

Appeal No. UKEAT/0036/19/SS

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 18th August 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

CHEMCEM SCOTLAND LTD

APPELLANT

MRS KIRSTY URE

RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant

Mr K McGuire of Counsel
Instructed by:
Beltrami & Co
83 Carlton Place
GLASGOW G5 9TD

For the Respondent

Mr C Edward of Counsel
Instructed by:
University of Strathclyde Law
Clinic
Rm GH844
Graham Hills Building, Level 8
40 George Street
GLASGOW G1 1QE

SUMMARY

In this case of unfair dismissal the ET held that although the Claimant had stated in evidence that she did not return to work after her maternity leave because her statutory maternity pay had been discontinued in a circumstance where the employer had been entitled to discontinue her payments, there were a variety of other factors that justified her decision not to return to work and those factors being repudiatory in character, the Claimant was entitled to refuse to return to work and treat the employer's conduct as constructive dismissal. The ET further held that her failure to return to work constituted a communication of her decision not to return to work, even though nothing was said to the employer. The EAT held (1) that the ET was correct to treat the various repudiatory acts as a sufficient ground for the Claimant's decision to rescind the contract and claim constructive dismissal; and (2) that while ordinarily it was necessary to communicate a decision not to return to work, the circumstances of this case were eloquent of such a decision and the employer could not have been in any doubt that this was what she intended; and decision of ET affirmed.

Topic Code – 11 Unfair Dismissal

THE HONOURABLE LORD SUMMERS

1. I heard argument this morning in this case by Skype and am grateful to the parties for their helpful written and oral submissions.
2. The Respondent is a civil engineering company. The Claimant is the daughter of the majority shareholder in the company, Mr Beaton. She worked for another company owned by her father called Blue Ridge Equestrian Ltd. It ceased trading during the events giving rise to this case. All its employees including the Claimant were transferred to the Respondent. The Respondent inherited responsibility for the Claimant and her claims insofar as they arose from her period of employment with Blue Ridge Equestrian Ltd.
3. The Claimant went on maternity leave on 26 September 2016 and was paid SMP by the Respondent. During her time on maternity leave the Claimant was in touch with her father about a variety of matters affecting her employment. The dialogue was a difficult one. The ET held at times Mr Beaton misled the Claimant or failed to communicate to her information which as an employee, she was entitled to have. These difficulties arose from the fact that Mr Beaton had left his wife, the Claimant's mother, and formed a new relationship with a member of staff Ms Thompson. The parties were in the process of divorcing one another. As a result, the relationship between the Claimant and Mr Beaton was fraught.
4. At the end of her maternity leave the Claimant did not return to work for the Respondent. The Claimant lodged a claim with the ET and asserted that she had been constructively dismissed. The Claimant argued that the Respondent had committed a variety of breaches of contract which had transgressed the obligation of mutual trust and confidence between the Claimant and the Respondent. The Claimant submitted that in these circumstances she was entitled to regard these acts as repudiatory. The Claimant argued that she had accepted the repudiation and had been unfairly dismissed.
5. Section 95(1) ERA 1996 provides that "an employee is dismissed if... (c) the employee terminates the contract under which he is employed... in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"

6. In a Preliminary Hearing designed to resolve a variety of matters including matters that are not the subject of appeal, the ET decided that the Claimant's employment terminated on 25 September 2017, the date she when she was due to restart work with the Respondents. The ET accepted that her failure to return on that date signified the end of her contract. I shall return to the significance of that matter by way of postscript.
7. In any event there was a full hearing where ET examined whether the conduct of the Respondent towards the Claimant amounted to a breach of the term of trust and confidence and thus entitled the Claimant to resign her employment.
8. It is clear from the Judgement (paragraph 40) that the issues that led to her decision not to return occurred over an extended period. No single event is identified by the ET as sufficient in itself to justify the Claimant's decision to treat her employment as over. The ET held that the sequence of events narrated (1)-(5) at paragraph 40 were repudiatory in nature and entitled the Claimant if she chose to resign by accepting the repudiation.
9. The Respondent appealed on two legal grounds. In summary these are -
 - The Respondent argued that evidence appearing in emails of 9 and 15 August 2017 made it clear that the Claimant had refused to return to work because the Respondent had terminated her SMP. The Respondent pointed out (correctly) that the SMP had come to an end when it ought to have come to an end and that the Respondent had acted lawfully in this connection. The Respondent argued that a repudiation could not arise from the Respondent's failure to pay SMP since that was something they were entitled to do.
 - The Respondent argued that the Claimant had failed to communicate her acceptance of the Respondents' repudiatory acts and in the absence of such communication there could not as a matter of law be a termination of contract.

The Basis of Repudiation

10. The difficulty with the first argument is that there is no sign that the ET relied on the cessation of SMP as being significant to its decision. The ET decided that the Claimant received her last payment on SMP on 18 June 2017 (paragraph 22). It does not rely on the failure to pay wages or SMP as a basis for repudiation. The reasons for the ET's decision that the Respondent committed a series of repudiatory breaches are laid out in paragraphs

40-42. None of these consist in a failure to pay SMP. The Respondent is correct to argue that non-payment could not amount to a repudiatory breach of contract. The Respondent was entitled not to pay any further SMP and hence the non-payment could not found a repudiation. I acknowledge that the Claimant refers to the non-payment of wages as an explanation for her decision not to return to work (see email of 9 August 2017; paragraph 22). The Claimant's personal reasons for leaving employment do not prevent the ET from looking at matters objectively. It is entitled to take into account all factors that in its judgement are relevant to the decision by the Claimant to end her employment. The Respondent did not appeal the Findings of Fact and argue that they were not open to the ET on the evidence led or that they were perverse in that they contradicted the weight of evidence.

11. The ET held that the repudiatory acts consisted in a number of matters. I summarise these as follows. The Respondent varied her wage arrangement without any explanation or warning in February 2017. The Claimant was switched from the payroll of the Respondent to Blue Ridge Equestrian Ltd, a company on the verge of insolvency. The Respondent failed to pay SMP on time in April and May without explanation. The ET considered that the Respondent failed to answer the Claimant's queries about what she was entitled to be paid and was misled as to the true position. The ET took the view that the whole circumstances indicated that Mr Beaton of the Respondent was hostile to her continued employment and exhibited that hostility over a prolonged period.
12. In the absence of any attack on these findings in fact or the ET's conclusion that they entitled the Claimant to end her employment, the Claimant's concerns about the cessation of her SMP in the email of 9 August 2017 are beside the point.

The Communication of Acceptance of Repudiation

13. The Respondent argued that the Claimant did not communicate her acceptance of the repudiation. The Respondent submitted that her non-appearance on 25 September 2017 could not as a matter of law amount to communication of her acceptance of the repudiatory acts. I do not agree. While in normal circumstances a failure to appear might not carry the implication in question, in the context of this case it plainly could. In any event it was a matter for the ET as finder of fact to judge whether her non-appearance was eloquent of an acceptance of the repudiatory acts (see **Weathersfield Ltd v Sargeant** [1999] ICR at 431F-H, 432C-F and 434G-435A). If the Respondent had wished to challenge the ET's decision

to interpret her non-appearance in that way it would have required to attack the factual basis upon which the conclusions at paragraph 40 rested. But no such attack was mounted.

14. The Claimant drew attention to paragraph 27 of the Judgement where the ET explains why in its assessment the Claimant did not return to work at the end of her maternity leave. It concluded she did not do so because of Mr Beaton's treatment of her. The ET explains that Mr Beaton knew that if she returned to work his new partner Ms Thomson would come under her management, and he did not wish that to happen. Mr Edward pointed out that when the Claimant did not appear on 25 September 2017 no one from the Respondent got in touch to ask why she had not returned after her maternity leave. The circumstances were eloquent of the true position. The Claimant did not need to communicate with the Respondent. The Respondent was hoping and perhaps even expecting her not to return.

Postscript

15. I do not consider that in any event the Respondent was in a position to argue these points. At the Preliminary Hearing the ET decided at paragraph 33 that the date of termination was 25 September 2017. Although the matter does not appear to have been fully explored and although the reasoning is limited, the ET determined that this was the date of termination. No appeal was taken against that judgement. The ET plainly considered that the key point in assessing the date of termination was the fact that she decided not to return after the end of her maternity leave. Although the full hearing explored the issue in greater detail, it came to the same conclusion. I am unable to see how the ET could have decided that the Claimant's employment terminated on any other day or for any other reason. Thus viewed the ET's judgement after the Full Hearing was one that, on this issue, it was bound to make in light of its earlier finding.

Other Matters

16. In the Notice of Appeal under heading "B" the Respondent referred to paragraph 33 of the Judgement of 12 March 2019 and paragraph 42 of the Judgement of 22 May 2019 and argued that they were inconsistent. Mr McGuire did not press this ground of appeal. He did not draw my attention to any inconsistency. I am unable to see one based on the Grounds of Appeal. Mr Edward speculated that there might be thought to be an inconsistency in paragraph 33 of the Judgement after the Preliminary Hearing in that the ET refer to the claimant's evidence that she had not "decided" whether to return to work given the "difficult circumstances". I consider Mr Edward is correct in referring this to the position

during August 2017. The ET's judgement at paragraph 33 in my view was that the Claimant did not at any stage tender an express resignation. The ET was of the view that she did terminate her employment when she chose not to return on 25 September 2017 at the end of her maternity leave. The ET acknowledges that because the Claimant worked from home this was not a straightforward inference. In other cases the Claimant would not have appeared at her place of work. But it was satisfied that she did not perform work after the end of her maternity leave. Thus understood the reference to the Claimant's indecision over whether to return is plainly referable to paragraph 21 in the Judgement at the Preliminary Hearing where the claimant is recorded to have said that in the "summer of 2017" she had not decided whether she would return to work given the "difficult circumstances".

17. The parties were agreed that the disposal of the Grounds of Appeal from the Judgement should be treated as the disposal of the appeal against the Reconsideration Judgement.
18. In these circumstances I refuse the appeals.