Appeal No. UKEAT/0019/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 July 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

RETIREMENT SECURITY LTD — APPELLANT

MISS A WILSON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R KOHANZAD (of Counsel) Instructed by: Peninsula Business Services Ltd The Peninsula Victoria Place 2 Cheetham Hill Road Manchester M4 4FB
For the Respondent	MISS A WILSON (The Respondent in Person)

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

UNFAIR DISMISSAL – Reason for dismissal including some other substantial reason

UNFAIR DISMISSAL – Reasonableness of dismissal

The ET upheld the Claimant's complaint of constructive unfair dismissal, finding that the Respondent's conduct of an investigatory process into allegations of misconduct was such as to be likely to destroy or seriously damage the relationship of trust and confidence and amounted to a fundamental breach of the implied term. The Respondent appealed, arguing (1) the ET had erred in failing to specifically consider whether it had shown a potentially fair reason for the dismissal and whether that dismissal fell within the band of reasonable responses; and (2) the ET had transposed the fair hearing/natural justice requirements of a disciplinary hearing on to an investigation meeting.

Held: *dismissing the appeal.*

The Respondent was seeking to put its case on a basis that had not been pursued before the ET; the ET had clarified the points in issue at the outset of the hearing, which did not include an alternative case that any (constructive) dismissal was nevertheless fair. Although a finding of constructive dismissal did not necessitate a finding of unfairness, it remained for the Respondent to show the reason for that dismissal and that it was capable of being fair. The difficulties that might arise for an employer in this regard did not absolve a Respondent from the burden imposed by section 98(1) **Employment Rights Act 1996** and did not require the ET to construct a reason on the Respondent's behalf. In any event, on the ET's findings of fact, the Respondent's conduct of the investigation process – the conduct that had entitled the Claimant to terminate the contract of employment – had been so flawed that the Claimant could reach no other view than that the Respondent wanted to be rid of her; that did not establish any reason that was capable of being fair for section 98 purposes.

As for the second ground of appeal, although the way in which a disciplinary investigation is to be conducted will depend on the particular circumstances of the case, the ET had permissibly found that the Respondent had acted in such a way as to breach the implied term. No error of law was disclosed.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions as to the approach that should be adopted in establishing the reason for, or the fairness of, a constructive dismissal.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal against a Judgment of the Employment Tribunal sitting in Liverpool (Employment Judge Grundy, sitting alone on 2 November 2018; "the ET"). By that Judgment, the ET determined that the Claimant's complaint of unfair constructive dismissal should be upheld. The Claimant appeared before the ET in person, as she does on this appeal. The Respondent was then represented by a solicitor, but now appears by Mr Kohanzad of counsel.

The Factual Background

3. The Respondent is a retirement property, ownership, and management company, which operates a number of Courts across the country ("Courts" being properties in a private development where there are a number of apartments owned by elderly people who are able to live independently). The Claimant commenced employment with the Respondent as a registered Court Manager on 4 January 2016. She was in charge of managing Osbourne Court, a 42-apartment property. The Claimant reported to a Services Manager, a position occupied at the relevant time by Miss Gaynor Davies.

4. In January 2018 Miss Davies held consultation meetings with various Duty Managers at Osbourne Court who reported to the Claimant. It seems that she was made aware of concerns

about the Claimant, expressed by four of the five duty managers, three of whom then made what were described as formal complaints against the Claimant.

5. The raising of these matters led to the almost immediate suspension of the Claimant as the Respondent sought to explore matters further. On 2 February 2018, the Respondent wrote to the Claimant inviting her to a meeting on 7 February 2018, to discuss allegations that had been made against her. These were listed under nine headings as follows (see paragraph 16 of the ET's Judgment):

> **"• Owner safety**
>
> **• Illegal deprivation of liberty**
>
> **• Confidentiality**
>
> **• Alleged theft**
>
> **• Not following internal accounting procedures- petty cash**
>
> **• Neglect**
>
> **• Concerns from Directors**
>
> **• Not following direct instructions**
>
> **• Improper leadership."**

6. In fact, this letter was sent to the wrong address and the Claimant actually received it on 6 February 2017, which meant that she had less than 24 hours to prepare for the meeting. The Claimant raised her concerns about this, specifically as to the lack of particularisation of the allegations, but was advised that the meeting was; "…*not a disciplinary process*," but was, "*an informal fact-finding meeting to share with you the exact details of the concerns raised and to give you an opportunity to accept or refute each concern*…." This response was provided by Mr Ben Yates, the Respondent's Head of Care, Quality and Compliance, who further advised that he would enlighten the Claimant at the meeting as to the exact details of the concerns in question.

7. The ET noted that the list of nine allegations was clearly "*...headlining some potentially very serious matters*", but that the Claimant came to the meeting on 7 February 2018 "*...still in the dark as to the exact matters the Respondent was alleging against her*." Indeed, as the ET recorded, the Respondent itself described this as "*an ambush meeting*" - a characterisation of the meeting with which the ET agreed and which it considered was "*Not in keeping with the fair treatment of a manager of some seniority with the claimant's responsibilities*" (see the ET at paragraph 20 of its Judgment).

8. The ET further noted that although Mr Yates had statements from the Duty Managers that had been used to compile the list of allegations, he chose not to make those statements available to the Claimant, even in an anonymised form. In fact, prior to the meeting with the Claimant, Mr Yates had investigated matters and had discussed the allegations with Miss Davies and drawn up a report in which he noted that, in some areas, there was, "*no evidence to prove a particular allegation*". This was the case in respect of the allegation of alleged theft, for instance. But Mr Yates' report was not shared with the Claimant, and that allegation, along with others, was still put to her in the meeting on 7 February 2018. The Claimant described the conduct of that meeting as making her feel as if she was "*under police investigation*" (see the ET at paragraph 22 of its Judgment).

9. During the course of the investigatory meeting, Mr Yates also referred to a document from the five Directors of the Respondent, which was said to relate to "*owner's welfare*", although this was never produced. As the ET observed, this left the Claimant facing "*...the fearful knowledge that such a signed document was said to be in existence without seeing the contents or the exact details*."

10. Miss Davies was also present at the meeting on 7 February 2018. The ET recorded how her role was described, as follows:

> **"26. …. Gaynor Davies is described as a companion. The claimant said she told her she was supporting her. The evidence of Ben Yates was that she was there to assist him and she herself said she was there to assist all parties. The role of a companion at a disciplinary hearing is a statutory matter. This was an investigatory meeting given it was after a suspension it must have been part of a formal rather than informal process."**

11. Noting that the role of a companion at a disciplinary hearing is a statutory matter, the ET considered it was odd that a more senior manager should offer herself as a companion to the Claimant when this was not at the Claimant's request. The label of "companion", in respect of Miss Davies, was all the more questionable given that - as the ET noted - halfway through the meeting she became the Chair and then, close to the end of the meeting, she absented herself due to a conflict.

12. The meeting on 7 February 2018 lasted over two hours. At one point it was suggested that concerns had been raised through a whistle-blowing process, although the Respondent did not seek to rely on any particular procedure regarding this. No documents were disclosed to the Claimant, and she described feeling that she was being set up. At the end of the meeting the Claimant asked what the next steps would be; Mr Yates indicated he would write his report and send it to the Respondent's legal advisors. It appears to have been intimated that this would give the Claimant 24 hours if she wished to resign and get a reference from the Respondent.

13. The ET recorded the position at the end of the meeting from the Claimant's perspective, as follows:

> **"39. The claimant believed that the respondent had reached the conclusion that she was guilty of serious misdemeanours having made serious allegations at the meeting but shown her limited information to justify any of the concerns. She felt the respondent had no confidence in her ability and had not given her any fair opportunity to answer a catalogue of half-baked allegations. She accepted in some respects if she had made mistakes she could learn from them but did not believe the respondent wanted her to continue in their employment. She had not knowingly put any owner at risk. She did not consider she had been given a fair hearing or that there was a will to continue a fair**

> **investigation. The five Directors had in effect without her being shown evidence of their concerns sealed her fate. Given the lack of a fair procedure in dealing with her to date, she considered she would face an unjustified dismissal in the circumstances and so if she was to continue working in the sector the only option was to resign. The cause of the resignation was the conduct of the respondent."**

14. The Claimant duly resigned by email on the morning of 8 February 2018. Her resignation was accepted by the Respondent the same day.

The ET's Decision and Reasoning

15. The ET considered whether there had been a fundamental breach of trust and confidence by the Respondent. It concluded that there had been, reasoning as follows:

> **"44. .... In my view the respondent's investigative process was so flawed that the claimant could reach no other view than the respondent wanted rid of her. In my judgement the term of mutual trust and confidence was breached by the respondent as a result of its formal processes in suspending and investigating this claimant from late January to 8 February."**

And continued

> **"45. In particular offering a companion who becomes the Chair of a formal investigatory process is wholly unfair and unsatisfactory. To give the claimant a list of 9 very serious "allegations" which were not allegations but were headlines is to wholly ambush her in the process of an investigatory meeting."**

16. Accepting that the Respondent operated a business in which the safety of the owners of Court properties was clearly of utmost importance, the ET found that the Claimant:

> **"46. … should have been allowed to fully understand what, when, where, it was said she was at fault. She should not have received a headline list 24 hours before a significant meeting. She had no proper time to prepare."**

Continuing:

> **"47. The meeting itself was very clearly unfair given the skewed roles of the participants. The claimant did not have any fair opportunity to answer the allegations against her. This was because full / anonymised statements were not shared with her at the meeting. The letter before told her not to contact anyone. She was told of Directors views in general terms but the documents were never shared with her despite the assertion she would be given "exact details". The respondent did not live up to its promise."**

17. As the ET further noted, the undue haste with which the Claimant's resignation was accepted suggested that this had been the desired outcome from the Respondent's perspective.

18. The ET was also satisfied that the Claimant had resigned in response to the Respondent's breach and she had not delayed. It concluded:

> **"51. … the claimant succeeds in discharging the burden of proof upon her to show that the respondents have been in breach of the implied term of mutual trust and confidence. I have considered the impact of the employer's behaviour on the claimant and assessed objectively it was so significant that it could give rise to a fundamental breach. The conduct of the alleged investigatory meeting was high handed and ultimately served its purpose it resulted in the termination of the Claimant's employment."**

It was on that basis that the ET held that the Claimant's claim should succeed.

The Grounds of Appeal

19. The Respondent's appeal against the ET's Judgment was permitted to proceed on the following two grounds: (1) that the ET failed to consider the fairness of the dismissal, erroneously focusing solely on whether there had been a breach of the implied term of trust and confidence; (2) that in concluding that there had been a breach of the implied term of trust and confidence, the ET erroneously transposed the requirements of procedural fairness and natural justice in disciplinary meetings onto investigatory meetings.

20. The Claimant resists the appeal, essentially relying on the reasoning provided by the ET.

Submissions, Discussion and Conclusions

Ground (1)

21. Having concluded that the Claimant had shown that she had been constructively dismissed, the ET upheld her complaint of unfair dismissal. As the Respondent points out, however, establishing a constructive dismissal does not automatically mean that the dismissal

was unfair. That is so, even where the repudiatory breach of contract in question is a breach of the implied obligation not, without reasonable and proper cause, to act in a manner likely to destroy or seriously damage the relationship of confidence and trust (see **Malik and Mahmud v Bank of Credit and Commerce International SA** [1998] AC 20 HL). In such a case it would still be open to an employer to show that such a dismissal was for a potentially fair reason and if the employer is able to discharge that burden, it will then be for the ET to decide whether the constructive dismissal for that reason fell within the range of reasonable responses and was fair (see per Sedley LJ, at paragraphs 21 to 29 **Buckland v Bournemouth University Higher Education Corporation** [2010] ICR 908 CA).

22. The first difficulty for the Respondent in the present case lies, however, in showing that it ever sought to demonstrate a potentially fair reason for the constructive dismissal of the Claimant. Although in its particulars of response (its pleaded case before the ET) the Respondent included the following averment: "*If, which it is denied, the Tribunal decide that the Claimant was dismissed, then that dismissal was for Some Other Substantial Reason and was fair in the circumstances*", I am unable to see that the Respondent ever stated what the other substantial reason was or more substantively, that it actively pursued this alternative case before the ET. Certainly, the ET records (see paragraph 1 of its Judgment) that the issues to be determined at the Full-Merits Hearing had been identified with the parties at the outset, as follows:

> **"1. …. Firstly, was the respondent in fundamental breach of contract by way of breach of the implied term of trust and confidence, if there was a fundamental breach, was the breach the cause of the claimant's resignation, thirdly was there a delay in the claimant resigning, or on the respondent's case did the claimant resign too soon."**

23. Mr Kohanzad has told me that his instructions are that it was in fact the Employment Judge who identified the issues at the outset of the Hearing, but he fairly accepts that the Respondent's solicitor made no attempt to correct the issues thus set out. Certainly, it is clear

that it was the ET's understanding that the Respondent was putting no positive case as to the reason for any dismissal. That would also seem to be consistent with how the Respondent's case was put in closing submissions, (summarised by the ET at paragraph 22 of its Judgment) which included no alternative case that any dismissal was, in any event, for a fair reason and fell within the band of reasonable responses.

24. Although the ET did not record any formal concession by the Respondent that a finding of constructive dismissal must mean that the Claimant's case would succeed, I am unable to see that the Respondent pursued any positive case that there was a fair reason for any dismissal found by the ET. Mr Kohanzad says that that should not be fatal to his client's appeal. He says that given the difficulty that an employer faces in establishing the reason for dismissal in a constructive dismissal case, in cases where the reason is obvious the ET should be encouraged to construct the reason – that is, to look at what was in the employer's mind at the relevant time, based on the evidence before it.

25. I am not persuaded that that is right. Section 98(1) of the **Employment Rights Act 1996** ("the ERA") makes clear that the burden is on the employer to show the reason for a dismissal, and that it was for a reason specified at subsection (2) or for some other substantial reason, such as to justify the dismissal of an employee appointed to a position held by the Claimant. If an employer chooses not to put forward any positive case as to the reason for the dismissal in a claim of constructive unfair dismissal, I cannot see that the ET is obliged to try to construct a possible reason on the employer's behalf. In saying this, I recognise that it may well be difficult for a Respondent to make good an alternative case as to the fair reason for a constructive dismissal. In a constructive dismissal case, a Respondent would need to show that the conduct which entitled the Claimant to terminate the contract (thereby giving rise to the

deemed dismissal by the employer) amounted to a reason that was capable of being fair for the purposes of Section 98 **ERA** (see **Berriman v Delabole Slate** [1985] ICR 546 CA).

26. In the present case, the Respondent's conduct was the carrying out of an investigatory process that was so flawed the Claimant could reach no other view than the Respondent wanted rid of her (see the ET's Judgment at paragraph 44). Mr Kohanzad says that given the incidents in the Respondent's mind at the relevant time, it should have been obvious that it carried out the investigatory process in that way for reasons relating to the Claimant's conduct or, at least, for some other substantial reason; namely its desire to investigate her conduct. In support of this submission, Mr Kohanzad observes that the Respondent itself characterised the two-hour investigation meeting as "*an ambush*". He contends that the employer is entitled to conduct such an approach at an investigatory stage, which does not necessitate the same standards of fairness as a disciplinary hearing. More than that, he contends that such a dismissal can fall within the range of reasonable responses, notwithstanding the ET's finding, for the purposes of establishing the breach of the implied term, that it was objectively unfair; the "range" test allowing for the possibility of a fair dismissal even where there is objectively unreasonable conduct, the two tests being different (see **Vickers Ltd v Smith** [1977] IRLR 11, **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17, and **Post Office v John Foley** [2000] ICR 1283.

27. As I have already recorded, I am unable to see that this was how the Respondent's case was put before the ET. More than that, however, it is not a case that the ET could have been expected to discern from the evidence adduced by the Respondent before it. On the Respondent's case, this was simply the investigatory stage: the Claimant had acted prematurely in resigning when no decision had been reached on the allegations. Even if the Respondent had wanted to test allegations relating to the Claimant's conduct or, for some other substantial

reason, felt that it needed to challenge her about these matters, I cannot see how it can be said to have shown that these were the reasons why it conducted a process that was so flawed that the Claimant could reach no other view than that the Respondent wanted rid of her. Given the ET's findings of fact as to the conduct which led the Claimant to resign, I cannot see any basis on which it could be said that the Respondent might have been able to establish any potentially fair reason for her dismissal for the purposes of Section 98 **ERA**; certainly, there was no "obvious" case in this regard which the ET might have been bound to find on the Respondent's behalf.

28. Ground (1) of the appeal, thus, fails. First, because the Respondent is seeking to put forward a case it did not run below, and second, because, in any event, it cannot make good that that case on the ET's findings as to the particular conduct caused the Claimant to leave her employment.

29. Although I do not need to go on to consider the question of fairness in these circumstances, for completeness, I make clear that I also reject the Respondent's case in this regard. Although I accept that (per **Buckland**) the test for determining whether there has been a breach of the implied term and the test for deciding whether a dismissal falls within the band of reasonable responses are different, that does not assist the Respondent in this case.

30. Even if the Respondent had been able to make good a potentially fair reason for the Claimant's dismissal, the ET's findings of fact as to what took place in this case - at a stage when the Respondent, on its own submission, had not determined that the allegations were made out, still less that the Claimant should be dismissed - would take this outside the band of reasonable responses. Applying the test laid down in the Court of Appeal in **Jafri v Lincoln**

College [2014] IRLR 544, there would have only been one answer: dismissal of the Claimant, in the circumstances as found by this ET, was unfair.

Ground (2)

31. Turning to the second ground of appeal, I can take the points raised in this regard fairly shortly. The Respondent seeks to argue that the ET wrongly transposed the requirements of procedural fairness and natural justice in disciplinary hearings onto the conduct of investigatory meetings. This, it is contended, is not required by the ACAS Code (see the ACAS Code on Disciplinary and Grievance procedures, at paragraphs 5-7), which states that an employer must be allowed to adopt different methods of investigation which – the Respondent submits - might include *"an ambush"* for the employee.

32. As, however, Mr Kohanzad acknowledged in oral argument, the ACAS Code does not really address the circumstances arising in the present case. The Respondent's conduct of the investigation meeting was found to have been such that it amounted to a breach of the implied term; it destroyed trust and confidence between the Respondent and the Claimant as its employee. Although the way in which an investigatory meeting (or, more generally, an investigation process) is to be conducted will depend on the particular circumstances of the case, if, without reasonable and proper cause, the employer thereby acts in a manner likely to destroy or seriously damage the relationship of confidence and trust, it would be a fundamental breach of contract. That is what the ET found had happened here. As that was a permissible finding on the evidence, I am satisfied that there is nothing in ground (2).

Disposal

33. For the reasons provided, I dismiss this appeal.