect of suspending the disciplinary process whilst the grievance is investigated and concluded. But this the panel didn't do, and they went on in fact to explore all the grievances in the compass of the disciplinary process as to which see the comprehensive outcome decisions to which I have already referred.

14. The disciplinary panel having so decided not to stay the process, on the third day of the disciplinary hearing the Claimant did not attend by now being unwell. But he sent via TT a letter was invoking the whistle blowing procedure. The issues raised therein are in fact intrinsically linked to the disciplinary issues such as reiterating complaints about the process and the bias as alleged of those conducting it; and second raising that the principle complainant against him, SJH, had herself been under investigation for bullying and harassment issues: ergo her credibility was thus undermined. Leaving aside whether this actually is whistle blowing pursuant to the provisions commencing at s43 of the ERA, this was again a tactical approach, the aim being as the Claimant made clear to me, that by so doing it the whistle blowing procedure would prevail. Therefore the disciplinary would have to go on hold whilst the whistle blowing complaint was investigated. Thus the letter was addressed to the clerk of the College because under its constitution issues relating to whistle blowing have to be put through the clerk. An investigator was appointed, who was external, and the investigation was very extensive indeed. A lot of people were interviewed and it was still going on in September 2016. The conclusion which was not favourable to the Claimant wasn't published until circa November 2016. I can piece that together from what I have been told today. I am not assisted by the lack of documentation.

15. But as a tactic it failed to halt the disciplinary process. He sees that, as made clear to me today, as detrimental treatment by reason of having raised a public interest disclosure. He goes further and says that thereafter the disciplinary panel and the appeal panel were biased against him as a whistleblower. The College via learned Counsel has made plain that pursuant to the whistle blowing protocol only the Governors are informed at first instance that a complaint has been made. They are not privy under the constitution to the contents. And procedurally it then travels a separate path via the audit committee which is "Chinese walled" for the purposes of dealing with whistle blowing.

16. And the fundamental is this: If the Claimant had a concern of bias and thus that HM should not be chairing the appeal panel, or that it was wrong to have proceeded to dismiss rather than await the outcome of the whistle blowing investigation, then this was not raised at the appeal. I have of course read the minutes. The Claimant has not been able to answer clearly to me why not. Yet, despite his disability, he has:-

16.1 A remarkable intellect.

16.2 A remarkable grip of the facts in this case.

16.3 An ability to find documentation in a morass of it with considerable aplomb.

16.4 A clear cut knowledge of the College procedures.

It follows that even though he has a disability I am not persuaded that it disadvantages him.

17. Thus I can see no reason why the Claimant could not have raised the whistle blowing issue when he issued his ET1 as it essentially concerns the period December 2015 to the outcome of the appeal against dismissal which is April 2016. He says that he was doing this by reason of ticking the box on page 9 of the ET1 but that box has to be contrasted with what he had ticked as to being his claims and the grounds that he gave in support of them, as to which see box 8 where he ticked for unfair dismissal, disability discrimination, notice pay, holiday pay and arrears of pay, and set out the short narrative at the bottom which makes it absolutely clear that those were the claims he was bringing in addition to one based upon "*Breach of Health and Safety at Work Act*" as to which the Tribunal has no jurisdiction as made plain at the December Preliminary Hearing. At box 9 what he was being asked to tick was whether or not, if he was bringing a whistle blowing claim, he wished it to be reported to the relevant prescribed body, ie in this case OFSTED. That is not the same thing at all as thereby indicating he is bringing a claim. Maybe there was confusion in his mind. And he is not supported by the 43 paragraphs of the then Particulars to the ET1: Not a word about whistle blowing. Furthermore when this Judge at the December 2016 Preliminary Hearing identified the heads of claim as he understood them to be, the Claimant did not correct him and point out that he was also claiming for whistle blowing.

18. Thus applying **Selkent**, it is self evident that the claim relating to whistle blowing is well out of time. If that was the only factor that I was dealing with then of course I would find that it would have been reasonably practicable to have brought it in time as the Claimant had the necessary legal knowledge of what constituted whistle blowing in December 2015. But that is not the only factor. Depending on the circumstances, I can allow the claim to proceed depending on where I think the balance of justice and thus prejudice lies. This case is already copious in size with a great many sub issues which I have identified over these two days, as I did in fact last December, to try in accordance with the overriding objective to get some grip particularly in terms of the identifiable issues. The College has already been put to considerable preparation as is obvious. If I grant the amendment it would inevitably mean a considerable amount of more preparation including sourcing further documentation and proofing additional witnesses and yet more days added to the hearing which is already likely to take many days in a situation where the Claimant could have brought this claim a long time ago.

19. Thus given all the circumstances which I have now explored, I have decided that the balance of prejudice lies with the Respondents. I therefore refuse the application to amend.

The otherwise over arching issue

20. First says the College additions in the Scott Schedule shouldn't be permitted if they are supposed to be claims as they have never been previously pleaded in the particulars of claim. The second application relates to strike out and alternatively that I

make deposit orders. In this respect during the course of this hearing I have been able to look at a lot more detail including medical reports and the 14 page decision letter on the dismissal and the equally full grievance outcome letter of the same day.

21. First I am with Mr Searle as follows: although at the preceding PH last year I painstakingly identified with Mr Royal what each claim was about and the legal label to be attached, nevertheless he has added a claim for indirect discrimination pursuant to s19 of the EQA to all but the first head of claim. To do so is misconceived. Section 19 doesn't apply in this case. He has given no overarching PCP or then engaged his mind as to the overall group covered by it and then the disadvantaged group by reason of a protected characteristic before getting to himself in the singular. I don't think he understands the law. Also the same applies to his attempt to claim harassment pursuant to s26. Applying the definition, despite the Scott Schedule he still hasn't pleaded anything that remotely comes within it. The same applies to victimisation pursuant to s27 particularly as he has failed to identify a "protected act".

22. The core issues in this case are so obvious. Thus the scenario is that back in May 2014 as a result of complaints made about his behaviour by colleagues he was suspended. Subsequent thereto the suspension was suspended so to speak because he went ill, originally with labyrinthitis. Thus the absence became one of sick leave. Once classed as fit the disciplinary investigation process resumed, was completed, and he was told that there would be a disciplinary hearing. But at that stage he presented to his doctors with depression and thus the internal proceedings were then very protracted because for a long period of time the Claimant was unfit to participate. There is then an issue in relation to matters relating to home visits to him by May 2015 being aborted, the Respondents say because of his aggressive behaviour. He would dispute that. As a consequence of all of this and the getting of occupational health reports and so on and so forth, the actual disciplinary hearing didn't get going until December 2015. And I do not read into that that the delay is due to the Respondents, it is due to the issues I have now touched upon. And it is only in that disciplinary hearing and after the Claimant had been allowed to raise some 25 grievances as part of the process, that we get the Claimant saying "well it may be this behaviour of mine back in January-May 14 is because of my disability". The problem there of course is that on the other hand he has never admitted the behaviour and he still doesn't. So leaving it like that what we then get is that the employer endeavoured to obtain more medical evidence. I have seen some of that today. None of that obtained provided any causative link between the mental disability of depression and the behaviour towards a colleague which was on the face of it deeply offensive and emotionally upset the female colleague concerned. Absent any link, and if on the basis of the range of reasonable responses test there has been a sufficiently reasonable investigation for the employer to reasonably conclude that the Claimant has so behaved, then that behaviour was so serious that it clearly would have constituted gross misconduct and warranted summary dismissal, which is what occurred on 14th April 2016.

23. Thus in particular the seminal authority of **British Home Stores Ltd v Burchell (1978) IRLR 379 EAT** engages. And prima facie from what I have now read and as encapsulated in the 14 page dismissal letter, there was a sufficiently reasonable investigation. Even more so at the appeal when two employees were re-interviewed, one of whom completely supports the victim so to speak[4]. Thus unless there is a causative link with the Claimant's disability, it seems to me the Claimant's case is doomed to failure. The medical evidence did not tell the College this behaviour can be

[4] The other couldn't assist either way.

attributed to the depression. The Claimant's own psychiatrist, some of whose report I have now read, didn't give any such opinion and neither did the General Practitioner. The college wanted to deploy a Mr Mike Drayton, who is a chartered psychologist on the panel of experts, to give a further opinion. The Claimant declined because he saw him as a stooge so to speak of the Respondents' solicitors as they had used him from time to time as a expect on mental health matters. I would only observe that to deploy him does not mean he is a "stooge": he is on the panel of experts. What it meant was that otherwise the College had medical evidence which didn't support the Claimant. And how is it going to square anyway with the Claimant saying I didn't do it? He can't have it both ways. Either he did do it and accepts that it may be he simply didn't remember but it would be part of his depression at the time as a trait thereof, in which case the College could then look at matters in that way, or he has to accept that if he wishes to deny the behaviour, then the employer is going to see that lack of ownership as a factor justifying dismissal even if he was disabled. It has a course a duty of care to other employees such as the victim.

24. So what does it mean? To me the claims as per the Scott Schedule, leaving aside the misguided and unnecessary attempt to apply s19, don't need to be analysed on the basis of strike this one out or let that one in. They are not separate heads of claim. They are all factual assertions, relied upon as the building up of a case, starting with the suspension, through to the final outcome of the appeal to show that the Claimant has been discriminated against because of something arising in consequence of his disability. In other words it is all part of the Section 15 claim and in the context of where engaged a failure to make reasonable adjustment pursuant to Section 20-21, linking to the unfair dismissal claim and a claim for notice pay (breach of contract) at common law as this was a summary dismissal.

25. Thus I am relabeling the Claimant's claim. Thus throughout the Scott Schedule where it reads indirect discrimination or harassment or victimisation those are struck out and instead relabelled Section 15/Section 20-21 and so on and so forth.

26. But for all the reasons that I have now given I am wholly satisfied that the overall claim has at best only little reasonable prospect of success. I will not strike it out primarily because I consider myself constrained, particularly in relation to the discrimination based claim, by the jurisprudence encapsulated in **Anyanwu and anor v South Bank Students Union & anor 2001 ICR 391 HL[5].**

Deposit Order

27. But pursuant to rule 39(1) of the 2013 Tribunal Rules of Procedure I am making a deposit order in respect of each of the claims as I have thus identified them to be.

28. The Claimant has no means. He already owes the College over £30,000 in costs which has been awarded in relation to his attempts twice to get an injunction in the County Court against the College being permitted to proceed with the internal processes which are of course now before this Tribunal. He has made plain to me that the enforcement of that order does not concern him as he has no assets.

29. Therefore I am going to make 4 nominal deposit orders because I am well aware of recent jurisprudence on the topic.

[5] Of more recent time see Hasan v Tesco Stores Ltd UKEAT/0098/16/BA

30. The Claimant now has to consider whether to pay the deposits and there is a time line if he is going to; therefore in those circumstances I am directing that there be **listed a further case management discussion by telephone, first available date 8 weeks' hence** if he pays the deposits or one or other of them thus limiting his claim to that specific claim. The agenda will be to give final directions for a trial before a full Tribunal to which end the parties will be sent agendas for completion and these will be back with the Tribunal for the purposes of this telephone case management discussion including time estimates and provisions for reading etc.

Continued joinder Rs 2-7

31. Mr Searle asks why they need to remain joined. All will give evidence for the College. Vicarious liability, if it becomes engaged, is accepted. I share his view that on the papers to date I can see no aggravating features making it likely a Tribunal would make awards personally against them. But the Claimant feels strongly that one way or the other they orchestrated his downfall. Of course the Tribunal will need to make findings of fact, which is not for me sitting alone. Thus constrained as I am by ***Anyanwu***, and with considerable reluctance, I will not disjoin them.

Judicial mediation

32. It is obvious to me that this is not a viable proposition. As to why may become relevant once the case is completed by the Tribunal at the final hearing.

Case Management

33. For the time being this case continues to be single case managed by this Judge.

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Employment Judge P Britton

Date: 23 August 2017

Sent to the parties on:

23/8/17…………………………….
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For the Tribunal:

S.Cresswell……………………