Appeal No. UKEAT/0080/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 June 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S ANTHONY — APPELLANT

DYSON LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR S ANTHONY (The Appellant in Person)
For the Respondent	MR CYRIL ADJEI (of Counsel) Instructed by: Temple Bright LLP 29 Great George Street Bristol BS1 5QT

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

The ET had struck out the Claimant's breach of contract claim as having no reasonable prospect of success, under Rule 37 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. It had not been wrong to do so. The Claimant's claim either related to his dismissal, in which case he could neither claim greater notice than he had been paid nor complain of the manner of the dismissal, because of the **Johnson** exclusion zone, *or* it related to an earlier stage in his employment, in which case he could demonstrate no loss. The appeal would be dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns the striking out of a breach of contract claim by an Employment Tribunal ("ET") as having no reasonable prospect of success.

2. In giving Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the London (East) ET (Employment Judge Prichard, sitting alone on 3 September 2018), whereby the Claimant's claim was struck out as having no reasonable prospect of success.

3. The Claimant appeared in person before the ET as he does on this appeal. The Respondent was represented below by its solicitor, but now appears by counsel. The Claimant's appeal was permitted to proceed to this hearing after consideration on the paper sift by HHJ Shanks.

The Factual Background and the ET's Decision and Reasoning

4. From 3 November 2017 to either 2 or 3 February 2018 (there is a dispute between the parties as to the precise date of dismissal; there has been no finding of fact by the ET on this point and it is unnecessary for me to resolve for present purposes), the Claimant was employed by the Respondent to work at the John Lewis store in Chelmsford, as a Dyson expert.

5. The Claimant was dismissed from that employment when he failed to pass his three-month probation period. Under his contract he was entitled to one week's notice and that was paid to him in lieu. On 8 June 2018 the Claimant lodged a claim in the ET complaining (relevantly) of breach of contract.

6. At the hearing on 3 September 2018, the ET considered the relevant contractual provisions, noting that, under the heading "*Performance Management*", the Claimant's contract provided as follows:

> **"You are expected to achieve a satisfactory level of performance in your role and this will be monitored regularly. Dyson will ensure you are provided with all the support and training you required to do your job effectively. However, if you fail to meet these standards for any reason. (my emphasis) you may be subject to performance management in accordance within the Dyson poor performance policy…." (ET para 5)**

7. The ET further noted that, under the heading "*Periods of Notice*", the contract stated:

> **"The first three months of your employment is a probationary period. During this time the notice required to terminate the employment is one week. Once you have successfully completed your probationary period you will be notified in writing." (see again, the ET para 5)**

8. The Claimant accepted that he had been dismissed when still within his probationary period. He complained, however, that he had not been given the necessary support and training. That was not accepted by the Respondent but the ET did not consider that it needed to resolve this dispute between the parties because it was satisfied that the Claimant's claim could not possibly succeed; it was clear that the Claimant had been paid for the one week's notice he was due under his contract.

9. In reaching this conclusion, the ET considered it relevant that the contract specifically allowed that the Claimant might fail to meet the required performance standards "*for any reason*." It did not see how the Claimant could successfully claim any more than the notice pay he had already received; his case appeared to be an attempt to circumvent the minimum qualifying period for an unfair dismissal claim and it was clear that this could not amount to a valid cause of action, see **Harper v Virgin Net Limited** [2004] IRLR 390, CA.

10. In the circumstances the ET did not consider it necessary to hold a Full Hearing and duly converted the listing into a Preliminary Hearing and proceeded to strike out the Claimant's claim

as having no reasonable prospect of success, under Rule 37 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

The Appeal and the Claimant's Submissions in Support

11. In his Notice of Appeal, the Claimant's sets out the various ways in which he claims that the Respondent was professionally negligent in failing to provide him with all the support and training that he required to do his job effectively. That failure - the Claimant contends - amounted to a breach of the contractual promise that had been made to him. Specifically, the Claimant says he was provided with no supervisor for the first month of his employment; he was given no information about his key performance indicators; no meetings were held to discuss his performance and only two of four scheduled training days ever took place. As the Claimant explains (at para 7 of his Notice of Appeal), his case before the ET was that:

> **"If monitoring, support or appropriate training is denied to you in the first month of the probation period and you are not provided with an extension to that probation period this leaves you at a disadvantage that is not of your own making. It is then easier for an employer to terminate you at will thus ignoring their own negligence..."**

12. It is against that background that the Claimant argues that a point of law arises from the ET's striking out of his claim, as follows:

> **"… The point of law is that an employer cannot, not follow certain of elements in its own Performance Management clause in an employment contract and thereby contribute significantly to an employee's termination under the same clause. This, for me at least, is a Breach of Contract. An employer should have to demonstrate that all elements of the clause have been carried out but this was not the case in my probation period."**

13. He further makes the point, in oral argument, that the "*for any reason*" referenced in the Respondent's Performance Policy did not permit the Respondent to dismiss an employee for any reason, but merely gave it the discretion to then apply its performance management policy.

14. In permitting the appeal to proceed to this Full Hearing, HHJ Shanks identified the question for law for the Employment Appeal Tribunal to determine, as follows:

> **"The Employment Judge struck out the Claimant's claim on the basis that the breach of contract claim could not possibly succeed because the Respondent was entitled to terminate the contract "for any reason" during the probation period and because he could not see how he could recover more than the notice pay which he had already received. It may be arguable as a matter of contract law that, if the Claimant was able to establish the breach on which he relies on the facts, he may nevertheless be entitled to recover some damages based on the principle that a contracting party cannot generally take advantage of its own wrong."**

That is a convenient way of summarising the Claimant's submissions in support of his appeal.

15. For completeness, I also note that, in responding to the Respondent's arguments on the appeal, the Claimant raised a further question as to whether the Employment Judge was "*supporting the Respondent's position*". The suggestion being made is that the ET was in some way biased in favour of the Respondent. This, however, is not a ground of appeal and there is no basis for thinking that the Employment Judge was biased or gave the appearance of bias in this case.

The Respondent's Case

16. The Respondent says that the ET's Decision can be seen as founded on two different bases. The first was the point of contractual construction. The ET cited the relevant provision that put the Claimant within the Respondent's Performance Management Policy. The only issue the Claimant had raised was whether the Respondent was entitled to take that route given its own failings. However, as the ET identified, the Respondent was entitled to move to the Performance Management Policy "*for any reason*"; that is, whether or not the Claimant was right about any failings on the Respondent's own part. Although the ET had not expressly set out the relevant provisions of the Performance Management Policy in the probation period, that merely spoke of a review meeting at which there were three possibilities: pass, extension or termination. On the Claimant's own case there was a review meeting and one of the three options was taken, termination.

17. Second and/or in the alternative, by operation of the **Johnson** exclusion clause (see **Johnson v Unisys Limited** [2003] 1 AC 518), the Claimant had to identify a breach of contract that preceded and was separate to his dismissal. Here, however, the only loss claimed by the Claimant was that arising from his dismissal and, as such, it had to be limited to his right to notice. To the extent the Claimant was seeking to complain of the manner or unfairness of his dismissal, such a claim would fall within the **Johnson** exclusion claim and could not be pursued.

Discussion and Conclusions

18. The Claimant was seeking to pursue a breach of contract claim before the ET, as allowed under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**. It is trite law that the remedy in such a claim will be to put the employee in the position he would have been in had the contract been lawfully performed by the employer.

19. In the present case, the Claimant contends it was not open to the Respondent to terminate his employment on one week's notice (paid in lieu) on the basis that he had not met the required performance standards during his probation period. He says this would allow the Respondent to take advantage of its own contractual wrongdoing - the failure to provide him with the support promised under his contract - and he argues that the ET's failure to allow this case to be determined on its merits amounts to an error of law.

20. The Respondent accepts that, as a matter of legal principle, a party cannot take advantage of its own wrongdoing. It contends, however, that this does not lay down an absolute rule of law; it is, rather, a rule of construction and, as such, may be excluded by a sufficiently clear contractual provision (see **Micklefield v SAC Technology Ltd** [1990] IRLR 218, at paragraph 22 to 25). It is the Respondent's case that the inclusion of the words "*for any reason*" in the Performance

A Management Policy expressly allowed it to take action on the Claimant's unsatisfactory performance regardless of any alleged failure to provide training and support. The Claimant contends, however, that this would do no more than allow the Respondent to subject him to performance management; it says nothing about the Respondent's right to terminate the contract.

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21. The first difficulty for the Claimant is that exploring the point he takes on the Performance Management Policy merely demonstrates that, within the probation period, the Respondent was permitted to simply move to dismissal: that was one of the three options there provided.

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22. In any event - and it seems to me that this is the point that is really fatal for the Claimant - there is nothing in the contract that would prevent the Respondent relying on its right to bring the relationship to an end, upon the giving of the required notice. Specifically, the notice provision clearly allowed that the notice required to terminate the employment was one week. There was no other contractual requirement: provided the Respondent gave the Claimant a week's notice, it was entitled to terminate his employment.

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23. In his ET1, the Claimant explained his claim as one for damages for loss of earnings following his dismissal. As the ET identified, however, the Respondent had been entitled to bring the contract to an end on the giving of one week's notice. Any claim would thus be limited to earnings for that period for which the Respondent had already paid.

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24. It appears that the Claimant might have recognised that difficulty as, in his witness statement, he explained:

> **"I am not claiming loss of earnings here I am claiming damages for the unethical way that... Dyson... behaved towards me and the injustice of Dyson's probationary process as it effected me."**

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25. Putting that into contractual language, the Claimant might be said to be seeking to claim damages for what he contended amounted to a breach of the implied contractual duty to maintain trust and confidence; it is his case that the Respondent ought not to have moved to dismiss him because it had itself failed to provide him with the support that had been promised at the outset of his employment.

26. The Respondent argues, however, that that is a complaint relating to the *manner* of the Claimant's dismissal, or purporting to complain of the *unfairness* of that dismissal, and thus a claim excluded as a result of the **Johnson** exclusion zone (see the discussion in **Eastwood & Anor v Magnox Electrical plc** [2004] UKHL 35; **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2011] UKSC 58; **Harper v Virgin Net Ltd** [2004] EWCA Civ 271).

27. As the case law makes clear, a complaint cannot be pursued where it amounts to a claim for damages for breach of contract where the breach, or the loss that is said to flow from it, results from the manner of a dismissal. To the extent that the Claimant was seeking to pursue such a claim, the Respondent is plainly correct in its submission.

28. The Claimant might, however, be seen to be putting his claim somewhat differently, arguing that his complaint relates to the way in which the Respondent failed in its contractual duty towards him during his employment and that, therefore, it did not fall foul of the **Johnson** exclusion zone (see **Eastwood** supra). The problem that would then arise is in identifying any loss: The Claimant's losses only arose once he was dismissed.

29. Thus, either the Claimant's claim related to his dismissal, in which case he could neither claim greater notice than he had been paid nor complain of the manner of the dismissal, because

of the **Johnson** exclusion zone, *or* it related to an earlier stage in his employment, in which case he could demonstrate no loss.

30. Accepting the genuine grievance that the Claimant feels about how he was treated by the Respondent and, no doubt, also that the matters he has raised have never been addressed at a Full Merits Hearing, whichever way the Claimant's case is expressed, it could - as the ET recognised - have no reasonable prospect of success. On that basis, there is no error of law in the ET's Decision and I am bound to dismiss the appeal.