Neutral Citation Number: [2022] EAT 71

Case No: EA-2019-001131-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24th March 2022

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

MISS S HOLMES **Appellant**
- and -
TELLEMACHUS LTD **Respondent**

- -
- -

Mr J Stuart (instructed by Advocate –) for the **Appellant**
Mr R Kohanzad (instructed by Cronor Group Ltd) for the **Respondent**

Hearing date: 24th March 2022

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JUDGMENT

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SUMMARY

CONTRACT OF EMPLOYMENT

Where a litigant in person asserts that they have been subject to detrimental treatment, and resigned as a result, consideration should be given to whether constructive dismissal is being asserted, to avoid falling into the "constructive dismissal trap". In this case the employment judge should have appreciated that the claimant was asserting that she had resigned as a result of the respondent's treatment of her, and that, as a result, they could not rely on a clause in her contract of employment to recoup recruitment fees. The employment judge should have considered whether the respondent had breached the implied term of mutual trust and confidence, whether the claimant had resigned in response without having affirmed the contract, so that the clause permitting recoupment of fees could no longer be relied upon. The matter was remitted to the same employment tribunal to determine whether the claimant was constructively dismissed. If she was, the respondent accepts that the fees will have to be repaid.

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HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of Employment Judge D M Jones after a hearing on 9 October 2019. The judgment was signed by the employment judge on 21 October 2019 and sent to the parties on 23 October 2019.

2. The claimant was employed by the respondent for a brief period from 28 January 2019 to 19 April 2019. She resigned from her employment. A deduction was made from her final wages in respect of 50% of an agency recruitment fees, in the sum of £945.00 ("the fee").

3. The claimant brought a claim in the employment tribunal, received on 6 August 2019. At section 8, the claimant ticked boxes suggesting she was owed notice pay, holiday pay and "other payments". The claimant referred to unlawful deduction from wages, in particular, the recruitment fee. At box 8.2, the section of the claim form that requires that the background and details of the claim and the dates when events occurred be set out, the claimant stated:

> "Please find attached two letters which were sent to the company outlining the issues and grievance raised with the relevant dates including reference to the applicable terms and conditions of employment."

4. The claimant set out, under the heading "in addition", a number of events that had occurred after the end of her employment. At section 9 the claimant set out what she sought, should her claim be successful. The claimant contended that the deduction of the fees was a penalty and that there had been an unlawful deduction from her wages.

5. Attached to the claim form was the claimant's formal grievance letter dated 25 April 2019. The letter set out the claimant's contention that she had been badly treated and stated: "I felt the only option available was for me to tender my resignation." The claimant also stated:

> "I was asked to put my notice in writing which I did stating that the role was making me ill and that I had no alternative but to leave for my own sanity as I was not prepared to keep being constantly criticised or work the way they expected me to.
>
> … by stating that the agency fee albeit 50% will be taken from my salary you are

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> effectively punishing me for leaving. I feel I have been forced into resigning due to the fact I have had to endure constant criticism, bullying and nit-picking from the internal account manager."

6. There was also attached to the claim form a letter of 9 May 2019, in which the claimant stated:

> "I further wish to state I did not give my explicit agreement or written consent on 18th April 2019 for any deduction to be made from my salary. I have been forced to leave…
>
> the purpose of this clause is to act as a penalty clause and effectively punish an employee for leaving even if their reasons are justified. …
>
> My resignation was due to the bullying, constant criticism and excessive workload stress I have been placed under while working at the company and as per my letter of resignation dated 12 April 2019 …"

7. Mr Kohanzad, for the respondent, accepted that the letters attached to the claim form, in broad terms, set out a complaint of constructive dismissal, but asserted that they were not to be treated as incorporated into the claim form.

8. The claimant also provided a statement of remedy, in which she referred to the clause which had been relied upon to support the deduction from her wages as being used as a penalty clause to punish employees for leaving regardless of the reason. She also contended that the deduction took her wages below minimum wage.

9. The matter came on for hearing before EJ Jones on 9 October 2019. A standard Notice of Hearing had been issued, listing the matter for a one-hour hearing, although provision was made for the parties to seek a longer hearing. The common practice in the employment tribunal is to list breach of contract claims for a one-hour hearing. It is unfortunate that neither party, including the respondent that was represented, sought a longer hearing. The claim clearly would take more than one hour to determine, irrespective of any constructive dismissal argument, because of the penalty clause issues.

10. At the hearing the majority of time was taken up in dealing with the legal arguments advanced by the respondent about penalty clauses. That being said, the judge must have read the letters attached to the claim form which was referred to at paragraph 14 of the reasons. The employment judge noted that the claimant challenged the decision to make deductions from

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her salary; complained that she had been bullied, causing her to become ill; and contended that this had led to her resignation.

11. The employment judge gave an oral decision at the hearing, but subsequently was concerned that the penalty clause issue required further consideration. As a result, the parties were asked to make further submissions on this matter. In the claimant's further submissions, she stated of the respondent's assertion that she was in breach of contract entitling them to recover the recruitment fee:

> "I have clearly outlined the reasons for my resignation, which are not a breach of contract, as I felt I had no option but to resign due to the respondent's failure to deal with the grievance raised …
>
> I believe it is both extravagant and exorbitant as it does not take into account cases where the respondent may in fact be in breach of contract."

12. The claimant stated that the respondent should not benefit from a breach of the ACAS Code and asserted that there had been a failure to deal with her grievance, and that she had been forced to leave the respondent's employment.

13. The written reasons were produced after consideration of the written submissions. The employment judge concluded that the clause relied upon by the respondent was not a penalty clause and decided that there had not been an unlawful deduction from the claimant's wages or an express breach of contract that would entitle the claimant to recover the recruitment fee, together with any consequential loss. The employment judge did not consider whether the claimant was asserting that she had been dismissed constructively.

14. The claimant appealed. The matter was set down for a Preliminary Hearing. I allowed the matter to proceed for the following reasons:

> "I consider that it is reasonably arguable that the employment judge failed to consider and determine the claimant's contention that she had been constructively dismissed by the respondent which gives rise to 4 arguable grounds of appeal:
>
> 1. if the claimant was constructively dismissed the respondent was not entitled to rely upon post termination provisions after the claimant had accepted the repudiatory

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breach of contract, and so was not entitled to rely on clause 19 to recoup recruitment costs

2. if there was a constructive dismissal it was wrongful with the consequence that the recruitment costs recouped by the respondent could be claimed as damages for breach of contract

3. the claimant's resignation should not have been treated as being an "event" nor was there a sum for which the claimant was "contractually liable" for the purposes of regulation 12(2)(a) of the National Minimum Wage Regulations 2015 because she had been constructively dismissed rather than voluntarily resigning, with the result that the case was distinguishable from **Commissioners for Revenue and Customs v Lorne Stewart** [2015] IRLR 187 and **Revenue and Customs Comrs v Middlesbrough Football Co Ltd** [2020] ICR 1404

4. I consider it is just sufficiently arguable, although it may not be necessary to determine the point, that if the claimant was constructively dismissed, because her resignation constituted an acceptance of the respondent's repudiatory breach of contract, rather than a voluntary instigation of the contractual right to give notice under clause 6 with resultant financial consequences under clause 19, the penalty clause doctrine and/or an equivalent common law or equitable principle prevented the respondent from relying on clause 19 to recoup recruitment costs and so the claim was not precluded by **Cavendish Square Holding BV v Makdessi** [2016] AC 1172."

15. The respondent accepts that if the claimant raised the issue of constructive dismissal and contended that it was improper to deduct the fees as a result, and were her complaint of constructive dismissal to be made out on the facts, all four grounds of appeal are bound to succeed. The respondent contends that the real issue is whether constructive dismissal was properly before the employment tribunal.

16. Mr Kohanzad suggested that I should be careful not to fall into the "hindsight trap". With the benefit of counsel acting under the Advocate scheme things may seem very different from how they appeared when the employment judge was considering the matter.

17. Mr Kohanzad contends that the letters attached to the Claim Form should not be considered to have been incorporated into it. Commonly, parties attach a great deal of material to the claim form that an employment judge cannot be expected to consider. He contends that the issue of constructive dismissal was not raised by the claimant in oral submissions at the hearing. In its Notice of Response, the respondent had specifically suggested that, if this were

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contended to be the case by the claimant, then she should seek the employment judge's notes of the relevant section of the evidence. He contends that the final submissions were produced in response to a letter from the employment judge suggesting that he wished to reconsider the penalty clause issue, not offering a general opportunity to re-open the case.

18. I have taken care to avoid the "hindsight trap". I am persuaded, however, that the employment judge fell into a different trap; the "constructive dismissal trap". Employment judges occasionally fail to appreciate that a litigant in person is asserting that they resigned from their employment because of their treatment by the employer, which was so bad as to breach the implied term of mutual trust and confidence, which in lawyer's terms would be constructive dismissal. The "constructive dismissal trap" can arise in time issues in discrimination claims where a claimant asserts that a series of detriments occurred because of a protected characteristic which the employer asserts are all out of time. Where a claimant suggests that he or she resigned as a result of such detrimental treatment that could be a discriminatory constructive dismissal and be in time.

19. This is a rather different version of the constructive dismissal trap. A breach of contract claim in a claim form could involve an assertion that an employer has breached specific terms of the contract or that there has been a breach of the implied term of mutual trust and confidence, or some express term, in response to which the employee has resigned. If there is a constructive dismissal, that can render terms of the contract unenforceable once the resignation has taken place.

20. I accept that not every document that is attached to a claim form should be treated as incorporated into it. In this case I consider that the claimant made it clear that the two letters attached were incorporated into the claim form and that the letters set out the fundamental basis of her claim.

21. It appears that the employment judge, at least in broad terms, appreciated this, and noted the claimant's contention that she had resigned in response to her treatment by the respondent.

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Unfortunately, despite having done so, he then fell into the constructive dismissal trap by failing to appreciate that this was a matter that he was required to consider, specifically whether the respondent had breached the implied term of mutual trust and confidence, whether the claimant had resigned in response without having affirmed the contract, so that the clause permitting recoupment of fees could no longer be relied upon. I appreciate the difficulty faced by the employment judge when dealing with this matter on such a short listing. Sometimes short-track cases raise important issues, in which case consideration may need to be given to whether the matter can be fairly dealt with in the time available, or whether the hearing should be used for case management, and a longer hearing listed.

22. I consider that, on a proper construction of the material before the employment judge, the issue of constructive dismissal was sufficiently raised. The focus of the hearing was the penalty clause issue. It would have been better if the claimant had focussed on the issue of constructive dismissal and expressly referred the judge to it, but the claimant was acting in person, trying to deal with difficult issues in a short time. I do not consider that the fact that she failed to utter the words "constructive dismissal" meant that the judge should not have appreciated that this was an issue in dispute, because it was raised in the documentation attached to the claim form.

23. The employment judge decided, after the hearing, that further submissions were required on the penalty clause issue. While I accept that this was not an express offer to reopen all issues. The claimant's submissions asserted constructive dismissal in broad terms, in the sense that her resignation had been forced on her by the conduct of the respondent. This should have alerted the employment judge to the fact that this point had been missed at the substantive hearing and resulted in a re-assessment. It is important that when dealing with litigants-in-person, employment judges consider the documentation with some care to ensure that they have appreciated the core claim being raised by the claimant.

24. While the most fundamental matter raised by the claimant was the penalty clause issue, it was

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clear that there was a suggestion that the claimant had resigned by reason of the conduct of the respondent that was so bad that she could not remain in employment. She asserted, at least in broad terms, that it was improper for the agency fees to be recouped as a result. The respondent accepts that in those circumstances, if the claimant was, in fact, constructively dismissed, the appeal must succeed on all four grounds.

25. The claimant asserted that there could only be one possible correct answer: that the respondent had chosen to call no evidence and so, on the basis of the evidence presented by the claimant, there must have been a constructive dismissal. While I consider that the employment judge should have appreciated that constructive dismissal was in issue, it was not expressly referred to by the claimant at the hearing itself. This was a case in which, once the issues were properly identified, there should have been some further case management and the matter listed for a one-day hearing to include the determination of whether the respondent had breached the implied term of mutual trust and confidence, whether the claimant had resigned in response without having affirmed the contract so that the clause permitting recoupment of fees could no longer be relied upon. I do not consider it is correct to say that there could only be one answer on the constructive dismissal issue, or that it would be just to conclude that the respondent has lost its opportunity to put forward evidence on this point. The claimant alternatively suggested that there should be a remission to the same employment judge. Mr Kohanzad stated that he was broadly neutral on that point.

26. I consider the case must be remitted. I accept that the employment judge sought to deal with this matter carefully. He did, in my view, fall into the constructive dismissal trap, but he is far from the first to have fallen into that particular trap. I have no reason other than to believe that the employment judge will deal with the matter professionally. Accordingly, I consider, because of his detailed knowledge of the case from the hearing and consideration of the written representations, it is appropriate for the matter to be remitted to the same employment judge to determine whether the claimant was constructively dismissed. If she was, the respondent

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accepts that the fees will have to be repaid. It is important to bear in mind the relatively small sum of money involved. The parties should consider carefully whether the claim can be settled. If a further hearing is required, case management should be considered with care. The claimant's current medical condition means that it is unlikely that she would be able to attend a hearing and adjustments are likely to be needed.

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