Appeal No. UKEAT/0264/19/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 February 2020

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

THE PHOENIX ACADEMY TRUST — APPELLANT

MR S KILROY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON J HOYLE (Consultant) Instructed by: Croner Consulting Group Limited Croner House Wheatfield Way Hinckley Leicestershire LE10 1YG
For the Respondent	The Respondent in Person

SUMMARY

CONTRACT OF EMPLOYMENT

UNFAIR DISMISSAL

The Claimant was summarily dismissed by the Respondent on 23 July 2018, just before the Respondent received his letter of resignation alleging constructive dismissal. On 6 August the Claimant invoked the contractual appeal procedure and subsequently stated that he did not intend to return to his employment if his appeal was successful. On 16 October the Respondent upheld his appeal against dismissal, reinstated him subject to a final written warning, and required his return on 29 October. By letter of 22 October the Claimant resigned, alleging constructive unfair dismissal. As part of its defence the Respondent contended that the Claimant had affirmed the contract by his invocation of the appeal procedure. The ET was not referred to the decisions of the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 or **Folkestone Nursing Home Ltd v Patel** [2019] ICR 273. The ET held that the Claimant had not affirmed the contract, relying in particular on his statements of intent not to return to work, and upheld the claim.

On the Respondent's appeal, the EAT applying **Folkestone Nursing Home Ltd** held that the Claimant had affirmed the contract of employment by his invocation of the contractual appeal procedure. However, that was not the end of the matter. The Claimant's case was that the Respondent had thereafter and until his resignation on 22 October continued to act in breach of the implied term of trust and confidence. Accordingly, it had been necessary for the ET to consider the five questions identified by the Court of Appeal in **Kaur** at [55]. The appeal was allowed and the matter restored to the same ET for consideration afresh.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Respondent employer against the decision of the Employment Tribunal ('the ET') at Nottingham (Employment Judge Blackwell), sent to the parties on 27 April 2019 whereby the Claimant employee's claim of constructive unfair dismissal was upheld. On the Rule 3(7) sift, Eady J rejected all grounds in the Notice of Appeal save the question of whether the Claimant had by his invocation of the appeal process affirmed the contract of employment and thereby disabled himself from claiming constructive unfair dismissal.

2. In her reasons for that decision, Eady J drew attention to the decision of the Court of Appeal in **Folkestone Nursing Home Ltd v Patel** [2019] ICR 273. The Respondent has rightly not sought to renew the other grounds of appeal.

3. As below the Respondent appears by its representative Mr Hoyle, an employment consultant. The Claimant was represented below by his solicitor Mr Hamilton. In order to save costs Mr Hamilton does not appear on this appeal but has submitted a skeleton argument. The Claimant has been present and made brief submissions. Following those submissions he then took the opportunity, before I made my decision, to have a telephone discussion with Mr Hamilton, to discuss the provisional indication I had given as to the disposal of this appeal.

4. The Claimant had been a teacher for 28 years. The Respondent Trust is a mixed BESD (Behaviour, Emotional and Social Difficulties) secondary school. By March 2018 the Claimant was its Acting Principal. In 2018 the Respondent was acquired by a body known as Community Inclusive Trust (CIT). In a conversation in January 2018 concerning the process of transfer,

CIT's Mr Armond had asked the Claimant 'Do you want a pay out?' The Claimant responded that he did not; and that he wanted to be considered for the permanent role of Head Teacher.

5. The subsequent disciplinary process which led to the Claimant's dismissal was conducted by persons representing CIT. In May 2018 the Claimant was questioned about alleged discrepancies between two inventories of pictures and artworks owned by the Respondent. This was subsequently broadened to include questions about the storage of paintings at the Claimant's house. To this was then added questions about his conduct as its exams officer. Various meetings and discussions followed in May and June 2018, in particular with Mr Armond and with the Respondent's HR lead, Mrs White. The ET found the Claimant to be a straightforward and truthful witness and that on five separate occasions Mrs White had, in effect, invited him to resign.

6. On 5 July 2018, the Claimant was invited to a disciplinary hearing relating to the matters previously identified. He was warned that summary dismissal might be a consequence. The disciplinary hearing took place on 12 July. In the course of the meeting the Claimant was told that there was to be further investigation in the light of what he had said and that he remained suspended for the time being. The ET observed that there was no evidence before it that any further investigation was in fact carried out.

7. On 23 July 2018 the Claimant instructed his solicitor to send a letter of resignation. On that date a letter was sent to the solicitors understood to be acting for the Respondent. They replied that they were no longer instructed and a letter in the same terms was sent on 24 July 2018 to Mr Rose, the Chairman of Governors. The letter concluded as follows:

> **"He now finds himself driven to the conclusion that there is no way in which he will be able to return. He feels that he is the victim of the current situation in which Phoenix Academy is being absorbed into CIT Academies, that he is not wanted, that the spurious**

allegations against him are a ruse to get rid of him and that if he were to return he would find himself under constant unwelcome pressure over his last 3 years. We are in no doubt that the circumstances as set out above amount to a constructive dismissal and it is our client's intention to regard himself as dismissed. This will inevitably give rise to a claim for unfair dismissal. We would welcome any proposals that Phoenix Academy may have by way of response."

8. However the Respondent's receipt of that letter was overtaken by a telephone call from Mr Rose to the Claimant on 23 July 2018 which informed him that he had been dismissed with immediate effect. In consequence it was common ground that the Claimant's letters of 23/24 July 2018 did not have the effect of terminating the contract of employment and that he was summarily dismissed by virtue of that telephone call: see the Judgment at paragraphs 1.1 and 1.2.

9. The dismissal was confirmed by a letter from the Respondent dated 1 August 2018. This stated that the two allegations concerning artwork and paintings were not upheld because the Respondent had not been able to speak to the former Chair of Governors; but that the allegation of gross negligence as exams officer was upheld. The letter advised the Claimant of his right of appeal.

10. By letter of 6 August the Claimant exercised that right. By letter dated 30 August Mr Rose invited him to an appeal hearing. The Appeal was to be conducted by Mr Stuart Farrah, a consultant from Lloyds Employment Law Consultancy. The Claimant duly attended on 4 September only to be told that Mr Farrah had been informed that the meeting had been cancelled because the Claimant had informed the Respondent that he would not be attending. The ET accepted the Claimant's evidence that he had done no such thing. The meeting was rearranged for 12 September and was attended by the Claimant and Mr Farrah alone. The meeting was recorded and a transcript subsequently provided.

11. Having considered the transcript, the ET concluded in paragraph 28 that : **"... it seems to me that a reasonable observer would have come to the conclusion that having regard to the explanations put forward by Mr**

Kilroy there was little or no foundation for the conclusion that he had been guilty of gross negligence in his role as exams officer".

12. By letter from his solicitors dated 19 September the Claimant complained about the continuing delays in the matter and the failure to make arrangements for the collection of his personal possessions. It also stated: "It seems that those with whom our client is communicating are unaware that irrespective of the result of the current appeal there is no question of our client returning to his former employment and, as he is *(sic)* points out to us as well as them, his personal possessions are quite separate from the outstanding issues."

13. By letter dated 2 October 2018 Mr Rose advised the Claimant that 'the two Governors who sit on the Appeals Committee have requested further documentation before being able to reach a satisfactory conclusion'. On 8 October 2018 the Claimant presented his ET1 claim form. This stated that his employment had ended on 23 July 2018 and claimed unfair dismissal. The date of the termination was based on his letter of that date, not the Respondent's telephone call of that date. However, as already noted, it was subsequently agreed that the Claimant's letter was received after that telephone call and was thus of no effect in respect of termination of his employment. The claim form included: 'If I were successful in my appeal my intention was to pursue my claim based on constructive dismissal'.

14. The Appeals Committee sat again on 11 October. The Committee consisted of two Governors, Ms Harvey and Mr Price. The Claimant was not invited to attend. The ET found that Ms Harvey's recollections of the meeting were 'almost non-existent', but that she had stated that the Committee had been informed that the Claimant had declined to attend. The ET accepted the Claimant's evidence that he had never been invited to attend; and accordingly had not declined to do so.

15. The outcome of the Appeals Committee meeting was that the Claimant was reinstated with effect from 23 July but issued with a final written warning. The ET described the outcome letter of 16 October as 'to put it charitably bizarre'. In respect of the Claimant's work as exams officer, it stated that this was 'a capability issue as opposed to gross negligence'; and that there had been a financial loss. The letter continued that the Claimant had been negligent in 11 listed respects. The ET concluded that:

> **"… all appear to relate to his role as Acting Vice Principal but none of which appear to relate to the original charge for which he was dismissed. Nor could any of them be properly described as negligent. However notwithstanding its manifest defects it seems to have been accepted by both Mr Kilroy and his solicitor" :** [36]

16. The letter of 16 October concluded that the decision to dismiss without notice for gross misconduct had been overturned; that instead the Claimant would be issued with a final written warning 'with the addition of a Performance Improvement Plan' to be supplied; that he was to be reinstated with effect from 23 July and reimbursed accordingly; and that he was to return to work on 29 October.

17. By letter of response dated 22 October the Claimant's solicitor stated that the expectation of return to work on 29 October was 'unrealistic'. Following his suspension in May 2018, the Claimant had initially hoped that he would be reinstated. However the way in which he had been treated had prompted his letter of 23 July. It continued:

> **"Nothing that has happened since has altered the position other than to convince our client that his decision was correct. Not only has there been the protracted delay in resolving his issue, there has also been a persistent disinclination on the part of the Academy to address the matter of his personal possessions at the school and for him now to be told that after a period of more than five months he is to receive a Final Written Warning and is "expected" to return to work, despite the letters to which we refer, is a continuation of an attitude which is wholly inconsistent with a normal employer/employee relationship".**

18. The position was then somewhat confused by subsequent correspondence, both from the Respondent (30 October and 13 November 2018) and from the Claimant's solicitors (15 November 2018). On 6 December 2018 the Respondent paid £9927.67 into the Claimant's bank account as purported salary unpaid between 23 July and 16 October. By letter the following day that sum was returned; but I was told today that the cheque had never been banked by the Respondent.

19. However at the beginning of the ET hearing on 24 April 2019 it was also agreed by the parties that the Claimant's resignation of 22 October had brought the employment contract to an end: Judgment para. 1.4. In respect of that resignation the ET identified the issues in relation to constructive unfair dismissal as:

> **"2.1 Was the employer guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract (in this case the implied term of trust and confidence) then the employee is entitled to treat himself as discharged from any further performance?**
>
> **2.2 If so did Mr Kilroy resign as a consequence of that breach?**
>
> **2.3 Did he do so promptly i.e. without affirming the contract?"**

20. In the light of its findings of fact, the ET held that there had been a breach of the implied term of trust and confidence. Its summary of those facts referred to the conversation with Mr Armond and Mrs White and the five invitations to resign. Objectively judged, the Claimant had been correct to form the view that his employer wished to be rid of him. The ET concluded that, had the Claimant's letter of 23 July not been overtaken by his summary dismissal on the same day, a claim of constructive unfair dismissal would have succeeded at that point.

21. The ET then observed that the contractual appeal procedure had placed the Claimant and his advisers in a quandary. Failure to pursue that procedure would have been a factor in a claim

of unfair dismissal. Conversely, pursuing the procedure gave rise to the question of whether the Claimant thereby affirmed the contract. The ET posed itself the question:

> **"44. Can affirmation be implied from Mr Kilroy's adoption of the contractual appeal process? Is that an unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach of the implied term of trust and confidence."**

22. In considering this question the ET observed that it was clear from the Claimant's evidence and contemporaneous documents that in pursuing the appeal he **"... wished to counter the allegations being made against him, clear his name and thereby support his family financially"** [43].

23. The ET concluded that the Claimant had not affirmed the contract. It stated:

> **"45. …On a number of occasions following the dismissal on 23 July Mr Kilroy made it plain that he did not intend to return to his employment irrespective of the outcome of the appeal. He did so in his meeting with Mr Farrah. His solicitor did so in their letter of 19 September, see page 220 and further his claim form to the Tribunal makes it clear that if his appeal was unsuccessful he was pursuing a claim of unfair dismissal but if it were successful and led to his reinstatement then he would then resign and pursue a claim of constructive unfair dismissal .**
>
> **46. Finally there is no doubt that Mr Kilroy resigned primarily because of the delays in the disciplinary process and primarily the impression that was objectively justified that one way or another the Trust wished to be rid of him"**

24. In its subsequent Decision on the Respondent's application for reconsideration, the ET stated that there was an error in paragraph 46, namely that the first use of the word "primarily" should read "partly".

25. The parties did not draw the ET's attention to the decisions of the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 or **Folkestone Nursing Home** to which I have already referred. Those decisions were handed down respectively on 1 May and 8 August 2018.

26. In **Kaur** the court reaffirmed that an employee who is the victim of a continuing cumulative breach of the implied term of trust and confidence is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation of the contract, provided the later act or acts form part of the series : [51]. In his judgment, Underhill LJ identified at [55] five questions to be asked by the ET in such a case :

> **"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in Waltham Forest v Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?"**

27. In **Folkestone Nursing Home** the Court held that it was implicit in a term in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout [26; also 27]. Sales LJ, as he then was, continued:

> **"28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not".**

28. In reaching these conclusions, Sales LJ rejected the argument that the employee may have other reasons for exercising a right of appeal under a contractual procedure, e.g. so as to clear his name and improve his chances of getting employment elsewhere. Thus:

> **"32. …in my view these other possible reasons why an employee might wish to invoke a contractual appeal process are collateral to the object of having such a process included in the contract of employment. That object is, that the employee is contractually entitled to ask the employer to reopen its previous decision to dismiss and to substitute a decision**

> **that there should not be a dismissal. Where a contractual appeal is brought, that is the obvious purpose of the appeal, judging the matter objectively. The fact that an employee might have other motives for seeking to appeal does not affect the interpretation of the contract".**

29. However the Court accepted that the way in which the employer handled the appeal process could potentially constitute a breach of the implied term of trust and confidence. Thus:

> **"37. As Elias J points out at [13], absent a term permitting the employer to reinstate the employee in a lesser post, an attempt to demote the employee as the result of an appeal may well give grounds for the employee to claim constructive dismissal as at the time the result of the appeal is announced. In my view, the same will be true if there is some feature of the employer's handling of the appeal which constitutes a breach of another important term of the contract, including the duty to maintain trust and confidence".**

The employee's appeal against the dismissal of his claim of constructive dismissal was allowed on that basis.

30. By application dated 9 May 2019 the Respondent applied for reconsideration of the judgment pursuant to Rule 71 of the **ET Rules of Procedure**. At paragraphs 46-45 of the application the Respondent referred the ET to the five questions in **Kaur** and invited a response. By its reconsideration Judgment sent to the parties on 27 June 2019 the ET noted that neither **Kaur** nor any other authority had been cited at the hearing. It continued that if **Kaur** had been cited, the response to the five questions would have been:

> **"17.1. The delay in communicating the result of the disciplinary hearing.**
>
> **17.2. See paragraphs 43-45 of the original decision.**
>
> **17.3. Probably not.**
>
> **17.4. Yes the conversations with Mr Armond and Mrs White.**
>
> **17.5. Yes."**

The application was refused and the decision confirmed.

31. On behalf of the Respondent Mr Hoyle focusses his submissions on **Folkestone Nursing Home.** He contends that it is decisive in favour of this appeal. For the reasons given by Sales

LJ, the Claimant, by exercising his right of appeal and not withdrawing it before its conclusion, was asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment. That amounted to an unequivocal election to affirm his contract of employment. Insofar as the ET relied on the Claimant's evidence and contemporaneous documents that he wished to counter the allegations made against him, clear his name and support his family financially, that was irrelevant : see Sales LJ at [32].

32. The ET was also wrong to take account of various statements made by the Claimant that he did not intend to return to his employment irrespective of the outcome of the appeal. The expressions to that effect in his observations to Mr Farrah at the meeting on 12 September, his solicitors' letter of 19 September and the ET1 form could not qualify the unequivocal effect of his adoption of the appeal process.

33. Accordingly, only the contents of the resignation letter of 22 October could be taken into consideration for the purpose of deciding whether there had been a repudiatory breach of contract, i.e. breach of the implied term of trust and confidence. The complaints in that letter provided no such basis. On the contrary, the reinstatement of the Claimant must necessarily have restored the relationship of trust and confidence.

34. Furthermore, the ET in its reconsideration Judgment had answered the first of the five questions in **Kaur** : "The delay in communicating the result of the disciplinary hearing". On the basis that that was a reference to the disciplinary hearing of 12 July, that communication had been received in the dismissal telephone call of 23 July; and thus preceded Mr Kilroy's affirmation of the contract by subsequent invocation of the appeal process.

35. In subsequent exchanges, Mr Hoyle agreed that in all the circumstances, and in particular the fact that the five **Kaur** questions had not been before the ET at the hearing which led to the Judgment under appeal, it would be appropriate to remit the case to the ET, even if successful on the first affirmation point.

36. In the written submissions prepared by his solicitor, the Claimant submits that the ET's findings of fact and conclusions distinguished this case from **Folkestone Nursing Home**. His repeated statements in the cited documents made it quite clear that he had no intention to return to his former employment. His resignation letter of 22 October made clear that his position was unchanged. The ET had concluded that **"It is clear beyond doubt that on or about 23 July Mr Kilroy formed the view that he could not return to the Trust and in accordance with his instructions the letter… was sent in those terms"** [41]. This consistent conduct far outweighed any suggestion that he affirmed the contract by appealing the decision to dismiss.

37. In the alternative, the ET's Decision could and should be upheld on a similar basis to that which had prevailed in **Folkestone Nursing Home**, namely by reference to the Respondent's conduct of the appeal process and its result. Mr Hamilton points to the passage in the Judgment which states that **"… It was not until Mr Kilroy's meeting with Mr Farrah that Mr Kilroy's explanations were taken seriously"**. The allegations amounting to dishonesty in respect of artwork had not been upheld. The allegations of gross negligence had been converted into a capability issue, and yet had resulted in a final written warning. The conduct was in breach of the implied term of trust and confidence; and the reinstatement had not restored that.

38. In his own brief oral submissions Mr Kilroy agreed that if the appeal was successful on the point of affirmation, remission was a sensible course. Having spoken to his solicitor and whilst maintaining the position on the issue of affirmation, Mr Kilroy confirmed that response.

39. I have considerable sympathy with the ET in this case. It was not provided by the parties with the two decisions of the Court of Appeal which were of direct relevance to the issues before it. On the Respondent's reconsideration application, it was provided with the decision in **Kaur** but not the decision in **Folkestone Nursing Home** on which this appeal now places its focus.

40. Nonetheless, having the advantage of the latter decision, I am clear that the ET's conclusion about the effect of the Claimant's adoption of the contractual appeal process cannot stand. In my judgment, the observations of Sales LJ in **Folkestone Nursing Home** have direct application. By his adoption of the contractual appeal process and viewed objectively, the Claimant was thereby and necessarily treating the contractual relationship as continuing to exist. I do not accept that his subsequent statements that he did not intend to return to work can amount in law to any qualification of his objective acceptance of the continuation of the contract. Expressed in terms of the principles of affirmation, his act in pursuing his appeal under the contractual procedure was an unequivocal election to treat the contract as continuing.

41. However, that is not the end of the matter. The Claimant's case is that breaches of the implied term of trust and confidence continued through the Respondent's conduct of the contractual appeal process. In consequence, the principles reaffirmed by the Court of Appeal in **Kaur** potentially come into play; and the five questions identified in that Decision fall to be answered. As the final parenthesis in question four makes clear, if the answer to the first four questions is 'yes', any previous affirmation is immaterial. An example is provided by the ultimate decision in **Folkestone Nursing Home** itself.

42. Accordingly I reject the Respondent's argument that only the contents of the letter of 22 October can be taken into account for the purpose of deciding the issue of constructive dismissal. The ET considered the Claimant's complaints about the Respondent's conduct after his invocation of the appeal procedure and was sharply critical of various aspects of that conduct. However, its attention not having been drawn to **Kaur**, it did not go on to consider the five questions. The only apparent reference to the effect of the Respondent's conduct of the process was in paragraph 46 of the Judgment.

43. The five questions were posed to the ET in the application to reconsider and these have been answered in the reconsideration Judgment. On the face of it, the answer to the first question identifies an event which precedes the Claimant's affirmative act of invoking the appeal procedure. However, these answers were given (i) in the context of the ET's finding on the issue of affirmation and (ii) without full argument.

44. In respect of its answer to the first question I add that the Judgment at paragraph 30 recorded that the Claimant's solicitors' letter of 19 September had complained about the continuing delay in transmitting the result of the appeal. In circumstances where the ET evidently understood Mr Kilroy to be contending that there had been a continuing breach of the implied term of trust and confidence, I reject any suggestion that the answers in the reconsideration Judgment demonstrate that the claim would have failed in any event.

45. In my judgment, Mr Hoyle was right to accept that even if successful on the point of affirmation, this was a matter which should be remitted and to the same ET. In any event, that is my decision.

A

46. In all the circumstances I conclude that the ET's Decision that there was a constructive unfair dismissal should be set aside; and that the determination of that issue should be remitted to the same ET for reconsideration in the light of this Judgment and the five questions identified in **Kaur**.

B

47. Having taken account of the principles of **Sinclair Roche and Temperley v Heard** [2004] IRLR 763, and in any event as both parties agree, I am quite satisfied that it is appropriate to remit to the same ET. The effect of the remission is to complete its task and to consider, with full argument, the questions which would have been considered if the relevant authorities had been drawn to its attention. There is no reason to doubt the impartial professionalism which it will apply to that task. I leave it to the ET to decide whether or not it needs to receive any further evidence for the purpose of that further consideration.

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