

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

At the Tribunal
On 7 February 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS J AYNGE

APPELLANT

MR K TRICKETT t/a SULLY CLUB RESTAURANT

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS JULIE AYNGE
(The Appellant in Person)

For the Respondent

MR JON STANLEY
(Representative)
Bayside Employment Relations Limited
26 Windsor Esplanade
Cardiff
CF10 5BG

SUMMARY

PRACTICE AND PROCEDURE - Preliminary issues

PRACTICE AND PROCEDURE - Amendment

The Claimant worked in a pub/restaurant owned by her parents of which the Respondent was the licensee. On Saturday 15 October 2016 there was a row between them during the evening shift and the Claimant left before the end of the shift; on Sunday 16 October there was a further interaction. The Claimant brought a claim for unfair dismissal stating in her ET1 that her employment ended on 15 October 2016 and referring to events on both 15 and 16 October. Both sides put in witness statements dealing in detail with events on 15 and 16 October. On a fair reading of the Claimant's witness statement, it would have been open to a Tribunal, depending on what other evidence was accepted and how the various exchanges were analysed, to find that there had been an express or constructive dismissal on either 15 or 16 October.

The hearing was listed for two days; the Claimant represented herself, the Respondent was represented by a consultant and was present with two other witnesses to the events. Instead of hearing all the evidence the Employment Judge acceded to a submission that the Claimant had effectively conceded in her witness statement and oral evidence that she was not expressly dismissed on 15 October 2016 and that, this being her only pleaded case, the claim should be dismissed on the basis of a "preliminary issue".

The EAT decided that the Employment Judge had taken an unduly technical approach to the pleadings and not taken sufficient account of the fact that the Claimant was representing herself and the domestic context of the events he was dealing with. In particular:

- (1) It was not clear that the Claimant had really conceded that she was not expressly dismissed on 15 October 2016 or that it would have been fair to hold her to such a concession;
- (2) On a fair reading of the pleadings it would have been open to the Employment Judge to decide the case on the basis of a constructive dismissal or a dismissal on 16 October 2016;
- (3) In any event he ought to have at least considered allowing an amendment to reflect the various possibilities if that was necessary.

In the circumstances the Claimant had not had a fair hearing and the case would be remitted to another Employment Judge.

A **HIS HONOUR JUDGE SHANKS**

1. This is an appeal from a Judgment of Employment Judge Cadney, sitting alone in Cardiff, which was sent out on 25 August 2017. He dismissed, in that Judgment, the Claimant’s claim of unfair dismissal having heard evidence only from the Claimant on the basis of a preliminary issue as to whether there had been a dismissal at all.

2. The Claimant at the hearing was acting in person and the Respondent was represented by a consultant, Mr Stanley, who has represented the Respondent today. Apparently, according to the Judgment, the Claimant agreed to the course taken and the Judge adopted it “*on the basis that [he] could not see any way that it could prejudice the claimant*” (paragraph 1).

3. The background was that the Claimant worked at a pub/restaurant called Sully Constitutional Club. Until 1 September 2016 the restaurant was owned by her parents but it was taken over by the Respondent, Keith Trickett, on that day. In fact, I should correct that slightly because she tells me today that her parents still own the building and that she and her sister, I think, stand to inherit it but that the Respondent, Mr Trickett, is the licensee and took over the business.

4. The ET1 in the case needs to be considered in a little detail. Under the heading “*Employment details*” (at page 24 of my bundle) the question is asked “*when did your employment end?*”, to which the answer has been inserted “*15/10/2016*”. Under the heading “*Please indicate the type of claim you are making*” (on page 26) there is a tick by the words “*I was unfairly dismissed (including constructive dismissal)*”. At page 27 is the familiar box (8.2) which is headed “*Please set out the background and details of your claim in the space below.*”

A *The details of your claim should include the date(s) when the event(s) you are complaining about happened*” and there is an invitation to use a blank sheet. The relevant paragraph is in the middle of the box, it says this:

B “Keith Trickett took over and employed me 1st September 2016, and dismissed me on 15th October 2016 just over 6 weeks later. Not given a reason for dismissal, no warnings, nothing in writing, no process or procedures done. Told that night “this is your last shift tonight” “that’s it we’re done”. The spurious reason was that Keith’s dog was in the restaurant during food service and I didn’t manage to get it out. Dog wouldn’t come when called. Told Keith shouldn’t be in the restaurant and it’s not my dog. He lost his temper [which] made me feel very demoralised, and said “that’s it we’re done”. The next day on the Sunday I went to collect my wages and to see if my job was defiantly [by which I think she means “definitely”] terminated and was told by Keith “we would of got rid of you in the first week if it wasn’t for your parents! We [have] been putting up with you”. In the first week I did everything [to] help as much as I could, I was excited about the change, they had plenty of good ideas and seemed to be ok with my work, so was a shock for Keith to say that.”

C
5. The ET3 response form on behalf of Mr Trickett agreed that the employment had ended on 15 October 2016, and in a long response first of all said the claim was defended and then in relation to facts relied on to defend the claim, this was said:

D “... Everything went ok until Saturday 15th October. Julie [that is the Claimant] came into work and seemed very offish and agitated and aggressive. ...”

E There is then a description of matters and this:

F “... She then went back up to the bar. 5 Minutes later she came back into the kitchen and shouted at Jackie [which is Mr Trickett’s partner] your f...ing dog is in the restaurant, Jackie said tell her to get out and she will go, Julie replied at the top of her voice it’s not my f...ing dog so I told Julie in front of three other witnesses to get back up to [the] bar, and this would be the last busy night shift she would work. So she went back to the bar, two minutes later she went up to Jackie in the restaurant and said if I’m f...ing sacked I’m going now, Jackie said Keith didn’t say you were sacked he said this is the last night shift you would work. She then walked back down to the kitchen and shouted at me, if I’m f...ing sacked I’m going now. I then said again to Julie in front of the witness, I didn’t say you were sacked I said this is the last busy night shift, you would work, from now on you will be on day shifts and Julie left the kitchen. Ten minutes later a customer came down to the kitchen to see if he could get served at the bar, Jackie went up to the bar to see where Julie was and she had walked out leaving a full bar unattended with cash in the till and customers waiting. I then had to get someone to manage the restaurant so that Jackie could look after the bar. I didn’t see Julie then until the Sunday [which as I understand it was the following day, 16 October] I was in the restaurant Jackie was serving at the bar. Julie walked up to Jackie and asked for her wages and where I was, Jackie told her I was in the restaurant, whilst Jackie was getting her wages out of the safe. Julie shouted across the restaurant bar at me, so I’m f...ing sacked am I. I said no you walked out Jackie came up handed me her wages, she turned and went to walk out I said I will get your tips money for now and Julie said stick them up your ass and walked out and I haven’t seen or heard from her since.

H After finding out that Julie was taking me to a tribunal, I then asked the other staff members to see a copy of their contract of Employment, so I knew where I stood with Julie to find out that no one has ever had [an] employment contract from the previous employer.

All witnesses to all the events that happened are willing to give statements.”

A 6. Following that exchange of pleadings, there was a Preliminary Hearing - I think, but
unfortunately I do not have any details of what happened - and a Full Hearing was fixed for two
B days starting on 10 August 2017. The Claimant and indeed the Respondent and two other
witnesses made witness statements, and the Claimant's witness statement said rather more than
was said in the ET1. She described being told "*This is your last shift*" and "*That's it, you're
done. Get out*" and the Respondent throwing his hands in the air (ET Judgment, paragraph 5).
C She said she left the kitchen very upset and went to the front bar and she told someone called
Mr Impey "*I've just been shouted at and told this is my last shift and that I've been sacked*".
She then had another conversation and then said this:

D "I went back into the kitchen to clarify what he meant. I asked if that was it after tonight. He
said I had mis-heard him and that he said "This is your last busy shift tonight. You're not
working a night shift again". I said "that's unreasonable". Then he shouted at me about
E spilling cream to which I apologised. If I realised I would have cleaned it up straight away.
Then he shouted at me again that customers are not coming in because of me, because of one
incident that happened months ago that Mark Sheppardson brought up on a Wednesday
evening. Then Keith told me to get out. I was upset and shaking, I got my bag and jacket,
Jacquie was wiping a table, I said to her "I am very upset" and that I was going. She smiled at
me and said "whatever". On the way out from the front bar Sandra and Tony were at the bar
who I served before going out, this was about 9.40pm when I left. I did speak to my dad that
night around 11pm when he got back from being out and he said he would talk to Keith. I
messed up my cousin when I got home after I was unfairly dismissed."

F 7. Then she dealt with events the following day, which are to a limited degree reflective of
what is said in the ET1. She said she waited till 6.30pm and then went down to ask for her
wages. She saw Jackie at the bar and she asked if her job was finished and Jackie said "*yes
because I walked out. I asked then if Keith agrees. He came out of the office and said "yes,
you're finished*" ". She goes on to say:

G "I asked if we could talk in the restaurant because I was hoping to sort this out, not in front of
the few customers in the front bar. Keith was very abrupt with me and said he would have got
rid of you in the first place if it wasn't for your parents, we've been putting up with you. As he
said this he was bashing his fist down on the counter, mocking the way he did this before and
saying "how do you like this?" banging his fist down. I left straight away upset and in
disbelief again."

H 8. It is clear from that statement that the Claimant accepted that on the night of the 15
October at one stage she was indeed told by Keith that she had not been dismissed but that she

A was not to work a night shift again. The Employment Judge said that her oral evidence confirmed that she knew she had not been dismissed and that she thought that her removal from busy shifts would be unreasonable.

B 9. Mr Stanley submitted to the Employment Judge that the Claimant had therefore
C conceded that she was not dismissed on 15 October 2016 and that her ET1 alleged an express
D dismissal on that date so that her claim must fail. The Employment Judge acceded to that
E submission and dismissed the claim without hearing any further evidence. It is clear that the
F Employment Judge accepted that, on the Claimant's account of events, it may have been
G possible on analysis to find that there was a constructive dismissal on 15 October or an express
H dismissal on 16 October. But on the basis that she relied on an express dismissal on 15
October, he, as I say, dismissed the claim.

A 10. It seems to me that the Employment Judge took an unduly technical approach and has
B not taken sufficient account of the domestic context of the events he was concerned with or the
C fact that the Claimant was representing herself. First, I am not sure that the concession went as
D far as accepting that there had been no express dismissal on 15 October 2016. Whatever Mr
E Trickett was saying, it could have been argued that the initial words - as the Claimant said they
F came out and of course there was to be a dispute about that - "*This is your last shift tonight. That's it, you're done*" could have been construed as a dismissal full stop, regardless of any
G later statement, or it could have been argued that the subsequent occasion when Keith "*told me to get out*" could have been an express dismissal. The Claimant as a litigant in person could not
H have been expected to analyse matters in that way or to understand the significance of any
concessions she might have been making. That is the first point: I am not sure the Judge was
right to find that there was such a concession.

A 11. The second point is that I am not sure it was fair to say that the ET1 was such that it
could not be argued that the Claimant was entitled to rely on either a constructive dismissal on
15 October or an actual or constructive dismissal on 16 October. As far as I can see the parties
B came prepared to tell their whole respective stories about the events of both days in detail. The
ET1, as I have said, referred to events on 16 October and the Claimant's witness statement gave
more detail about events on 15 and 16 October. This was essentially, as I said in argument, a
C row in a pub which the Employment Judge needed to make findings about and then apply a
common sense analysis too.

D 12. I fully recognise the importance of pleadings and Mr Stanley very rightly referred me to
what is said by the then President (Langstaff J) in the case of Chandhok v Tirkey [2015] IRLR
195 and what he says in particular at paragraph 18:

E “18. In summary, a system of justice involves more than allowing parties at any time to raise
the case which best seems to suit the moment from their perspective. It requires each party to
know in essence what the other is saying, so they can properly meet it; so that they can tell if a
tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to
those which are proportionate; so that the time needed for a case, and the expenditure which
F goes hand in hand with it, can be provided for both by the parties and by the tribunal itself,
and enable care to be taken that any one case does not deprive others of their fair share of the
resources of the system. It should provide for focus on the central issues. That is why there is
a system of claim and response, and why an employment tribunal should take very great care
not to be diverted into thinking that the essential case is to be found elsewhere than in the
pleadings.”

F It seems to me in this case that the essence of the case was that the Claimant had been unfairly
dismissed as a consequence of the events on 15 and 16 October 2016 and that she had
G sufficiently raised that in her ET1.

H 13. Furthermore, if one goes through the points that the President rightly makes as to the
purpose of pleadings, it does not seem to me that any of them are undermined in this case. The
parties each knew, in essence, what the other was saying and they had prepared witness
statements and had witnesses at the Tribunal to deal with what was being said on both sides

A about those events. There was no question of jurisdiction being lost on time grounds. The costs were not disproportionate to an investigation of what had happened over those two days. And the time needed for the case was, as I said, two days; but because of the turn of events, turned out to be at most two hours. Therefore it seems to me that there was a focus on the central issues and sufficient time and resources have been dedicated to those issues. That is the second reason.

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C 14. The third reason is that even if the Employment Judge was right that the ET1 did not enable an analysis of what had happened to involve constructive dismissal on 15 October or an actual dismissal on 16 October, I think he should have at least considered allowing an amendment to raise those points expressly, if that was required, in fairness to the Claimant who, as I said, is a lay person who is representing herself and really cannot be expected to know exactly what the difference between an actual and a constructive dismissal is, not least because it is often quite difficult for lawyers to get their heads around those concepts.

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F 15. I say no more about whether such an amendment is indeed necessary or whether an application or consideration of it should succeed, but I am afraid, although Mr Stanley has done a sterling job of attempting to support what the Tribunal Judge says, I cannot help feeling that the Claimant has suffered an injustice here and I am going to remit the case back to a different Employment Judge. I stress to the Claimant, this not a finding that she wins. The whole thing starts again and even if the scope of the case is a full investigation of the facts on 15 and 16 October 2016, if the Respondent's evidence is accepted about what was going on, it may well be that her claim fails on its merits, whatever basis it is put on.

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