Appeal No. UKEAT/0072/20/AT (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 November 2020
Judgment handed down on
10 March 2021

Before

JUDGE BARRY CLARKE

(SITTING ALONE)

EVERGREEN TIMBER FRAMES LIMITED — APPELLANT

MR N K HARRINGTON — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR JAMIE MORGAN (of Counsel) Instructed by Markel Law LLP Interchange 81-85 Station Road Croydon CR0 2AJ
For the Respondent	MR ASHLEY SERR (of Counsel) Instructed pursuant to the Direct Public Access Scheme

SUMMARY

CONTRACT OF EMPLOYMENT

The Employment Tribunal erred in concluding that the parties entered into a contractually binding agreement by which ownership of a car would transfer from the Respondent to the Claimant upon the termination of his employment. Although the Employment Tribunal did not err in deciding that a proposal described as a "gift" was an offer, one of the ingredients of a contract, it erred in concluding that the Claimant could accept part of the Respondent's offer insofar as it related to the car while seeking to improve upon other parts of the offer. The claim was remitted to a different Employment Tribunal to consider the Claimant's contention that the parties entered into an oral agreement for the transfer of the car at a meeting on 30 May 2018.

JUDGE BARRY CLARKE

Introduction

1. I refer to the parties as they were before the Employment Tribunal (ET), as Claimant and Respondent.

2. This was a full hearing of the Respondent's appeal from the Judgment of the ET in Lincoln (Employment Judge Blackwell sitting without non-legal members), which was sent to the parties on 17 August 2019 after a hearing held on 29 July 2019. At that point, the Respondent was known as Evergreen Timber Frames Limited, but it has since changed its name to Secure Self Storage (South Yorkshire) Limited. The Respondent was represented before the ET by Mr Morgan, who appeared again on its behalf before the EAT. The Claimant, Mr Harrington, represented himself before the ET but instructed Mr Serr to resist the appeal.

3. The Claimant worked for the Respondent for just over two years in a managerial role. His benefits included a company car. In consequence of a challenging trading environment, the Respondent decided to cease trading in its current form. It informed the Claimant that he was at risk of dismissal by reason of redundancy. He was subsequently dismissed for that reason on 1 August 2018. The Claimant brought a breach of contract claim before the ET. The dispute was limited to what the Respondent promised him by way of severance terms.

4. By its Judgment, the ET partially upheld the Claimant's breach of contract claim and awarded him damages in the sum of £8,400 (which it found to be the value of the car). The ET did not uphold the Claimant's other complaints of breach of contract concerning an alleged promise to transfer a computer to him or to pay him a bonus of one month's pay. There is no

appeal against those aspects of the ET's Judgment. This appeal only concerns the Respondent's challenge to the ET's decision to award damages for breach of contract in respect of the car.

The claim before the ET

5. The Claimant presented his breach of contract claim to the ET on 31 October 2018. Insofar as relevant to the car, his case (as set out in his claim form) was as follows:

> **"My redundancy/severance (in writing) included a company car as a gift. The company decided to take it off me a week before I finished my 4 week notice. I had previously verbally accepted this and also confirmed in writing my acceptance of this, and this is the only reason I stayed with the company until the end. It had been reiterated several times that this was part of my pay off for staying with the company and completing my notice and supplying them with as many calculations as possible within the notice period. I believe this to be a breach/broken contract."**

The Claimant said that the car had previously been promised to him by one of the Respondent's directors, Mr Topham, and that the promise was "written into a redundancy plan".

6. The Claimant's claim form continued with a chronology of events between October 2017 and September 2018. The Claimant was permitted by the ET to rely on this chronology as his evidence in chief, and in lieu of a written witness statement. It included the following, insofar as relevant (and corrected for typos):

> **"30th May 2018. I was part of a meeting regarding the company dismissing me due to the business ceasing to trade … I had a discussion with [Mr Topham and others] regarding my pay off which was to include the company car, computer and a bonus of a month's salary.**
>
> **3rd July 2018. I was part of a meeting with [Mr Topham and others] and given my redundancy letter. There were a few things missing from the letter we had previously agreed on. I accepted points A-E and the inclusion of the car but said I was not happy with the omission of the computer and bonus pay.**
>
> **5th July 2018. I emailed [the Respondent] and lodged an appeal against the omission of the severance.**
>
> **19th July 2018. I received a letter in the post to say my appeal would be heard on 25th July 2018.**

> **23rd July 2018. I was told by [Mr Topham] to make sure I brought the company car to my meeting on Wednesday. This made me a bit uneasy, so I contacted Acas …**
>
> **25th July 2018. I attended the appeal meeting … I read out my appeal letter word for word … I was told there and then I had lost my appeal against my redundancy. I reiterated that I was not appealing the redundancy but the severance. [Mr Topham] then entered the meeting and told me that he was taking the car off me and had booked a taxi to take me home."**

7. The Claimant's case before the ET, in summary, was that he was dissatisfied with the severance terms proposed and that he wanted it to reflect all matters he believed had been agreed, namely the car, the computer and the bonus. The Respondent resisted the claim, saying that there was no contractual agreement to that effect.

The ET's approach

8. The ET proceeded on the basis that this dispute arose, or was outstanding, on the termination of the Claimant's employment, meaning that it had jurisdiction under the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**.

9. The ET's contractual jurisdiction applies not only to contracts of employment but to any "other contract connected with employment"; see Section 3(2)(a) of the **Employment Tribunals Act 1996** and **Oni v Unison Trade Union** [2018] IRLR 806. Such contracts can include severance agreements; see **Rock-it Cargo Limited v Green** [1997] IRLR 581.

10. The first issue for the ET, insofar as relevant to this appeal, was to determine whether the parties had entered into a contractually binding agreement by which ownership of the car would be transferred from the Respondent to the Claimant upon the termination of his employment. The ET focused its enquiry on whether the parties had formed a contract, separate to the contract of employment, for its transfer. If it decided that the parties had not entered into such a contract, that

was the end of the matter. If they had, it was clear that the agreement had been breached, because the Respondent did not transfer the car to the Claimant; accordingly, the second issue for the ET, if it became relevant, was to decide the amount of damages to award for that breach.

The evidence before the ET

11. The Claimant gave oral evidence to the ET, as did Mr Topham. They answered questions about their discussions between October 2017 and July 2018. The bundle contained the limited correspondence passing between the parties.

The ET's Judgment

12. The ET found that Mr Topham handed a letter to the Claimant at a meeting on 3 July 2018 that was held to discuss his dismissal by reason of redundancy. This letter set out the amounts that would be paid to him upon his dismissal, including a redundancy payment "to be quantified in due course". The letter also asked the Claimant to continue working during his notice period on various projects. It then stated that the Respondent "would also like to gift [him] a Nissan Qashqai".

13. The ET's Judgment records that the Claimant sent a letter of appeal to the Respondent on 25 July 2018 in which he said that he acknowledged and accepted the "gift of the Nissan Qashqai", adding in parenthesis that this had been "previously agreed before the closure of the business". The Claimant's letter dated 25 July 2018 also referred to discussions between the Claimant and Mr Topham "nine months earlier" (i.e. in October 2017) where the Claimant said they had "verbally settled" on terms including transfer of the car.

14. Having heard evidence from the Claimant and Mr Topham, the Employment Judge held as follows regarding the discussions in October 2017 (at paragraph 6):

> **"I accept that there were discussions in October 2017 which did involve Mr Harrington and Mr Topham. I accept that in relation to the option to immediately close the business there were discussions as to how Mr Harrington would exit the business. It seems to me that even if Mr Harrington is right and they were firm proposals he can no longer rely upon them because of the passage of time and the fact that the option on which they were dependent i.e. closure did not take place."**

15. The ET therefore disregarded the discussions in October 2017 as relevant to the existence of a contractual agreement for transfer of the car on termination of the Claimant's employment. The ET made no findings of fact about the redundancy discussions in May 2018. Regarding the discussions in July 2018, the Employment Judge concluded as follows (at paragraphs 18 to 21):

> **"Turning now to the Nissan vehicle. Mr Morgan submits that the letter handed to Mr Harrington on 3 July which I have quoted above cannot be relied upon as a term upon which Mr Harrington can sue. He says it is what it says it is, namely a gift within the discretion of the company. I reject that submission. The statement is made in the context of a letter bringing about the agreed termination of Mr Harrington's employment on the ground of redundancy and it is to be read in that context.**
>
> **Mr Morgan goes on to say however that even [*if*] I am against him on that point and that the letter handed in on 3 July is a contractual offer to transfer ownership in the Nissan vehicle, by appealing Mr Harrington rejected that offer and tabled a counter offer. Again I do not agree with that submission. Mr Harrington in his letter of 25 July accepts the offer set out in the letter of 3 July in terms subject first to clarification as to the amount and calculation of the redundancy payment which was given and accepted by Mr Harrington and secondly to his appeal on what he says were the terms that were not included and should have been within that letter.**
>
> **It seems to me this is not as Mr Morgan puts it a battle of terms. Mr Harrington accepts the letter of 3 July and goes on to say that it is not complete. In my view therefore there is offer and acceptance of the letter of 3 July. Mr Harrington's letter of 25 July cannot be read as a rejection or a counter proposal.**
>
> **Thus, in my view Mr Harrington's claim in respect of the Nissan succeeds. Mr Morgan went on to argue that there was insufficient evidence of value for me to conclude that £8,400 was a correct sum by way of damages. I accept that all I have is Mr Harrington's evidence in which he says he researched the value of the vehicle on the internet. I think it is well known that such services are widely available and therefore I accept Mr Harrington's evidence on the point and note that whilst they could have done so Evergreen have served no evidence to the contrary."**

The grounds of appeal

16. The Respondent has criticised the ET's Judgment by reference to the following grounds of appeal:

16.1 The first ground of appeal is that the ET erred in law or was perverse in reaching a decision on a point which was not the Claimant's case or was not identified as an issue at the outset of the hearing. This is a contention that the Claimant's pleaded case was that an oral agreement had been reached in May 2018 that, in return for him remaining with the company during his notice period, he would become the owner of his car. Instead, the ET found for the Claimant on a different basis, namely that he was offered the car by Mr Topham's later letter dated 3 July 2018 and that he accepted it by his letter of appeal against dismissal dated 25 July 2018.

16.2 The second ground and the third ground can be taken together. They criticise the ET for deciding that the car was not a gift (contrary to the wording of the letter handed to the Claimant on 3 July 2018) and instead deciding that there was a contract for its transfer. In terms of the law of contract, the second ground of appeal is that there was no offer and the third ground of appeal is that, if an offer was made, there was no acceptance of it.

16.3 The fourth ground of appeal is that the ET decided on the value of the car despite having no (or no sufficient) evidence of its value.

17. The Claimant has resisted the appeal as follows:

17.1 As to the first ground, the Claimant says that his ET1 claim form included reference to the written correspondence at the time, such that the issue was never confined solely to whether

there had been an oral agreement concerning the vehicle. Moreover, the Claimant says that the ET was entitled to look at the wider picture bearing in mind that it was dealing with a litigant in person with whom there was a discussion of the issues at the outset.

17.2 As to the second and third grounds, the Claimant says that the reference to the vehicle in the letter handed to him on 3 July 2019 had the effect of amending his contract of employment to include an additional right on termination by redundancy, analogous to a right to an enhanced redundancy payment. It was, it is further said, an unconditional offer of the car, bestowing a contractual right to it. The Claimant now accepts that there is no need for his contract of employment to have been amended to bestow jurisdiction on the ET, and I have proceeded on that basis.

17.3 As to the fourth ground, the Claimant says that he had contended from the outset of his claim that the car's value was £8,400. That was the value he had put on it in his ET1 claim form. It was open to the ET to accept his oral evidence that he had based this valuation on his internet research, bearing in mind that the Respondent adduced no valuation evidence to the contrary.

Discussion and conclusions

18. I can deal with the first ground of appeal quickly. To support its contention that the ET reached conclusions that were contrary to the way in which the issues had been identified at the outset of the hearing, the Respondent applied for an order that the relevant parts of the Employment Judge's notes be produced. Presumably it was hoped these would reflect the Respondent's assertion that the Claimant had, in discussion with the Employment Judge, confined his claim to an oral agreement reached in May 2018. At the sift stage, the EAT ordered the Respondent to prepare its own note of the hearing and send it to the Claimant within 28 days,

so that it might be agreed with him, before deciding whether to renew its application for the Employment Judge's notes. However, the Respondent did not approach the Claimant with a proposed note until a week before the EAT hearing. No such note was agreed in the short time left. The Registrar refused the Respondent's request for an adjournment of the EAT hearing so that these steps could belatedly be followed.

19. In the absence of such an agreed note, I reject Mr Morgan's submission that the ET departed from the Claimant's case as identified at the outset of the hearing and that it reached a conclusion that was not open to it. There is no material before me from which I could safely conclude that the ET made such an error. I accept Mr Serr's submission that the ET's conclusion was rooted firmly in the Claimant's pleaded claim which referred to the promise of the car being not only verbal but also "written into his redundancy plan" and agreed "in writing".

20. The Respondent's position in respect of its second ground of appeal is straightforward. The first requirement for the formation of a contract is that the parties have reached an agreement: that an offer was made by the Respondent to the Claimant to transfer ownership of the car to him upon termination of his employment, and that he accepted it. Such an agreement may still lack contractual force if its terms are not sufficiently certain, if its operation is subject to a condition which is not met, if it was made without any intention to create legal relations and if there was no consideration passing from the Claimant to the Respondent.

21. The Respondent's case before the EAT, as it was before the ET, is simply that it made no offer. Mr Morgan submits that, in saying to the Claimant it wished to "gift" him the company car he used, the Respondent made a promise that was gratuitous and unenforceable.

22. The ET rejected that submission by reference to the context in which the "gift" was proposed: the agreed termination of Mr Harrington's employment on the ground of redundancy. Its reasoning is short but sufficient to make the point that the proposal had to be viewed through the lens of the surrounding circumstances. The gift proposal was found in a letter headed "Confirmation of dismissal on notice"; it included other proposals for the termination of his employment (accrued wages, holiday pay and redundancy pay) and, importantly, followed a request that he undertake work on a series of specific projects during his notice period.

23. I agree with Mr Serr that to describe a payment as a gift in the context of negotiating the terms on which employment will come to an end is analogous to describing it as an "ex gratia" payment; in context, it means a payment over and above an employee's entitlements under statute or their contract of employment. Although it was not cited to the ET, the High Court's Judgment in **Edwards v Skyways Ltd** [1964] 1 WLR 349 supports the conclusion it reached. Megaw J (as he then was) rejected an employer's contention that its offer of a payment to redundant employees was unenforceable because it had been described as "ex gratia". He reasoned as follows:

> **"... the words "ex gratia", in my Judgment, do not carry a necessary, or even a probable, implication that the agreement is to be without legal effect. It is, I think, common experience amongst practitioners of the law that litigation or threatened litigation is frequently compromised on the terms that one party shall make to the other a payment described in express terms as "ex gratia" or "without admission of liability". The two phrases are, I think, synonymous. No one would imagine that a settlement, so made, is unenforceable at law. The words "ex gratia" or "without admission of liability" are used simply to indicate – it may be as a matter of amour propre, or it may be to avoid a precedent in subsequent cases – that the party agreeing to pay does not admit any pre-existing liability on his part; but he is certainly not seeking to preclude the legal enforceability of the settlement itself by describing the contemplated payment as "ex gratia". So here. There are obvious reasons why the phrase might have been used by the company in just such a way. It might have desired to avoid conceding that any such payment was due under the employers' contract of service. It might have wished – perhaps ironically in the event – to show, by using the phrase, its generosity in making a payment beyond what was required by the contract of service. I see nothing in the mere use of the words "ex gratia", unless in the circumstances some very special meaning has to be given to them, to warrant the conclusion that this promise, duly made and accepted, for valid consideration, was not intended by the parties to be enforceable in law."**

A

24. It was open to the ET, having regard to the surrounding circumstances, to conclude that the Respondent's proposed gift of the car to the Claimant was not a gratuitous promise to him, despite the use of that word, but simply one of its proposals for the termination of his employment. The ET's conclusion reflected the industrial reality of the situation and accorded with common sense. It made no error of law in finding that an offer had been made. The second ground of appeal therefore fails.

B

C

25. The third ground of appeal concerns the next stage of formation of a contract: acceptance. In the employment field, severance terms typically incorporate a compromise of statutory and contractual claims. A party's acceptance of a such terms is usually communicated by a signature on a statutory compromise agreement or through the conciliation efforts of an Acas officer and subsequently confirmed in a COT3 document, in either case with enforcement through the civil courts. Here, the parties did not avail themselves of either route; unusually, this was a discussion about severance with no element of compromise. The ET's task was to determine whether the parties' negotiations had crystallised into a contractually binding agreement, which required it to identify a definite offer by one party and a definite acceptance of that offer by the other party.

D

E

F

26. In this case, the Respondent's offer to the Claimant included an ex gratia element in the form of transfer of the car. It did not include the bonus or transfer of the computer, which he believed he had also been promised at the meeting on 30 May 2018. This aggrieved the Claimant; he thought that the terms were incomplete. He was offered the opportunity to bring an internal appeal. He did so by a letter of appeal dated 25 July 2018. In this letter, the Claimant said that he accepted certain parts of the offer, including the car, but he sought clarity on the calculation of the redundancy payment before he would agree to it. He described the omission of the computer and the bonus as a breach of an oral contract and intimated he would take legal action.

G

H

27. I accept Mr Morgan's submission that the ET erred in law by concluding that it was open to the Claimant, through his letter of appeal, to accept the offer in part while simultaneously contending that, in breach of contract, the offer was incomplete.

28. When employers and employees discuss severance arrangements, there will be numerous matters to address, reflecting the many terms and conditions found in contracts of employment and the range of statutory employment rights. An agreement might cover pay, accrued leave, notice, pension contributions, the use of confidential information, benefits, incentives and, of course, any sum offered on an ex gratia basis. The negotiation of such agreements would become too complex if it were possible to reply to an offer in a form that permitted a party unilaterally to sever, and then accept, some terms, while rejecting, or seeking improvement to, others.

29. By the ET's own analysis, the offer of the car was not a freestanding gift; it was a proposal made in the context of discussions for the agreed termination of the Claimant's employment by reason of redundancy. If the offer could not be stripped of its context, nor could its acceptance.

30. Mr Serr sought valiantly to contend that the Respondent's approach on this point was overly technical and artificial, that it paid insufficient attention to the purpose of an internal appeal under the Acas Code of Practice and the ET's own flexibility under rule 41 of the ET's Rules of Procedure. I agree with Mr Morgan, however, that the ET is bound by the same principles of law as the civil courts when it comes to formation of contract. On the topic of acceptance, the correct approach is summarised at paragraph 2-031 of **Chitty on Contracts** (33rd Edition) as follows:

> **"A communication may fail to take effect as an acceptance because it attempts to vary the terms of an offer. Thus an offer to sell 1,200 tons of iron is not accepted by a reply asking for 800 tons; an offer to pay a fixed price for building work cannot be accepted by a promise to do the work for a variable price; and an offer to supply goods cannot be accepted by an "order" for their "supply and installation". Nor, generally, can an offer be accepted by a reply which varies one of its other terms (e.g. that specifying the time of performance), or by a**

> **reply which introduces an entirely new term. Such a reply is not an acceptance; but it may, rather, be a counter-offer, which the original offeror can then accept or reject and the new offeror can revoke prior to its acceptance**."

31. This approach was endorsed by the High Court in **Gibbs v Lakeside Developments Ltd** [2016] EWHC 2203 (Ch), where Arnold J upheld a decision of the County Court, in relation to a dispute about forfeiture of a lease, that an email by which the company purported to accept the leaseholder's settlement offer, but which attached a consent order specifying a different payment date, was not an acceptance but a counter-offer. Likewise, in the present appeal, if the analysis were to be limited to the written correspondence quoted in the ET's Judgment (a point to which I return at paragraph 35 below), the correct analysis would be that the Claimant's letter of appeal was a counter-offer to improve the severance terms.

32. In relation to the fourth ground of appeal, I am unpersuaded by Mr Morgan's submissions. The Claimant stated in his ET1 that he valued the car at £8,400. The Respondent was on notice of this valuation from the start. It declined the opportunity to adduce any evidence of a lower valuation. The Claimant gave oral evidence that he had researched its value online. The ET accepted his evidence. It was open to it to do so. In a case of this nature, it would have been disproportionate to do as the Respondent has suggested, namely to adjourn the calculation of damages to a remedy hearing where, in the absence of agreement between the parties, it could consider expert evidence on the car's value. There was no error of law in the ET's approach.

Disposal

33. The first, second and fourth grounds of appeal fail but the third ground of appeal succeeds. The ET erred in law in concluding that the parties entered into a contractually binding agreement by which ownership of the car would be transferred from the Respondent to the Claimant upon

A the termination of his employment. The error was in concluding that the Claimant could sever and accept the part of the Respondent's offer relating to the car.

B 34. Mr Morgan contended, were I to allow this appeal, that the EAT should substitute its Judgment for that of the ET and dismiss the Claimant's breach of contract claim; such an approach would also be proportionate, he said, given the value of the claim.

C 35. The appropriate disposal is for the case to be remitted. I bear in mind that the Claimant's case was not limited to a contention that an enforceable agreement arose from the correspondence passing between the parties. His principal complaint was that the Respondent's offer letter, when
D it came, did not reflect the terms of an oral agreement he contended had already been reached at a meeting on 30 May 2018. The ET concluded that no oral agreement had been reached at a meeting on 20 October 2017, but it made no findings on the Claimant's assertion that the
E Respondent had agreed at a meeting on 30 May 2018 to transfer the car to him in consideration for his agreement to work on specific projects during his notice period. It is on that point that the remitted hearing should focus.

F 36. Given that the Respondent's fourth ground of appeal has failed, the remitted hearing should proceed on the basis of a valuation for the car of £8,400.

G 37. While in no way doubting the professionalism of the Employment Judge, I consider that the matter should be remitted to a different ET. Applying **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, I note in particular that he took a firm view of the evidence before him
H and that it would incur no additional cost to do so, given the limited point requiring determination.