Neutral Citation Number: [2022] EAT 36

Case No: EA-2020-000851-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 February 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR M FENTEM	**Appellant**
- and -	
OUTFORM EMEA LIMITED	**Respondent**

- -
- -

Mr M Jackson (instructed by DLG Legal Services) for the **Appellant**
Mr A Solomon QC and Mr A Hodge (instructed by Knights plc) for the **Respondent**

Hearing date: 11 January 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

For the purposes of the law of unfair dismissal, section 95(1)(a) **Employment Rights Act 1996** provides that the concept of dismissal includes a case in which the contract of employment is terminated by the employer.

In the present case, by a letter of 16 April 2019, the employee resigned by giving nine months' notice to take effect on 16 January 2020. On 19 December 2019 the employer invoked a clause in the contract enabling it, following the employee having resigned, to "terminate the [employee's] employment forthwith" by paying to him the salary, excluding bonuses, to which he would have been entitled in the remainder of the period of notice that had been given by him. As a result, the contract ended on 19 December 2019, instead of on 16 January 2020.

The employment tribunal considered itself bound by the majority decision of the EAT in **Marshall (Cambridge) Limited v Hamblin** [1994] ICR 962, to conclude that the invocation, following a resignation, of a clause permitting the employer to terminate the contract upon making a prescribed payment calculated by reference to the unexpired period of the employee's notice does not, as a matter of law, amount to a dismissal. On appeal the employee accepted that **Marshall v Hamblin** stood for that proposition of law, and that if it must be followed, then the appeal must be dismissed. But it was argued that the EAT ought not to follow it, in particular, because it was manifestly wrong.

Held: The circumstances in which the EAT will depart from its own previous decisions are tightly circumscribed. One of them is where a previous decision is "manifestly wrong", which means that it can be seen to be obviously wrong, without the need for extensive or complicated

argument: **British Gas Trading v Lock** [2016] ICR 503 at [77] to [80]. Despite the reasoning in the decision itself being problematic, the proposition of law said to emerge from **Marshall v Hamblin** could not be said to be obviously wrong, without needing any detailed consideration or analysis of the arguments or potentially relevant authorities. That being so, it could not be said to be manifestly wrong, so as to enable the EAT to depart from it. The appeal must therefore be dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. Part X **Employment Rights Act 1996** concerns unfair dismissal. Within Chapter 1 section 94 sets out the right not to be unfairly dismissed. Section 95 then provides as follows:

> "**Circumstances in which an employee is dismissed.**
>
> **(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—**
>
> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
>
> **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or**
>
> **(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**
>
> **(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—**
>
> **(a) the employer gives notice to the employee to terminate his contract of employment, and**
>
> **(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;**
>
> **and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."**

2. In the present case the contract of employment of the claimant in the employment tribunal included the following provisions:

> **"3.1 This Agreement shall commence on the Commencement Date and will, subject to earlier termination below, continue unless and until it is terminated by either party giving to the other 9 months' prior written notice. The Executive's period of continuous employment commenced on 22 October 1990.**
> **…**
> **19.5 Where the Executive serves notice to terminate his employment with the Company, the Company shall at any time during the period of notice be entitled to terminate the Executive's employment forthwith and in full and final settlement of the Executive's claims under this Agreement by paying to the Executive, the salary (excluding bonuses) to which he would have been entitled during the notice period or any part of it in lieu of such notice or any part of it."**

3. The claimant's employment came to an end following a change in ownership of the

business. How this came about was described by the tribunal in the following passage:

> **"17. The Claimant resigned by letter dated 16 April 2019. The Claimant explained the reasons for his resignation briefly (this is not a criticism). He says this at paragraph 20 of his statement and I accept this (unchallenged) evidence: "*Following the change in ownership, infrastructure and working environment I determined in April 2019 that, after what would eventually be just over 29 years of loyal, dedicated and unblemished service, and in the final few years of my career, the new arrangement was not necessarily something I desired.*"**
>
> **18. He gave nine months' notice and in the meantime continued to work. The Claimant, however, indicated that he was willing to be flexible since his employment would be terminating so close to the financial year end.**
>
> **19. On 16 October 2019, Mr Hathaway, Managing Director, wrote to the Claimant apologising that it had taken so long to "confirm" the Claimant's resignation and to accept it. He noted that the Claimant's last day of employment, in accordance with his notice, would be 16 January 2020. Mr Hathaway thanked the Claimant for his flexibility and said "…** ***I note and appreciate the flexibility around this date you have indicated, due to the financial year end. I therefore propose to review this with you closer to the time when we have a clearer idea of the input required*****".**
>
> **20. On 19 December 2019, the Claimant was called to a meeting with Mr David Joyce, Chief Operating Officer, who was his line manager. Mr Joyce told him that the Respondent was exercising its discretion to pay him in lieu of the remainder of his notice period, bringing his employment to an immediate end. The meeting was followed up with a letter on the same day which said, among other things, as follows:**
>
> ***Your notice was due to expire on 16 January 2020. However, in accordance with clause 19.5 of your service agreement dated 4 April 2007, in circumstances where you serve notice to terminate your employment, the company has the right to terminate your employment with immediate effect at any time during your notice period by making a payment in lieu of your salary only in respect of any part of your notice period not worked. Your employment therefore ends today (19 December 2019) […]***
>
> **21. The Claimant was subsequently paid his salary in lieu of the remainder of his notice period.**
>
> **22. The Claimant was surprised by this approach but he did not protest to the Respondent.**
>
> **23. I agree with the parties, and find, that the effective date of termination was 19 December 2019. Not least that is because the Claimant was told in clear and unequivocal terms that his employment was to come to an immediate end on that date."**

4. The tribunal had to decide whether, for the purposes of his unfair dismissal claim, the

claimant was dismissed. The judge, EJ Dyal, recorded at [25] that counsel for the respondent, Mr Hodge, "accepts as a general proposition that where an employee resigns on notice and the employer unilaterally brings forward the date of termination, that will ordinarily amount to a dismissal". But Mr Hodge submitted that where there is a term of the contract "that permits the employer to terminate the contract and make payment in lieu of the remainder of the notice period" the position is different and there is, in law, no dismissal. For that proposition he relied upon the decision of the EAT in **Marshall (Cambridge) Limited v Hamblin** [1994] IRLR 260. Counsel for the claimant, Mr Jackson, argued that **Marshall v Hamblin** did not so decide. He submitted that the EAT in that case had regarding it as involving the employee merely effectively being placed on garden leave until the end of the period of notice that he had given, so that, for that reason, there was no dismissal.

5. EJ Dyal, however, concluded that the EAT in **Marshall v Hamblin** had not analysed that case in that way. Rather, it had concluded that the employer had used a contractual term permitting it to "waive or shorten the period of notice which the employee had given", the effect of which was to "bring forward" the date of termination; and that, in those circumstances, as a matter of law, the termination remained one by reason of resignation. The employment judge then considered three other authorities of the EAT which, it was suggested, were inconsistent with **Marshall v Hamblin**. But he concluded, upon analysis of each, that none provided him with a basis on which to depart from it. He was therefore bound to follow **Marshall v Hamblin**, and therefore bound to conclude that the claimant in the present case was not dismissed. So he dismissed his claim of unfair dismissal.

6. The claimant appealed. Mr Jackson appeared again for him. Mr Solomon QC now led Mr Hodge. I shall continue to refer to the parties as they were below, as claimant and respondent.

7. Mr Jackson confirmed at the outset of the hearing of the appeal, that he did not seek to rerun his contention in the employment tribunal that **Marshall v Hamblin** should be distinguished, on the basis that it was regarded, factually, as being a garden leave case. However, the foundation of his case on appeal was that I can, and should, not follow **Marshall v Hamblin**. The foundation of the resistance to the appeal was that it was not open to me so to do.

Marshall v Hamblin

8. Before I turn to the actual decision in **Marshall v Hamblin**, I should note that at the time the definition of dismissal for the purposes of an unfair dismissal claim was found in the predecessor or section 95(1) of the **1996 Act**, section 55(2) **Employment Protection (Consolidation) Act 1978**. The wording of section 55(2)(a) was as follows:

> **"(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice,"**

In section 95(1)(a) of the **1996 Act** (set out above) the second part has been compressed into the words in brackets. It was rightly agreed before me, however, that there is no difference in meaning.

9. In **Marshall v Hamblin** the employee (the Respondent to that appeal) was a salesman, earning basic pay and substantial commission. How the employment ended, the relevant contractual provisions, and the analysis of the tribunal below, were described by the EAT in the following passage:

> **"2 On 18 November 1990, he gave written notice of resignation. It is common ground that such notice would produce a termination date in three months' time, that is 18 February 1991.**
>
> **3 Negotiations were entered into between the Appellants and the Respondent for the payment of a sum of money to facilitate the Appellants dispensing with the services of the Respondent prior to 18 February 1991. These negotiations broke down mainly upon the issue of payment of commission. The Appellants decided**

to pay the Respondent the sum total of his salary (excluding any commission) up to 18 February. Such payments were made gross. The Appellants refused to allow the Respondent to continue working after 30 November. One of the effects of that decision was that between 30 November and 18 February Mr Hamblin was deprived of the opportunity of selling vehicles and consequently he lost any chance of being paid commission.

4 The Respondent claimed that he was unfairly dismissed and the Industrial Tribunal upheld that submission. In relation to notice the staff handbook which we are informed was accepted by both sides in front of the Industrial Tribunal as representing the Contract of Service, the following terms appear.

> **"Notice**
>
> **Employment may be terminated by previous notice in writing on either side in accordance with your Contract of Employment. Unless increased by an individual Agreement, this will normally be as follows..."**

There is then set out various periods of acceptable notice and in the case of Mr Hamblin who was an employee of very long standing, the period would have been not less than 12 weeks. The handbook continues:

> **"Notice will normally be given at the beginning of the appropriate pay period. Payments in lieu of notice are at the discretion of the Company."**

5 The Tribunal's main findings were:

> **'10. We do not accept Miss Boswell's argument based on section 49(3) of the 1978 Act. In our view, the words "waiving his right to notice" mean waiving a right to insist that notice should be given in accordance with a contract of employment. In this case the applicant had given notice. This fact is agreed. In the circumstances, the question of waiving a right to notice just does not arise. One cannot waive a right to notice in a case where notice has already been given.**
>
> **11. In any event, whatever the meaning of section 49(3) may be, we agree with Mr Devonshire that in this case there was never any question of waiving any right at all. On 30 November 1990 Mr Pickett purported to terminate the applicant's contract of employment - and did so. In the Notice of Appearance the respondents have said that they used their discretion in making a payment in lieu of notice in accordance with the terms and conditions of employment. An employer, in our view, cannot make a payment in lieu of an unexpired period of notice already given by an employee. The meaning of "in lieu of" is perfectly plain. In this case there was no question of the respondents giving notice to the applicant: it was the applicant who had given notice to the respondents.**
>
> **12. We can well understand why the respondents did not wish the**

> **applicant to work his full notice. In most cases, where there is no element of commission, no doubt an employer can satisfy his obligation to pay an employee during a notice period by making a payment in lieu of notice. A payment in lieu of notice, as the Court of Appeal have recently emphasised, is a payment of liquidated damages for breach of a contract of employment. In a case where the prospect of earning commission during the notice period may be a substantial one, a payment in lieu of notice will not absolve an employer from his obligations. We agree with Miss Boswell that an employee cannot insist on remaining in employment after giving notice. In circumstances such as this, a mutual agreement is called for. Such a mutual agreement, as pointed out in *McAlwane v Boughton Estates Ltd* [1973] 2 A11 ER 299, a case referred to us by Miss Boswell, will not alter the original character of the termination of contract of employment; it will merely alter the notice period. In this case, there was no attempt to reach any agreement as to the liability to pay commission during the notice period.**
>
> **13. Section 55(4)(a) of the Employment Protection (Consolidation) Act 1978 provides that the effective date of termination, in relation to an employee whose contract is terminated by notice, means the date on which the notice expires.**
>
> **14. On 30 November 1990 the applicant was still employed by the respondents. His employment was terminated summarily, with a "payment in lieu of notice", on that date. He was dismissed by the respondents.' "**

10. By a majority the EAT allowed the appeal. Their reasons, in full, were as follows:

> **"6 "Payment in lieu"**
>
> **The Tribunal gave their decision before the case of Delaney v Staples [1992] ICR 483 was decided and at page 488 Lord Browne-Wilkinson analysed the expression "payment in lieu of notice" as follows:**
>
> **"The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories.**
>
> > **(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.**
> >
> > **(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of**

a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.

(3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.

(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment.

The nature of payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In Gothard v Mirror Group Newspapers Ltd [1988] ICR 729, 733, Lord Donaldson of Lymington MR stated the position to be as follows:

"If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

In my view that statement is the only possible legal analysis of a payment in lieu of the fourth category. But it is not, and was not meant to be, an analysis of a payment in lieu of the first three categories, in none of which is the dismissal or breach of contract by the employer. In the first three categories, the employee is entitled to the payment in lieu not as damages for breach of contract but under a contractual obligation on the employer to make the payment."

Had the employer given notice the present case would have fitted within the second category as defined by Lord Browne-Wilkinson in Delaney. Does the fact that the employee gives notice affect the position? This raises the problem

whether such a term of a contract can be utilised in order to cut short the period of notice already given by the employee.

7 The approach of the Tribunal was that the employer could not waive a notice which had already been given by the employee. With respect we do not consider that this is a correct analysis of the situation. Until such time as the employee's notice expires, the contract of employment continues. The employer is entitled to utilise a term of that contract to bring the employment to an end at an earlier date than the date of the expiry of the employee's notice. The waiver of the employer is in relation to the period of notice (provided he pays the appropriate sum in lieu). In spite of some considerable hesitation we have come to the conclusion that in a contract of employment which gives the employer option to make a payment in lieu, there is no right in the employee to work out his notice.

8 We therefore agree with the contention of the Appellants that if this does not fit precisely within the analysis of the second category outlined by Lord Browne-Wilkinson, we regard it as a further category with the same attributes as the that category save only that the employee has given notice. It was urged upon us that any other approach to the problem would result in the employee being in a position to "blackmail" the employer by forcing him to retain an unwanted employee in his service.

9 The Tribunal here held that an employee cannot insist on remaining in employment after giving notice. It does not seem to us that this is a decisive argument, and if our interpretation of contracts containing the discretion to make a payment in lieu of notice is correct the difficulty does not arise.

10 We find some support for our view that the employer has a right to waive a period of notice and where it is specified in a contract, make a payment in lieu, by the terms of section 49(3) of the Employment Protection (Consolidation) Act 1978. This provides:

> **"Any provision for shorter notice in any contract of employment with a person who has been continuously employed for [one month] or more shall have effect subject to the foregoing subsections, but this section shall not be taken to prevent either party from waiving his right to notice on any occasion, or from accepting a payment in lieu of notice."**

11 <u>Commission</u>

Does the fact that the employee derives the major part of his remuneration from commission affect the position? At one stage we were attracted to the argument that an employer in such cases is under a duty to allow the employee to earn his commission. A waiver of notice and a payment in lieu prevents the employee earning such commission and the employer would thereby be in breach of contract. With some hesitation we have reached the conclusion that two factors negate that approach. The first is that there is no right to commission at all under the contract. All payments are made at the discretion of the Company under the terms of the contract. We considered whether, although there was no right to payment of commission, was there a breach by the employer of

preventing the employee from placing himself in a position where the Company's discretion could be exercised towards him? In the final analysis we considered this goes beyond the accepted approach that an employer may not prevent an employee from earning a commission.

12 Secondly, upon the hypothesis that some sum in respect of lost commission is due to the Respondent that does not prevent the employer waiving his notice and bringing matters to an end. Any further claims can be pursued under section 50, Schedule 3 of the 1978 Act. The employee's right is to pursue a claim in the County Court (see Westwood v Secretary of State for Employment [1985] ICR 209).

13 Admission of Wrongful Dismissal

By paragraph 4.3 the Industrial Tribunal held:

> **"There followed an exchange of letters, as recorded in the Originating Application, and, on 30 November 1990, there was a meeting attended by the applicant, with Mr Sayer in attendance, Mr Pickett and one of the respondents' directors. Mr Sayer took a comprehensive note, which included the following paragraph:**
>
> **"Mr Pickett, addressing Mr Hamblin, commented that it was common for the Contract of Employment to be terminated by the Company and for the payment to be made in lieu of notice. By making such a payment, the Company recognised that it was in breach of contract satisfying any claim for damages by paying in lieu. He went on to say that the payment in lieu could be made free of tax and confirmed that it would be so here. He was adamant that Mr Hamblin's employment would end as from tonight.""**

We do not accept that such an admission binds the Court in any way. Moreover it seems to have been made after considering the passage in Harvey "Industrial Relations and Employment Law" volume 3, paragraph Q224 which is in the following terms:

> **"Note however that where the employee resigns if the employer imposes a termination of the employment before the expiry of the notice given, this will amount to a dismissal; the British Midland Airways Ltd v Lewis [1978] ICR 782."**

14 We have considered that case and insofar as the entry in Harvey indicates that any termination during a period of the employee's notice will amount to a dismissal, there is no support for that proposition in the case cited and in our view the passage in Harvey is misleading.

Conclusion

15 There was no dismissal in this case. The Respondent resigned and within the terms of the contract the Appellants paid wages (but not commission) until the expiry of the notice. Insofar as such commission is contractually recoverable

> **that is a matter which lies outside the jurisdiction of the Industrial Tribunal, the correct forum for such claims being the County Court."**

The approach of the EAT to its own previous decisions

11. In **British Gas Trading v Lock** [2016] ICR 503 the EAT (Singh J as he then was) reviewed earlier authorities which had considered in what circumstances the EAT will depart from its own previous decisions. Drawing the threads together at [75] he said this:

> **"75. In the light of the authorities to which I have referred it may be helpful if I summarise the applicable principles when this Appeal Tribunal is invited to depart from an earlier decision of its own. Although this Appeal Tribunal is not bound by its own previous decisions, they are of persuasive authority. It will accord them respect and will generally follow them. The established exceptions to this are as follows:**
>
> **(1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;**
> **(2) where there are two or more inconsistent decisions of this Appeal Tribunal;**
> **(3) where there are inconsistent decisions of this Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;**
> **(4) where the earlier decision is manifestly wrong;**
> **(5) where there are other exceptional circumstances."**

12. He added, at [77] and [78]:

> **"77. I would not wish to add any further gloss to the concept of "manifestly wrong": it means a decision which can be seen to be obviously wrong ("manifest"). If the error in the decision is manifest it should not be necessary for there to be extensive or complicated argument about the point.**
>
> **78. As for the concept of "exceptional circumstances" it is inherently one that it is flexible and dependent on the circumstances. It is deliberately not defined by reference to an exhaustive list or in some other way because one cannot predict what circumstances will arise in the future and which may justify departure from an earlier decision. In this way courts and tribunals retain the flexibility required to do justice in the case before them. On the other hand it is also important to recall that certainty in the law is also a fundamental value: indeed it lies at the root of the concept of legal certainty which is well-established in EU law and on which reliance has been placed by Mr Cavanagh in the course of his submissions albeit in a different context."**

13. In that case the EAT was invited to depart from its previous decision in **Bear Scotland**

Limited v Fulton [2015] ICR 221, which Singh J declined to do. He observed:

> **"104. In my judgment the present case does not fall into any of the established exceptions to the general principle that this Appeal Tribunal will normally follow one of its own earlier decisions. I have come to the conclusion that it would be inappropriate for me to reconsider the merits of the substantive argument, considered recently and at length by Langstaff J in Bear Scotland. If I were to accede to the invitation extended by Mr Cavanagh, however eloquently put, there would be nothing to prevent this Appeal Tribunal, if differently constituted, taking yet again a different view in a third case, perhaps in a year's time. Furthermore it would in the meantime merely create uncertainty for everyone who has to apply the relevant legislation, including the Employment Tribunal, which is bound by decisions of this Appeal Tribunal. I agree with the submission made on behalf of the Secretary of State by Mr Tolley that, if Bear Scotland was wrongly decided, then it must be for the Court of Appeal to say so, not for me sitting in this Appeal Tribunal."**

The claimant's case that the EAT should not follow *Marshall v Hamblin*

14. Mr Jackson submitted that, with reference to the five categories identified in **Lock** at [75], categories (1), (2) and (4) applied here.

Per incuriam previous authority?

15. As to category (1) he submitted that **Marshall v Hamblin** was *per incuriam* **West Midlands Co-Operative Society v Tipton** [1986] ICR 192. He relied in particular on Lord Brandon's citation from **Post Office v Crouch** [1974] 1 WLR 89, in which Lord Reid stated that the legislation conferring the right not to be unfairly dismissed, should be "construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense". This, he suggested, prefigured the discussion in **Uber BV v Aslam** [2021] UKSC 5 of the purposive approach to be taken to legislation conferring rights upon workers. Had the EAT in **Marshall v Hamblin** had its attention drawn to **Tipton** the outcome might well have been different.

16. However, I do not consider that **Marshall v Hamblin** was decided *per incuriam* the decision in **Tipton**. As is well established, the *per incuriam* principle only applies where the

decision under scrutiny has overlooked an earlier inconsistent decision in light of which it is apparent that its reasoning was "demonstrably wrong": **Morelle v Wakeling** [1955] 2 QB 379, 406. That requires the earlier decision to be directly concerned with the specific point at issue, which **Tipton**, which concerned the significance, or not, of a right of appeal, to the fairness of a dismissal, was not.

Inconsistent authority?

17. As to **Lock** category (3), Mr Jackson now relied on only one prior decision of the EAT as inconsistent: **McLoughlin v Sutcliffe Catering (UK) Limited** [2002] UKEAT/0932/01. However, while not abandoning the point he told me that he was making no oral submission about it.

18. I note that in **McLoughlin**, at [13], the EAT suggested that the passage in **Hamblin** which refers to the commentary in *Harvey* "may have been too sweeping". But it said no more than that; and the appeal in hand was decided on the basis that, on a correct analysis of the facts of that case, there had been no early termination imposed by the employer prior to the expiry of the employee's notice. At best for the present claimant the EAT's observations on this passage from **Hamblin** were *obiter*. In agreement with EJ Dyal, I conclude that **McLoughlin** is not an inconsistent authority, and I do not regard it as providing a basis to depart from **Marshall v Hamblin**.

Is *Marshall v Hamblin* manifestly wrong? The arguments

19. Mr Jackson's principal contention was that **Marshall v Hamblin** is manifestly wrong. In summary, the principal strands of his case were as follows.

20. First, what was then section 55 of the **1978 Act** and is now section 95 of the **1996 Act**,

sets out a clear, exhaustive, description of the circumstances in which, for the purposes of an unfair dismissal claim, an employee is treated as having been dismissed. The starting point is that, for there to be a dismissal, the case must fall into one of the categories at section 95(1)(a), (b) or (c), subject only to the limited additional provision in the circumstances set out in section 95(2).

21. By virtue of section 95(1)(a), where the contract is "terminated by the employer" there is a dismissal. It expressly provides that this is so whether that termination is with or without notice. There is no proviso or qualification. Section 95(1)(a) applies in any and every case in which the contract is terminated by the employer, regardless of any other factual or legal feature of the case.

22. If, during the currency of a period of notice that has been given by the employee, the employer does something to bring the contract to an end on a sooner date, which pre-empts the employee's notice taking effect, that is then a termination of the contract by the employer. The analysis is no different where, following the resignation, the employer does so by invoking a clause in the contract itself, of the present type. The fact that the employer has acted in a manner that is permitted by, and compliant with, the contract is irrelevant. It does not affect the fact that it is still the conduct of the employer which actually brings the employment to an end on that earlier date. So there is still a termination by the employer and section 95(1)(a) applies.

23. Mr Jackson submitted that what was being contended for was, in effect, an exception or qualification to the application of section 95(1)(a) to such a case. But, whereas section 95(2) created a limited specific exception to section 95(1)(b), there are no exceptions to section 95(1)(a). He also prayed in aid again in this context his arguments about the approach to the construction of employment protection legislation, drawing on **Tipton** and **Uber BV v Aslam**,

as supporting the conclusion that **Marshall v Hamblin** was manifestly wrong, because it would entail a significant undermining of the protection against unfair dismissal that Parliament plainly intended that employees, who are generally in a vulnerable and subordinate position, should have.

24. Mr Jackson also submitted that the reasoning of the majority in **Marshall v Hamblin** was fundamentally flawed. They had allowed themselves to be distracted by an irrelevant analysis of the discussion in **Delaney v Staples** [1992] ICR 483 of the different meanings of "payment in lieu of notice", and a mistaken analysis of the case in hand as involving a waiver by the employer of its right to notice. They had failed to cite, or apply, the words of section 55(2)(a), and engage with the question which they needed to focus on, being whether there was a termination by the employer, and hence a dismissal. Had they done so, the answer would have been clear.

25. Mr Solomon reminded me of what was said in **Lock** at [77] and [104]. The circumstances in which the EAT may depart from one of its own previous decisions are tightly circumscribed, so as to avoid the instability and uncertainty of inconsistent decisions, and the repeated revisiting of the same point, at the same level. He acknowledged that **Marshall v Hamblin** had been questioned and criticised in various quarters. But even if I might conclude that, if free to do so, I would have decided the point of law the other way, that would not be sufficient. It could not be said that **Marshall v Hamblin** was *obviously* wrongly decided. Indeed, contended Mr Solomon, it was rightly decided.

26. Mr Solomon argued that in **Marshall v Hamblin** the parties had agreed, by the employment contract, that, following notice having been given by the employee, the employer could then choose to bring forward the date of termination. Where the employer avails itself of

such a mechanism, that does not alter the fact the *mode* of termination remains resignation. It is only the *date* that is affected. The decision to terminate, and the alteration, in an agreed way, of the date, are separate things. The majority therefore rightly concluded that the resignation was not converted into a dismissal.

27. Mr Solomon submitted that this analysis goes with the grain of a body of authority to the effect that, where an employer has given notice, it is possible for the date of termination then to be brought forward without affecting the fact that there is still a dismissal. He referred me to the discussion in *Harvey* at DI[266] and following. This shows, he said, that the analysis where the context is one in which one party has already given notice, may be materially different, and that, in such a context, the date of termination can be altered without the mode of termination changing.

28. Mr Solomon also contended that the argument drawing on **Uber BV v Aslam** was not to the point in a case where the employee has freely resigned and does not claim to have been constructively dismissed. Such an employee could not be viewed as vulnerable or the sort of person who unfair dismissal legislation was designed to protect. There was no issue in a case such as this about the contractual provision in question truly reflecting the parties' genuine agreement.

29. The majority in **Marshall v Hamblin** had identified that the case was different from **Delaney** category two, because the employee had given notice. Their observation about section 49(3) was not part of the *ratio* and took matters no further. They had addressed in terms the question of whether there was a dismissal, concluding expressly that there was. They had come to the right conclusion.

30. Mr Solomon stressed again that in any event it could not be said that the majority decision in **Marshall v Hamblin** was obviously wrong. He suggested that the reasoning of the minority in that case was itself in places wrong. The fact that Mr Jackson had advanced a policy-based argument in support of his case was also a sign that the majority decision was not obviously, manifestly, wrong.

31. If **Marshall v Hamblin** could not be said to be *manifestly* wrong, I could not depart from it. Indeed, like Singh J in **Lock**, I should resist the temptation to descend into the detail of the doctrinal arguments. Any such exercise must be left to the Court of Appeal. On that point Mr Jackson responded that I could not judge whether **Marshall v Hamblin** was manifestly wrong, without examining what, in principle, I considered the right analysis of the underlying legal issue to be. He referred me to **Jhuti v Royal Mail Group Limited** [2018] ICR 1077 in which Simler P, as she then was, was also invited to depart from a previous EAT decision on a particular point, and began with an analysis of the underlying statutory framework pertinent to the issue. Mr Solomon responded that **Jhuti** does not add to, or gloss, the guidance given by Singh J in **Lock**; and in the event, on the point at issue in **Jhuti**, it was concluded that the relevant part of the previous decision was *obiter*.

Discussion

32. At its broadest level, the legal issue raised by this appeal is one of statutory interpretation. Section 95, like its predecessors, sets out an exhaustive definition of the circumstances in which an employee will be deemed to have been dismissed, for the purposes of an unfair dismissal claim. However, within that framework, elements of the definition use common-law contract-law building blocks, or have been interpreted as doing so.

33. As a starting point what is clear, I think, is that the statute provides that, in any and every

case in which the contract of employment is terminated by the employer, there is a dismissal. Section 95(1)(a) so provides, without qualification. Accordingly, focussing in a little closer, the issue raised is concerned with the concept, for these purposes, of the contract being "terminated by the employer".

34. As a matter of general contract-law analysis, contracts of employment may be terminated in conceptually distinct different ways: by the employer; by the employee; by agreement; by the occurrence of a limiting event; or, occasionally, by operation of law. Section 95 of the **1996 Act** uses these distinctions to identify the sub-set of cases in which there will be a dismissal for the purposes of this statutory right: those of termination by the employer, termination by a limiting event (being one of the kinds of event set out in section 235(2B)), and certain cases of termination by the employee. A termination by agreement does not, however, fall within this definition of dismissal.

35. Treading a little further, conduct of the employer or employee which terminates the contract is conduct by that party which brings the contract to an end on a particular date. The date need not be expressly stated, as long as it is unambiguously ascertainable. There may be an issue in the given case as to whether the factual conduct relied upon meets that test. There is a sub-body of authority which offers guidance. But the underlying statement of legal principle is not, I think, controversial.

36. With that legal framework in mind, I turn to consider what legal proposition emerges from the majority decision in **Marshall v Hamblin**. This requires a little elucidation.

37. First, we need to consider what understanding the majority proceeded on, as to factually what had occurred in that case. As to that I note that, in coming to their conclusion at [15], they

referred to the employer having paid wages, but not commission, "until the expiry of the notice". Those words read alone might suggest that they understood the case to be one in which the employment still ended on the date given in the employee's notice. But, as EJ Dyal discussed, reading the decision as a whole, the majority appear to have regarded the case as one in which, factually, the employer used a term of the contract to bring the employment to an end on a date earlier than the date on which the employee's notice would otherwise have expired. On that reading, the phrase "until the expiry of the notice" was a loose compression that perhaps meant, more precisely, something like: " in the amount that would have been due in the period remaining until the expiry of the notice." In all events, as I have noted, Mr Jackson did not pursue on appeal the argument that the case was viewed by the majority as factually one in which the original termination date did not change.

38. Proceeding from that understanding of the facts of the case, in his skeleton argument for this appeal, Mr Solomon described **Marshall v Hamblin** as "authority for the proposition that there is no dismissal when, following an employee's resignation, the employer exercises a contractual right to bring forward the effective date of termination". I observe that the learned editors of *IDS Brief* and *Harvey* refer to it in similar terms. As I have noted, before me Mr Jackson conceded that, if I am bound to follow **Marshall v Hamblin**, then it points to the conclusion that there was no dismissal in the present case, because it is one in which, following a resignation, the employer invoked a contractual clause enabling it to cause the employment to terminate on an earlier date.

39. But to understand with just a little more precision the point at issue, it is helpful to identify some propositions of law about which counsel before me did *not* disagree. First, Mr Solomon of course accepted that the *mere* fact, in a given case, that the employer's conduct is compliant with the contract does not, without more, mean that its conduct is not a termination

by it, and hence a dismissal. Thus, the mere fact that, in a given case, the employer has given the period of notice required by the contract, means that there is no *wrongful* dismissal, but there is still a dismissal. Though trite, restating this point helps us to narrow down, more precisely, the issue between the parties.

40. Secondly, it was common ground that, where an employee resigns on notice, and, during the currency of that notice, the employer then unilaterally acts to cause the contract of employment to end on an earlier date, that *will* generally amount to a termination by the employer, and hence a dismissal by it, which takes effect before the employee's resignation has the chance to do so. Mr Solomon confirmed in oral submissions that he did not resile from the concession to that effect which Mr Hodge made to the tribunal on the respondent's behalf, as recorded by it at [25].

41. What Mr Solomon contended makes the difference, doctrinally, to the analysis, in a case such as **Marshall v Hamblin**, and such as the present, is the *combination* of two factual features. The first is that the context is one in which the employee has first given notice of resignation (in circumstances which are not contended, or found, to amount to constructive dismissal). The second is that the employer has then invoked a clause of the contract, which specifically permits it, *where the employee has given notice of resignation*, thereafter to cause the employment to end on an earlier date, by making a prescribed payment by reference to the balance of the notice period which the employee's resignation has set in train. It is that combination which, he submits, means that, in law, the employer's conduct only alters the date on which the prior resignation takes effect.

42. That is, I think, the proposition of law that Mr Jackson accepts emerges from **Marshall v Hamblin**, but which he submits is manifestly wrong. The nub of his case, in short, is that it

is plainly and obviously wrong to suggest that this combination of features makes any difference. The position, in such a case, remains that it is the unilateral conduct of the employer that has caused the employment to end on the earlier date, and so that must be a termination by the employer, regardless of the fact that it is parasitic upon a resignation, and was carried out in a manner permitted by the contract.

43. It does appear that the majority in **Marshall v Hamblin** considered that the sentence included in the contract in that case: "Payments in lieu of notice are at the discretion of the company" meant that the employer was entitled, by making a payment referrable to the unexpired balance of the notice period given by the employee, to cause the employment to end earlier, without that giving rise either to a breach of contract *or* to a dismissal. They stated: "The employer is entitled to utilise a term of that contract to bring the employment to an end at an earlier date than the date of expiry of the employee's notice." But they also concluded that there "was no dismissal in this case", adding that the employee resigned, and the employer then made that payment "within the terms of the contract."

44. However, I am bound, with great respect, to say that I cannot see how anything in the reasoning along the way supported their "no dismissal" conclusion. **Delaney** was concerned with how "payment in lieu of notice" can describe payments falling into different categories: sometimes of wages, sometimes not, sometimes in compliance with the contract and sometimes by way of damages for breach. The majority concluded that the case had the same attributes as **Delaney** category (2) save that the employee had first given notice. But, even if they were right to say that, they did not consider whether that would have any bearing on whether there was still a dismissal.

45. I also agree with Mr Jackson that the majority were wrong to regard the case as

involving a waiver by the employer, and wrong to see section 49 as a source of comfort. The employer did not accede to a request by the employee to release him early. The majority's discussion under the heading "commission" also seems to me have cast no light on whether there was a termination by the employer in that case; nor did the proposition that the EAT was not bound by the employer's concession of wrongful dismissal; nor did the proposition (though true, as such) that it is not the case that any (that is to say, *every*) termination during a period of the employee's notice will amount to a dismissal.

46. I have thought it right to set out these observations about the reasoning adopted by the majority in **Marshall v Hamblin**, because I was, in light of this aspect, initially strongly inclined to the view that the decision is not merely wrong, but manifestly wrong. My misgivings about the majority's view of the meaning of the clause relied upon, and the relevance of their reasoning process to the question of whether there was a *dismissal* (even if not in breach) by the employer, caused me initially to doubt whether the legal outcome on this point could reasonably be defended as correct.

47. However, ultimately, it is indeed the outcome, or proposition of law, for which the decision stands, that must be the focus of consideration. If there is a line of analysis that can reasonably arguably be advanced in defence of the outcome, that is not itself obviously, manifestly, wrong (and even if there is also a line of analysis that can reasonably be advanced against that proposition), then the *legal outcome* cannot be said to be manifestly wrong, even though the majority who decided the case itself did not reason the matter out in that way.

48. As to that, two aspects of Mr Solomon's submissions have given me pause. The first concerns the body of authority discussed in the passage in *Harvey* to which he referred me. Mr Jackson is right, I think, that the cases discussed there all concerned a scenario in which an

employer dismissed on notice, the employee then evinced a wish to leave sooner, the employer agreed in principle to that happening, and, one way or another, that was then brought about. The same can be said of another case on which Mr Jackson relied for illustrative purposes, **Palfrey v Transco plc** [2004] IRLR 916, although there the dismissal was found to have been "brought forward" by a fresh employer's notice, with the adverse consequence for the employee that his tribunal claim was out of time.

49. Mr Jackson argued that, as they all involved the date of a dismissal being "brought forward" in accordance with the employee's wishes expressed following the dismissal, these authorities were simply of no relevance to a scenario in which the employee has resigned on notice, and then the employer acts unilaterally to cause the employment to end earlier, without the employee, following the resignation, having specifically agreed to that. However, I am not sure that it can be said that it is obvious that there is nothing in the discussion in any of these authorities that might inform the approach to the issue at hand. It would, I think, require some consideration or analysis of them, to come to a firm conclusion about that.

50. The second point is that, even leaving aside whether that particular body of authority arguably has any relevant insights to offer, I do not, ultimately, think that I can say that it is simply not reasonably arguable that a provision *of the contract itself* could provide, or have the legal effect, that, following a resignation, the employer can, without *also* needing the post-resignation agreement of the employee, cause the employment to end sooner than the date given by the employee, by making the employee a contractually-prescribed payment, by reference to the unexpired period of the employee's notice, in a way that only alters how and when the resignation takes effect.

51. Having, after considerable reflection, come to the conclusion that I cannot say that these

points are obviously not reasonably arguable, I am driven to the conclusion, despite my misgivings about the substantive reasoning in the decision itself, that the proposition of law which, it was common ground before me, emerges from **Marshall v Hamblin**, is not one that I can say is manifestly wrong. I have therefore concluded that I cannot depart from it on this point; and I will therefore refrain from considering these lines of argument any further, or indicating how I would have decided the point had I considered myself free to do so. Resolution of it must be left to the Court of Appeal.

Outcome

52. Ultimately, I have concluded that, like the employment tribunal, I am bound to follow **Marshall v Hamblin**. For that reason the appeal is dismissed.