Neutral Citation Number: **2022 EAT 40**

Case No: EA-2021-SCO-000011-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date:22nd February 2022

Before :

THE HONOURABLE LORD FAIRLEY

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Between :

GC GROUP LTD **Appellant**

- and –

MS GEORGINA YOUNG **Respondent**

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- -

Mr S Maguire of Creideasach Employment Law Specialist for the **Appellant**
Georgina Young, **the Respondent**, in person

Full Hearing 22nd February 2022

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TRANSCRIPT OF ORAL JUDGMENT

SUMMARY

TOPIC NUMBERS :

11 – UNFAIR DISMISSAL; Constructive dismissal

8 – PRACTICE AND PROCEDURE; Perversity appeal; Full hearing orders

The Employment Tribunal found that the claimant had been constructively unfairly dismissed. The Appellant argued that the Tribunal had erroneously applied a subjective rather than an objective approach to the issue of whether or not there had been a breach of contract and had taken into account t matters which were not known to the Appellant at the material time. Separately, the Appellant sought to argue that the Tribunal had made findings in fact for which there was no evidence.

Held:

1) There was no basis in the Tribunal's reasons to conclude that, in determining whether or not there was a breach of contract, it took into account matters which were not known to the Appellant at the material time and / or that it applied a subjective rather than an objective test to the issue of whether or not there had been a material breach; and
2) Having failed to comply with the EAT's Full Hearing Order of 6 October 2021, the Appellant was not in a position to substantiate a perversity ground. All that the Appellant could do was to refer to certain parts of the evidence led for the Appellant and assert *ex parte* that there was no contrary evidence. Such a position could never be a sufficient basis on which to sustain a perversity appeal. In any event, the particular factual matters identified in this ground of appeal were all, at best for the Appellant, matters that were peripheral to the Tribunal's conclusions about breach of contract

THE HONOURABLE LORD FAIRLEY

1. This is the appeal of GC Group Limited from a Judgment of a full Employment Tribunal sitting at Glasgow and chaired by Employment Judge McManus. The Judgment is dated 20 April 2021. It was issued following a lengthy and discontinuous hearing which took place over 15 days between May 2019 and February 2021. The Judgment is also lengthy, extending to 115 pages and 247 paragraphs. In places, it is difficult to follow due, in part, to the structure adopted by the Employment Judge.

2. The Tribunal ultimately dismissed a number of claims brought under the **Equality Act 2010** as well as a claim for holiday pay and notice pay. Those decisions are not challenged.

3. In one respect alone, the Tribunal found in favour of the claimant. It did so in her claim of constructive unfair dismissal. Having found that the Appellant constructively and unfairly dismissed the claimant, it made a total monetary award to her of £55,406.85 comprising a basic award of £8,435.25 and a compensatory award of £46,971.60.

4. Before the Employment Tribunal, the Appellant resisted the claim of unfair dismissal only on the basis of a denial that the claimant had been constructively dismissed. It did not seek to argue, in the alternative, that if there had been a constructive dismissal, the reason for that was a potentially fair one in terms of section 98(2) of the **Employment Rights Act 1996** ("**ERA"**) or that any such dismissal was nevertheless fair in terms of section 98(4) **ERA**.

5. In this appeal, the Appellant seeks to challenge the finding of liability for constructive unfair dismissal. It does so on two grounds, both of which were allowed to proceed to a full hearing following consideration at Rule 3(7) stage.

6. The two grounds are summarised in the following way in the Notice of Appeal:

    (i) The Employment Tribunal erred in law in that it substituted its opinion for that of the reasonable employer; and

(ii) The Employment Tribunal erred in law in that there was no evidence to support findings in fact.

I will deal with each of these grounds in turn**.**

Ground 1

7. The concept of "substitution" by a Tribunal of its own opinion is one which is familiar in appeals to this Tribunal. It generally arises where (first) the employer took a decision to dismiss; (secondly) the reason for the dismissal was a potentially fair one falling within section 98(2); and (thirdly) the tribunal therefore required to consider whether the decision to dismiss was, in all the circumstances, reasonable and thus fair in terms of section 98(4) as being one which fell within the band of reasonable responses open to the employer. In a case concerning a dismissal of the type described at section 95(1)(a) or (b) **ERA** (dismissal by the employer), it is at that third stage of considering the "band of reasonable responses" that errors of "substitution" can potentially arise.

8. Cases of constructive dismissal are, however, different. As was noted by the Court of Appeal in **Bournemouth University Higher Education Corporation v. Buckland** [2010] ICR 908, the question of whether or not there was a *constructive* dismissal (section 95(1)(c) **ERA**) is judged objectively by looking solely at whether or not there has been a material breach of contract. The issue of the "band of reasonable responses" does not arise at all in a constructive dismissal case where the sole basis for the employer's defence is that there was simply no dismissal.

9. In this case, therefore, the issue of whether or not a dismissal by the Appellant fell within the band of reasonable responses did not arise. That was so because the Appellant disputed that there had even been a dismissal and did not suggest, even on an alternative basis, that any constructive dismissal that might be found by the Tribunal to have occurred was nevertheless fair.

10. At first sight, therefore, this first ground of appeal appears to be based upon a misunderstanding of the issue that the Tribunal had to determine. In light of the

supplementary oral submissions made today by Mr Maguire, however, I have considered his explanation that what the Appellant really means in this first grounds of appeal is that the Tribunal failed properly to consider whether there was reasonable and proper cause (per **Malik v. BCCI** [1997] ICR 606) for the particular conduct of the Appellant which it found to have breached the implied duty of trust and confidence and caused the claimant to resign. Again, however, the issue of "reasonable and proper cause" is an objective test and not one which falls to be determined by reference to the "band of reasonable responses" (see **Sharfudeen v T J Morris LTD t/a Home Bargains** UKEAT/0272/16/LA at para. [34])

11. In advancing this ground today, Mr Maguire submitted that the Tribunal had allowed itself to be influenced by matters about the claimant's subjective feelings (as expressed by her in contemporaneous e mails which were not shared by her with the Appellant at the material time) and also by information about her mental health which was not known to the Appellant prior to July 2017.

12. I accept that absence of knowledge of a material fact is something which could, in principle, amount to reasonable and proper cause for conduct by an employer which might otherwise amount to a breach of the implied term of trust and confidence. On a careful reading of the Tribunal's reasons in this case, however, I have great difficulty in understanding why it is said that any such absence of knowledge arose as a live issue about any of the matters which the Tribunal found to constitute the breach of contract in response to which the claimant ultimately resigned.

13. So far as the issue of knowledge of the claimant's health is concerned, the Tribunal found that the Respondent was aware from July 2017 that the claimant had issues with depression (para. 76). At para 85, the Tribunal made specific reference to a Fit Note produced by the claimant dated 14 July 2017. The Fit Note referred to the reason for her absence at that time as being "Reactive depression" due to "work and domestic stressors".

14. At para. 215 of its Reasons, the Tribunal then identified 26 particular matters which it categorised as a "series of acts" by the Appellant. It found that these matters combined to constitute a fundamental breach by the Appellant of the implied term of trust and confidence. At para. 216, the Tribunal stated:

> **"By this series of events, the respondent acted in fundamental breach of the term of trust and confidence, entitling the claimant to resign. The claimant resigned in response to that breach."**

15. Careful examination of the Tribunal's reasons shows that all of the 26 factors identified by it at para. 215 relate to acts of the Appellant which occurred in or after July 2017. Of those 26, 20 relate to things which happened after 14 July 2017, by which time the Appellant was on notice of the fact that the claimant was stating unequivocally that she had depression. The six other acts which pre-date 14 July 2017 all relate to the way in which the Appellant handled a meeting on 6 July 2017 when the claimant first sought to raise concerns with Mr Blaney – effectively as an informal grievance – about her working conditions. None of those six other matters is said by the Tribunal to have related in any way to the issue of the claimant's mental health, nor is there any basis to suppose that the Tribunal took into account any mental health issue of the claimant in its findings about those six matters.

16. Of the Tribunal's 26 criticisms of the Appellant, only three related to failures by the Appellant to recognise or investigate the claimant's intimation that she had a mental health issue in the form of depression. It is also important to recognise that every one of those three failures are said to have occurred after 14 July 2017.

17. Turning to the issue of the claimant's e mails, and importantly for the purposes of the submissions made to me today, there is nothing within para. 215 or elsewhere in it reasons to suggest that the Tribunal was influenced by subjective feelings that the claimant might have had (as described in the emails) or that the Tribunal misdirected itself in law by forgetting that the test of whether or not there has been a breach of the implied duty of trust and confidence is an objective one. On the contrary, the Tribunal correctly self-directed on the objective nature of the test that it required to apply at paras 19 and 218 and expressly recognised that point under reference is to the case of **Leeds Dental Team Limited v. Rose** [2014] IRLR 8).

18. In these circumstances, I saw no basis whatsoever for any suggestion that, in determining whether or not there was a breach of contract, the Tribunal took into account matters which

were not known to the Appellant at the material time and / or that it applied a subjective rather than an objective test to the issue of whether or not there had been a material breach.

19. On the contrary, it is quite clear that the Tribunal correctly self-directed on the law about constructive dismissal at paras. 18-21 and 199. Its conclusions (i) that the Appellant had failed in the 26 respects identified by it at para. 215; and (ii) that such failures amounted cumulatively to a breach of the implied term of trust and confidence were conclusions that were plainly open to it on the evidence.

20. Read as a whole, the Tribunal determined that there were sundry failures by the Appellant in how it dealt with concerns raised by the claimant, first informally on 6 July 2017 and thereafter through a formal grievance process in July and August 2017. It was open to the Tribunal to conclude that those failures combined in such a way as to amount to a fundamental breach of contract in response to which the claimant eventually resigned.

21. Quite apart, therefore, from the apparently erroneous legal basis on which this ground is described in the ground of appeal, I can see no error of law in the Tribunal's approach to the issue of constructive dismissal and, in particular in its application of the objective **Malik** test.

22. I have accordingly concluded that there is no merit in this first ground of appeal which falls to be refused.

Ground 2

23. Ground 2 seeks to criticise a number of areas in which it is maintained that the Tribunal made findings in fact for which the was "no evidence".

24. On 6 October 2021, this Tribunal made a case management Order for this Hearing. Paragraph 4 of that Order stated:

> **"If it is considered by any party that a point of law raised in the appeal or cross-appeal cannot be argued without reference to evidence given (or not given) at the**

> **Employment Tribunal, the nature of which does not, or does not sufficiently, appear from the written reasons of the Employment Tribunal, then the parties so contending shall within 28 days of the seal date of this Order give notice to the other party(ies), and they shall seek to co-operate in the agreement of a statement or note in that regard; in the absence of such agreement within 14 days of such request, either party shall be at liberty to apply on paper within 7 days thereafter to the Employment Appeal Tribunal, giving notice to the other party(ies), in relation to such evidence (whether for the purpose of resolving such disagreement or of seeking answers to a questionnaire or requesting the Employment Judge's notes (in whole or in part), from the relevant Employment Tribunal)."**

25. Any appellant who seeks to assert before this Tribunal that an employment tribunal has made a finding for which there was no evidence must produce some form of arguable basis for that position at the Full Hearing of the appeal. That is precisely why case management orders of the type seen in paragraph 4 of the Order of 6 October 2021 are made.

26. The premise on which this ground is based is that there was *no evidence* for certain matters about which the Tribunal made clear findings in fact. That is a high standard which amounts, in effect, to an allegation of perversity. In this appeal process, however, the Appellant has made no attempt to comply with paragraph 4 of the EAT's Order of 6 October 2021. The result is that, at the Full Hearing of the appeal today, Mr Maguire was not in a position to put before me the essential component parts of such a ground of appeal. All that he has been able to do is to refer me to parts of the evidence that was led for the Appellant and assert *ex parte* that there was no contrary evidence. Such a position could never be a sufficient basis on which to sustain a perversity appeal of the type made here.

27. In these circumstances, I have considered whether or not a **Burns / Barke** order (by which I mean a reference back to the Tribunal for clarification) would be appropriate. I have concluded, having regard to the over-riding objective, that it would not.

28. In the first place, the Appellant has had ample time to prepare for this appeal, to consider the Judgment and Reasons of the Employment Tribunal, and to comply with the Order of 6 October 2021.

29. Secondly, the high point of Mr Maguire's submissions today appeared, in any event, to be that there was some evidence relied upon by the Appellant before the Tribunal (in particular

in the written witness statements of Mr Maguire himself and Mr Blaney as well as in certain documents prepared by Mr Maguire) that was contrary to the findings made by the Tribunal. That falls very far short of what would be needed to present an argument that there was *no evidence* for the matters referred to in this ground of appeal. It ignores the very important consideration that the Tribunal also heard evidence from a number of other witnesses whom they found to be credible and reliable, including the claimant herself and her representative Amanda Lees.

30. Thirdly, the particular factual matters identified in this second ground seem all to have been, at best for the Appellant, peripheral to the Tribunal's conclusions about breach of contract at paras 215 and 216. As I have already noted, the essence of the Tribunal's decision on constructive dismissal was that there were sundry failures by the Appellant in the way that it dealt with the claimant's grievance. Whilst it might be possible, as Mr Maguire has sought to do in this ground of appeal, to try to pick through the findings in fact looking for alleged points of contention, there was plainly sufficient evidence for the Tribunal to make the findings about the 26 failures that formed the basis for the conclusion drawn at 216. Put another way, none of the criticisms in this ground of appeal – even if properly presented – would be capable of affecting the essence of the Tribunal's decision. In these circumstances, it is not apparent that a **Burns / Barke** remit to the Tribunal would serve any useful purpose.

31. The result of that is that the Appellant has also failed to satisfy me that there is any merit in ground 2 which also fails.

32. The appeal is therefore refused.