Appeal No. UKEAT/0213/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 June 2018
Judgment handed down on 19 July 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR E PARKER — APPELLANT

BC SOFTWEAR LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBERT TALALAY (of Counsel) Instructed by: Keystone Law 48 Chancery Lane London WC2A 1JF
For the Respondent	MR RODERICK MOORE (of Counsel) Instructed by: DC Commercial Solicitors 21 Carlton Crescent Southampton Hampshire SO15 2ET

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Contributory fault

The Employment Judge did not err in law in rejecting the Claimant's case that he had been constructively dismissed and in finding that the Claimant had been dishonest.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Eddie Parker ("the Claimant") against a Judgment of Employment Judge Gumbiti-Zimuto dated 23 February 2017. By his Judgment the Employment Judge dismissed a complaint of constructive unfair dismissal which the Claimant had brought against BC Softwear Limited ("the Respondent").

The Background Facts

2. The Respondent is a supplier of luxury bathrobes and towels to hotels, spas and laundries across the United Kingdom and Europe. In 2015 it employed some 19 employees. There was a linked company, Towelsoft Limited ("Towelsoft"), which was a retail outlet for the Respondent's products.

3. Ms Barbara Cooke had founded the Respondent. She was its managing director. She was also a majority shareholder and director of Towelsoft. Ms Cooke was married to Mr Michael Parker; he was the Respondent's chairman. But he and Ms Cooke were going through a divorce and he was not involved in the day-to-day running of the business.

4. The Claimant was the son of Mr Michael Parker. He was employed by the Respondent in 2012 as a customer service representative. His duties included assisting in content management for Towelsoft's retail web site. His remuneration included commission based on the sales of both the Respondent and Towelsoft.

5. In May 2015 Ms Cooke agreed that the Claimant could take a sabbatical and that his position with the Respondent would be kept open until 1 December 2015. However,

unilaterally and without reference to Ms Cooke, the Claimant's father wrote to him on 31 July 2015 saying that as director of the company he agreed to hold his position open for a 12-month period. Ms Cooke did not agree to that extension.

6. The matter which was to result in the termination of the Claimant's employment came to light in August 2015. It resulted from a concern expressed by the Respondent's bank. Ms Cooke investigated the concern and found that a substantial number of payments were made to the Claimant's account online via the Towelsoft website or via Sagepay, a secure payment mechanism used by the Respondent's customers to pay by credit card. The sums amounted to about £3300 over a six-month period.

7. Ms Cooke and Mr Michael Parker discussed the matter at a board meeting on 28 August 2015. The meeting was recorded and transcribed. Mr Parker said that he had left the Claimant four or five messages to explain. He had not heard anything. He said that Ms Cooke was assuming he was guilty; and "from his past history I totally agree with you". So at that stage Mr Parker did not put forward any explanation on his son's behalf. Ms Cooke did not have contact details for the Claimant while he was on his sabbatical; and, although the Claimant knew of the allegations, he did not contact her to give any explanation.

8. The Claimant returned to the UK in December 2015. Mr Parker told Ms Cooke that he would return to work on 14 December. At first Ms Cooke did not accept this, the date of 1 December having passed. But she soon resiled; and a series of emails passed between them where she asked him whether he was intending to return to work and if so on what date. The Claimant never confirmed that he would return to work. He said Ms Cooke had wrongfully accused him of fraud and had repeated the allegations to third parties including his fellow

employees. By email dated 4 January 2016 he resigned and brought his claim of unfair dismissal.

The Parties' Case About the Payments

9. It is, in my judgment, important to appreciate that there was a direct conflict of evidence between the Claimant and Ms Cooke about the payments in question. His case was that she had specifically authorised them; the Respondent's case was that she knew nothing about them until alerted by the bank in August.

10. The Claimant said that Ms Cooke had specifically agreed that he should take this money from Towelsoft in this way prior to his departure on sabbatical. He backed up this account with a witness statement from Mrs Susan Mullins, a tax practitioner. In a letter dated 6 September 2016, a few months prior to the ET hearing, and in her witness statement for that hearing, she said that Mr Michael Parker had told her in June 2015 that Ms Cooke had agreed to his having this money; and she had said that it should be shown on his return as expenses payments received.

11. There were, as the Employment Judge found, a number of difficulties with this account. If Mr Michael Parker had known that the payments were authorised it is mystifying that he should not have said so at the board meeting in August. Moreover there were two specific problems with Mrs Mullins' evidence. Firstly, she had said in an earlier letter that she had been advised the sums were personal expenses paid by the Towelsoft credit card; this was not and never had been the Claimant's case. Secondly, on any view the sums were not expenses received and should not have been entered in this way on a tax return.

12. The Respondent relied on the evidence of Ms Cooke. She maintained that she had first learned of the payments in August 2015 and had not authorised them at all. She considered that the Claimant had helped himself to Towelsoft's money and had deliberately taken small, regular but different amounts to avoid suspicion.

The ET Hearing and Reasons

13. The Employment Tribunal hearing took place on 8 and 9 February 2017. The Claimant relied on the implied term of a contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Both parties were represented by counsel: Mr Talalay for the Claimant and Mr Moore for the Respondent. The Respondent relied on the evidence of Ms Cooke. The Claimant gave evidence and relied on the evidence of Mrs Mullins. Mr Michael Parker did not give evidence.

14. The agreed list of issues alleged five breaches. These were:

(a) falsely alleging that the Claimant had committed a fraud;

(b) informing his colleagues and/or family friends that he had committed a fraud;

(c) failing to set out the allegations in writing and carry out a formal investigation into the fraud;

(d) failing to acknowledge the extension of his sabbatical;

(e) refusing to allow him to return to work following return from his sabbatical.

15. The agreed list of issues set out further questions relating to resignation, affirmation, reason for dismissal, fairness, compensation, **Polkey** and contribution.

16. In paragraphs 4 to 40 of his Reasons the Employment Judge made findings of primary fact on which I have already drawn. He discussed the evidence of Mrs Mullins at this point and found that her recollection was not reliable on the question whether she was told in June 2015 that Ms Cooke had authorised the payments. But he left his key conclusions to paragraphs 47 to 59, where he dealt with the five alleged breaches.

17. Allegation (a) was addressed in paragraphs 48 to 52, which contain a good deal of detail. The Employment Judge rejected the allegation that Ms Cooke had falsely alleged that the Claimant had committed fraud. He concluded:

> **"52. Having rejected the evidence of the claimant and Susan Mullins, I am of the view that there was no agreement to allow the claimant to receive the payments. Further, accepting that the payments were first brought to her attention by the bank and her investigation revealed no explanation for the payments, in the circumstances I am satisfied that Barbara Cooke had reasonable and proper cause for alleging that the claimant had been stealing from the respondent. On a balance of probabilities, the respondent did not falsely allege that the claimant had committed fraud."**

18. The Employment Judge then turned to allegation (b). He said:

> **"53. Barbara Cooke believes the claimant committed a fraud on the respondent. Barbara Cooke had reasonable and proper cause for believing that that was the case. Barbara Cooke admits that she informed her senior management team and family friends that this was the case. This was not a breach of contract on the part of the respondent."**

19. The Employment Judge turned to allegation (c) - the lack of written charges and formal investigation. He found that there had been some investigation by Ms Cooke; but since the Claimant had not returned to work, the question of a disciplinary investigation had not arisen: see paragraphs 54 to 55. He concluded that there was no breach of contract.

20. The Employment Judge turned to allegation (d). He found that the extension had been agreed between Mr Michael Parker and the Claimant without any reference to Ms Cooke; she

could not be faulted for failing to acknowledge an extension about which she had not agreed and was not consulted: see paragraph 56.

21. The Employment Judge turned finally to allegation (e) - refusal to allow the Claimant to return to work. He accepted that the Respondent had taken this position initially; but it had changed by 16 December. He found that the Claimant was aware that he could have returned to work and had no intention of doing so.

22. The Employment Judge concluded as follows:

> **"59. I am of the view that taken individually or as a whole, the matters that I have set out above do not show that there was a serious breach of contract justifying the claimant's resignation. There was no fundamental breach of contract.**
>
> **60. I am not satisfied that the matters set out above show that there was a breach of the implied term of trust and confidence. I am not satisfied that there was a breach of contract.**
>
> **61. The respondent's submission [is] that "the only issue of substance that arose thereafter and before his resignation on 4 January 2016 was the "chicken and egg" situation regarding his return and the pursuit of internal charges and … his case in respect thereof is one of gamesmanship/opportunism". In my view, that accurately characterises the claimant's position. There was no breach of contract: the claimant resigned his employment, he was not dismissed.**
>
> **62. If the claimant had been dismissed, I would in any event have concluded that on the balance of probability, the claimant had caused payments to be made into his own account without authority. This was dishonest conduct which entitled the respondent to dismiss him for his conduct.**
>
> **63. In the circumstances, the claimant's conduct contributed to such dismissal to an extent that no basic or compensatory award should be made. Alternatively, by reason of the *Polkey* principle, the claimant should receive no award because if a fair procedure had been followed, the claimant would have been dismissed in any event."**

The Appeal

23. As I turn to consider the various grounds of appeal, I emphasise that the Employment Appeal Tribunal hears appeals only on points of law: see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this, the Employment Appeal Tribunal is concerned to see whether the Tribunal has applied correct legal principles, given sufficient reasons and reached findings and conclusions which are supportable, that is to say not perverse, if the

correct legal principles are applied. A finding or conclusion is perverse if and only if it is one which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached.

24. The original grounds of appeal contained a direct factual attack on the Employment Judge's rejection of allegation (a). No doubt because of the large factual component in the Notice of Appeal, the matter was listed for a Preliminary Hearing before Slade J. The direct attack on allegation (a) did not survive this hearing; in truth the Employment Judge's conclusions were factual, fully reasoned and free from any error of law. The appeal was allowed to proceed only on amended grounds.

25. Grounds 1 and 3 of the amended grounds concern the Employment Judge's rejection of the Claimant's case relating to allegations (b) and (c). It is argued that the Employment Judge misdirected himself or failed to give sufficient reasons for rejecting these allegations. Grounds 2 and 3 concern the question of resignation; it is said that the Employment Judge did not deal with this issue. Ground 3 also asserts that the Employment Judge did not make any finding as to the fairness of any dismissal. Grounds 1 to 3, taken together, potentially open up a route for the Claimant to a finding of constructive unfair dismissal.

26. Even then, however, the Claimant is faced with the difficulty that the Employment Judge made a finding that the Claimant acted dishonestly in taking the payments in question so that the Respondent would have been entitled to dismiss him and his conduct contributed to his dismissal to the extent that he should receive no award: see paragraphs 62 and 63.

27. Grounds 4 to 6 are concerned with these findings. On behalf of the Claimant, Mr Talalay submitted that there is a distinction between allegation (a), which is not the subject of this appeal, and the subsequent findings of the Employment Judge in paragraphs 62 and 63 of his reasons that the Claimant was guilty of dishonesty such that he should receive no award. He pointed to a difference in the burden of proof. The burden of proof lay upon the Claimant in respect of allegation (a); but it lay on the Respondent for the other allegations. He submitted that there was no cogent or compelling evidence of dishonesty; no proper investigation; and therefore no basis for any conclusion that the Claimant was dishonest, or that the Respondent was entitled to dismiss him; or that he should receive no award.

28. Logically grounds 1 to 3 come first; and I will attempt to deal with the grounds in a logical order. But of course any victory on grounds 1 to 3 would be Pyrrhic unless accompanied by success on grounds 4 to 6.

Allegation (b) - telling friends and family

29. Mr Talalay first attacked the Employment Judge's reasoning and conclusions about allegation (b). He argued that for an employer to tell employees and family friends that an employee is a thief must go to the heart of trust between an employer and an employee. Ms Cooke did this while the Claimant was on sabbatical and unable to defend himself. Moreover, he submitted that the Employment Judge has not given sufficient reasons in paragraph 53. He ought to have dealt with the extent to which Ms Cooke disseminated the allegations in question.

30. Mr Moore submitted that, in the context of a small family company, where Ms Cooke knew perfectly well that she had not authorised the payments in question and that there was no good reason for them, it was not a breach of the implied term of trust and confidence to tell

A employees and friends what she thought. Sufficient reasons were given for what was, in truth, an ancillary point in the case.

B 31. Here I must keep carefully in mind the limited remit of the Employment Appeal Tribunal: I am concerned only to see whether there is an error of law in the Employment Judge's reasons.

C 32. In my judgment the Employment Judge applied the correct legal test and reached a permissible conclusion on this point. It is important to keep in mind that the Respondent was a relatively small company, to a substantial extent family owned and run, and that Ms Cooke D would legitimately expect to know about the payments in question and authorise them. On the Employment Judge's findings, she knew that these were payments which she had not authorised. It is important also to keep in mind that the Claimant's father had said that he had telephoned the Claimant in Australia for an explanation and none had been forthcoming.
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33. In my judgment, once granted that she had not authorised the payments and had been fully entitled to conclude that the Claimant had committed a fraud, Ms Cooke did not place the
F Respondent in breach of contract by saying what she thought. Of course if she had really authorised the payments, there would have been the clearest breach of the implied term of trust and confidence; but she had not. In those circumstances, and in the context of a small family
G company where she would expect to know about the payments, the Employment Judge was entitled to find that there was no breach of the implied term of trust and confidence.

H 34. Although the findings in paragraph 53 are brief, they are in my judgment sufficient to meet the **Meek** test: the parties can see why the Employment Judge reached the conclusion he

did, and the Employment Appeal Tribunal can see whether there was an error of law. I do not think any wider findings were required as to the persons to whom Ms Cooke spoke. The complaint in the Claimant's witness statement relates to work colleagues and family friends: see paragraphs 50 and 51 of that statement. The Employment Judge sufficiently covered the matter.

35. I should make it plain that quite different considerations might apply where an employee of a large company was charged with a fraud of this kind. In such a company it will usually be possible to make a distinction between, on the one hand, the person or persons who ought to have known about and authorised the payments and, on the other hand, the person or persons who ought to investigate and instigate disciplinary proceedings. Those who ought to have known about and authorised the payments would of course be entitled to say that they did not know about them and that a fraud had been committed; whereas those charged with investigation would be expected to keep an open mind while the investigation proceeded. But this was a small company where Ms Cooke herself would be expected to have known about and authorised the payments. The Employment Judge did not commit an error of law by his finding in the circumstances of this case.

Allegation (c) - failure to inform the Claimant and investigate

36. Mr Talalay places reliance on the ACAS Code of Practice for what he says is common sense guidance: see especially paragraphs 5 and 9 of the Code. He says that there was no compliance with the Code. Failure to conduct an investigation properly may amount to or contribute to a breach of the implied term of trust and confidence: see **Blackburn v Aldi Stores Ltd** [2013] ICR D37 (a grievance procedure case). It does not matter that the Claimant was on sabbatical at the time; he remained an employee of the Respondent.

37. Mr Moore submits that the Employment Judge was entitled to conclude that resignation occurred before these steps could or should have been taken. He found, correctly, that Ms Cooke had taken some steps to investigate. Clearly the key point was to see what explanation the Claimant would give. He was aware of the allegations and had given no explanation. His return to work was required for the matter to be taken further. The Employment Judge had found as a fact that the Claimant's position could be characterised as gamesmanship and opportunism.

38. It is no doubt true that failure to adhere to a proper procedure may amount to or contribute to a breach of the implied term of trust and confidence: see, in the context of a grievance procedure, **Blackburn v Aldi Stores** at paragraphs 21 to 25. Where such an allegation is made the Employment Tribunal's task is to make findings and assess what occurred against the **Malik** test. So long as it adopts this approach the Employment Appeal Tribunal will not interfere with its decision unless its conclusion is perverse.

39. Paragraphs 5 and 9 of the Code set out in broad terms what is required of a disciplinary investigation in the early stages. Necessary investigations should be carried out without delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing. If it is decided that there is a disciplinary case to answer the employee should be informed in writing. He should be given sufficient information about the proposed misconduct to enable him to prepare his answer.

40. It is plain that the Employment Judge approached the case with the **Malik** test in mind. In my judgment he reached a permissible conclusion. The Employment Judge was entitled to

say that there had been some investigation: this was supported by Ms Cooke's witness statement. There was in truth not a great deal to investigate; the basic facts about the payments were known. If the matter were to proceed further, the next step would be to interview the Claimant. It is no doubt theoretically true that the Claimant could have been interviewed even if he did not return to work; but the Employment Judge was entitled to take the view that it was not a breach of the implied term of trust and confidence to wait for his return to work before proceeding with a disciplinary investigation. After a very short period when Ms Cooke was reluctant for him to return to work she asked him for the date of his return. He did not give a date. The Employment Judge characterised his stance as involving gamesmanship and opportunism.

Resignation and Unfair Dismissal

41. Mr Talalay submitted that the Employment Judge made no findings about the reason for resignation; this was an issue defined for the Employment Judge and he ought to have dealt with it. Nor did he make any findings, which would have to have been alternative in nature, about the reason for dismissal and the test in section 98(4). These again were issues defined in the list of issues.

42. These points would only assist Mr Talalay if his arguments relating to allegations (b) and (c) succeeded. They have not succeeded. I will therefore deal with the points briefly. Technically the Employment Judge was not required to deal with the reason for resignation or with unfair dismissal: the issues were drafted in a way which called for the reason for resignation to be decided only if there had been a repudiatory breach of contract and the questions relating to unfair dismissal only if the Employment Judge found that there was a constructive dismissal. Speaking for myself, I think it would have been helpful to make

findings on the Claimant's reasons for resignation; for example, if the appeal had been successful on the issue of repudiatory breach of contract, the reasons for the Claimant's resignation would have come into sharp focus. But, the appeal having been unsuccessful on that issue, there is no material error of law by the Employment Judge in failing to do so.

The finding of dishonesty

43. The grounds of appeal relating to the Employment Judge's finding of dishonesty are academic in the light of my conclusion that the Employment Judge was entitled to find that there was no constructive dismissal; but I consider that I ought to deal with them.

44. Mr Talalay submitted that there was no cogent evidence of fraud at all; there was only the evidence of Ms Cooke with no meaningful supporting evidence - for example, from an accountant to whom the Claimant had apparently spoken (see paragraph 18 of Ms Cooke's witness statement). Against the evidence of Ms Cooke was the evidence of the Claimant and Mrs Mullins - evidence of a tax professional which, he submitted, ought not to have been rejected. There had been, he submitted, no meaningful investigation; it was quite wrong to make a finding of fraud in the absence of such an investigation. He drew attention to **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 at paragraph 73. He submitted that this was a classic case where the employer - and the Employment Judge - was entitled to give the alleged wrongdoer the benefit of the doubt without feeling compelled to come down in favour of one side or the other. Hence the importance of the burden of proof: while the burden remained the balance of probability, cogent evidence was required before a finding of fraud or dishonesty was made.

45. Mr Moore submitted in answer that the question whether the Claimant had committed fraud was a question of fact for the Employment Judge. He applied the correct burden of proof; his reasoning was sufficient; and the outcome could not be described as perverse. The Employment Judge was faced with a "binary choice"; one person was lying, the other telling the truth. He was entitled to resolve the conflict.

46. In my judgment the Employment Judge was entitled to find that the Claimant had been dishonest. In truth there was a stark conflict of evidence between Ms Cooke and the Claimant. This conflict of evidence had to be resolved for the purposes of allegation (a) as well as for any subsequent finding of contributory conduct: for, if Ms Cooke had authorised the payments, she was making a false allegation; and, if she had not, the Claimant was guilty of fraud.

47. The parties laid before the Employment Judge the direct evidence of Ms Cooke and the Claimant and the supporting evidence of Mrs Mullins. It is true that the Employment Judge did not have all the possible evidence: it is particularly noteworthy that Mr Michael Parker, the source for the evidence of Mrs Mullins, was not a witness at the hearing; and it is also true that the company's accountant did not give evidence. But the Employment Judge had the evidence of the two key protagonists as well as an understanding of how the issue had unfolded; and he was entitled to make up his mind about that evidence.

48. In **Roldan** Elias LJ set out helpful guidance for employers faced with investigating "diametrically conflicting accounts" of an incident. He said (paragraph 73):

> **"73. The second point raised by this appeal concerns the approach of employers to allegations of misconduct where, as in this case, the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, other evidence to provide corroboration one way or the other. Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even**

> **where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other."**

49. This is helpful guidance for employers; but it does not lay down any rule of law for an Employment Judge faced with conflicting evidence given in the formal setting of a hearing on a key issue in the case. An Employment Judge is entitled to make an assessment of the evidence and resolve the issue; he is not bound to resort to the burden of proof - indeed, if there is primary evidence on both sides it will usually be possible for the Employment Judge to reach a conclusion on that evidence.

50. It is plain, reading the witness statements and the list of issues, that the parties went to the hearing in this case expecting to address the question whether Ms Cooke had authorised the payments and whether the Claimant was guilty of fraud. In my judgment the Employment Judge did not commit any error of law in deciding the case as he did. Nor was his decision perverse or insufficiently reasoned; he was entitled to accept the evidence of Ms Cooke and to reject that of the Claimant and Mrs Mullins for the reasons he gave.

51. For these reasons the appeal is dismissed.