Neutral Citation Number: [2025] EAT 41

Case No: EA-2024-000164-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 March 2025

Before :

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between :

MRS HELEN KINCH

Appellant

- and –

COMPASSION IN WORLD FARMING INTERNATIONAL

Respondent

- -
- -

Ms L Millin, of Counsel, for the **Appellant**
Mr T Gillie, of Counsel (instructed by **The Legal Partners Limited**) for the **Respondent**

Hearing date: 19 March 2025

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JUDGMENT

SUMMARY

Practice and procedure; strike out; unfair dismissal.

The appellant resigned with notice in response to what she claimed was a repudiatory breach by the respondent of her contract of employment. She subsequently presented a claim form (ET1) in which she complained of constructive unfair dismissal. Following an application by the respondent under rule 37 of the Employment Tribunals Rules of Procedure, 2013, her complaint was struck out on the basis that it had no reasonable prospect of success. The judge concluded on the papers that there was no prospect of the appellant establishing that a series of agreed extensions of her notice period following her resignation did not have the effect of affirming the contract. The appellant submitted *inter alia* that the complaint should not have been struck out without a hearing of evidence about the precise circumstances in which the notice period was extended.

Held: A key part of the judge's reasoning was his understanding that it was an undisputed fact that the appellant had repeatedly asked for extensions of her notice period for her own benefit. That was wrong. There was nothing in the parties' pleadings, in their written submissions about the strike out application, or in the contemporaneous documents to support such a conclusion. The particular facts and circumstances in which extensions of the notice period were agreed were, however, important factors in determining whether or not the contract had been affirmed. It was an error of law to conclude that the issue of affirmation could be resolved without hearing evidence. It was thus an error of law to strike out the complaint under rule 37.

The strike out judgment was set aside and the case remitted to a differently constituted tribunal for it to hear evidence on the merits of the complaint of constructive unfair dismissal, the respondent's defence of affirmation and any other factual matters necessarily incidental to those issues.

THE HON. LORD FAIRLEY, PRESIDENT:

Introduction

1. The issue in this appeal is whether an employment tribunal erred in law in reaching a conclusion on the papers that a complaint of constructive unfair dismissal had no reasonable prospects of success and in striking it out on that basis.

Facts

The appellant's employment and resignation

2. The appellant was formerly employed by the respondent with the job title of UK Finance Controller. Her employment commenced on 28 June 2016. In mid-June 2022, she submitted a flexible working request to work from home due to personal circumstances. Her request was declined. On 26 August 2022, during a telephone call with the respondent's global HR manager, the appellant was told to return to the office for two days per week or face "a sticky end".

3. On 30 August 2022, the appellant submitted her resignation with notice. Her resignation was accepted. According to the appellant, she then agreed to a request from the respondent that she serve out an extended period of notice whilst working from home. There were thereafter agreed further extensions of the notice period such that she ultimately continued to be employed by the respondent until April 2023.

4. During the extended period of notice, the appellant submitted a grievance about the refusal of her flexible working application. The grievance was unsuccessful, and was appealed. The appeal was refused.

The ET1

5. In her claim form (ET1), that the appellant complained of constructive unfair dismissal. At section 8.1 ("Type and details of claim") she ticked "I was unfairly dismissed (including constructive dismissal)" and, at section 8.2 explained under reference to the conversation on 26 August 2022:

> "I stated I was reluctantly resigning to avoid the sticky end referred to by…[the] Global HR manager."

At section 9.2, she described the initial and subsequent extensions of the notice period in the following way:

> "I offered three months notice to assist the team, and I have been asked to extend this a few times. The last time, I offered to assist and this was accepted."

The ET3

6. In a paper apart to its response form (ET3), the respondent denied that it had breached the appellant's contract of employment. It averred that by making a flexible working request, bringing a grievance about the refusal of that request and thereafter appealing the adverse grievance decision, the appellant had herself breached the implied duty of trust and confidence owed by her to the respondent (ET3 § 32).

7. The respondent also averred (ET3 § 34):

> "Further, or alternatively, the Respondent contends that the Claimant affirmed repudiatory breach of contract (*sic*) by asking to extend her notice and thereafter continuing to work for the Respondent."

Case management

8. In a listing letter dated 26 July 2023, a full hearing on the complaint was appointed to take place over three days on 7 to 9 February 2024. Standard pre-hearing case management orders were made including orders for documents to be exchanged by 23 August 2023, and for a joint bundle of documents to be prepared and lodged by 6 October 2023. By agreement, parties extended the deadline for the joint bundle to 18 September 2023.

9. On 21 September 2023 a case management preliminary hearing was held. The tribunal's note of that hearing records its understanding that the appellant was complaining of constructive unfair dismissal based upon an alleged breach of the implied duty of trust and confidence. That breach was said to have consisted of the refusal of the appellant's home working request culminating with the conversation with the Global HR Manager on 26 August 2022. The issue in relation to the respondent's argument of affirmation of the contract was noted as being:

> "Did the claimant waive any breach and or affirm the contract of employment by extending her notice period to 28 April 2023?"

10. At the case management hearing, the respondent intimated its intention to apply for the appellant's complaint to be struck out under rule 37 of the Employment Tribunal Rules of Procedure on the basis that it had no reasonable prospect of success or, alternatively, for the tribunal to make a deposit order. The note from the case management hearing records that the respondent was ordered to submit any application for strike out / deposit order in writing by 19 October 2023. The appellant was permitted to respond to any such application by 2 November 2023. It was further noted that parties were agreed that consideration of any such application would "take place on a consideration of the papers without the need for a hearing to take place".

Strike out application and response

11. In a written application dated 19 October 2023, the respondent applied for strike out or, alternatively, a deposit order. The application stated (at paras. 2 and 3):

> "2. This application is made on the narrow basis that the Claimant affirmed her contract of employment by continuing to work as the Respondent's employee for eight months after she tendered her resignation. That was seven months longer than required under her contractual notice period. By affirming the continued existence of the contract, the Claimant waived her right to bring a claim for constructive dismissal. This is a complete answer to the Claimant's claim so the Claimant's whole claim falls away.
>
> 3. The facts material to this application are not in dispute and can be stated shortly. The Claimant resigned on 30 August 2022 purportedly in response

> to a repudiatory breach of her employment contract in relation to a refusal to grant a flexible working request to work from home five days per week. The Claimant's contractual notice period was one month. However, it was agreed that she would work a three month notice period to support the organisation and enable a smooth handover to her replacement. In November 2022, the Claimant asked the Respondent to exercise its contractual discretion to provide her with further occupational sick pay having exhausted her contractual entitlement earlier in the year. On 25 November 2022, the Claimant and the Respondent again agreed to extend the Claimant's notice period for a further three months until 28 February 2023. On 20 February 2023, the Claimant asked to stay on until 28 April 2023 because her plans to leave the United Kingdom and move to Montenegro had been pushed out. The Respondent accepted the Claimant's offer, because the Claimant's replacement was not starting until 2 May 2023. It was therefore, a mutually beneficial arrangement. Over the course of her last two months, the Claimant also engaged in the Respondent's grievance procedure by filing a grievance on 2 March 2023."

12. In a written response dated 2 November 2023, the appellant stated:

> "3. Following the telephone call on 26 August 2022, the Claimant submitted her resignation on 30th August 2022 as she was unable to return to the office. She was asked by the Respondent to extend her notice which she did, in order to support the Team, whilst working from home, and her last day of employment was 28th April 2023."

13. The response noted that the test for strike out could not be satisfied by considering what was said in the ET3 or in submissions and deciding whether written or oral assertions regarding disputed matters were *likely* to be established as facts. Rather, the tribunal had to be satisfied that there were *no* reasonable prospects of success.

14. The response submitted that: (i) as a matter of law, an agreed extension of a period of notice did not inevitably lead to a conclusion of affirmation of the contract; and (ii) the prospects of the appellant establishing her complaint of constructive dismissal could not be determined on the papers alone and without factual inquiry.

Consideration of the application for strike out

15. Consideration of the strike out application took place without a hearing on 19 November 2023. In a reserved judgment dated 23 November 2023 which was sent to the parties on 4 January 2024, the employment judge struck out the complaint and gave the following reasons:

> "4. On 30 August 2022 the claimant resigned from her position of 'UK finance controller' with the respondent. The respondent accepted the claimant's resignation on 31 August 2022. The claimant subsequently requested to work a three month notice period from home, this was agreed by the respondent.
>
> 5. Before the end of the claimant's three month notice, the claimant made a request that the notice period is extended. The respondent agreed that the claimant's notice period was to be extended to February 2023. Before the extended notice period came to an end the claimant again asked for an extension of the notice. This was granted by the respondent to the 28 April 2023.
>
> 6. On 2 March 2023 the claimant submitted a grievance to the respondent about flexible working. The respondent replied in writing on the same day. On 3 March 2023 the claimant requested a meeting to discuss her grievance. The grievance meeting then took place on 7 March 2023. The claimant was informed of the outcome of her grievance on 8 March 2023. The claimant appealed the grievance outcome and the grievance appeal meeting took place on 23 March 2023. The claimant was informed of the outcome of her grievance appeal on 31 March 2023."

16. The judge noted that in the respondent's submission in support of its application for strike out:

> "8. The respondent says (i) that the claimant has continued to work and be paid under the contract of employment for an 8 month period after she resigned; (ii) that the claimant called on the respondent for further performance of the contract by asking the respondent in November 2022 to exercise its discretion to provide the claimant with further occupational sick pay after she had exhausted her entitlement to four weeks of occupational sick pay per year; (iii) that the claimant also pursued a grievance in respect of the request for flexible working after her resignation and after the resignation has been accepted by the respondent; (iv) there were two extensions of the notice period which were initiated by the claimant for her own ends (namely she wasn't yet ready to relocate to a foreign country)."

17. Having noted the terms of section 95 of the **Employment Rights Act, 1996** and the well-known dictum of Lord Denning MR in **Western Excavating v. Sharp** [1978] 1 QB 761, the judge stated:

> "12. The claimant's response to the respondent's application is set out in an e mail dated the 15 November 2023 sent to the tribunal at 15.58. Regrettably this doesn't help me with regards to the issues at hand in this application.
>
> 13. I am satisfied that the claimant has waited too long, she has affirmed the terms of the employment contract by her actions of seeking an extension of contractual notice. On two occasions securing the benefit of the contract for a period of eight months following her resignation. The contractual notice period is only three months.
>
> 14. In my view the claimant's complaint of constructive dismissal is doomed to fail. There is no reasonable prospect of the claimant showing a constructive dismissal.
>
> 15. The claimant's complaint that she was unfairly dismissed is therefore struck out pursuant to rule 37(1) because the complaint has no reasonable prospect of success."

Reconsideration request

18. On 8 January 2024, the appellant applied for reconsideration under rule 70. Within that application, the first point made by her was that her response to the strike out application was not contained within an e mail of 15 November 2023 but in her response dated 2 November 2023.

19. Secondly, she pointed out that it was not agreed that she had asked to stay on after she resigned. Her position, as set out in her ET1, was that she had been asked by the respondent to stay "to support the team". The judge's findings on that issue (at ET § 4, 5 and 13) were not agreed facts.

20. Thirdly, she submitted that, even if the respondent's case on affirmation was accepted after a hearing on the facts, the tribunal would still have to examine how it came to be that the employment contract ended in April 2023 if not by her resignation in response to a fundamental breach.

21. Following receipt of the reconsideration application, the judge considered the appellant's response of 2 November 2023. Having done so, he concluded that nothing in that document might have resulted in a different conclusion. In a Judgment dated 28 February 2024, he refused to reconsider the earlier decision.

The appeal

The grounds of appeal

22. There are two grounds of appeal. The first is that the tribunal ought not to have struck out the complaint of constructive unfair dismissal without examining "the facts around the leaving date to ascertain if the [appellant] was unfairly dismissed, or whether she had not affirmed her contract and had been constructively unfairly dismissed". The second is that the judge erred in failing to consider the appellant's response to the strike out application dated 2 November 2023 by erroneously concluding, at ET § 12, that her response was contained in an e mail dated 15 November 2023.

The respondent's submissions

23. For the respondent, it was submitted that a tribunal may still strike out a claim where facts are disputed (**Eszias v. North Glamorgan NHS Trust** [2007] ICR 1126 at para. [27]). Although it would only be in an exceptional case that a case would be stuck out where core facts were in dispute, that could still happen, for example, where the facts relied upon by a claimant were clearly inconsistent with undisputed contemporaneous documentation (**Eszias** at para. [29]). In this case, the core facts were not in dispute, particularly when regard was had to the contemporaneous documents. The judge was thus entitled to conclude that there was no prospect of the appellant establishing that she had not affirmed the contract. Reliance was placed on the decision and reasons of Simler J in **Cockram v. Air Products plc** [2014] ICR 1065.

24. In contrast to the position in **Bashir v. Brillo Manufacturing** [1979] IRLR 295 (where the employee was absent on sick leave for 2 months after the alleged repudiatory breach occurred), it was clear that the appellant in this case had continued to work under the contract for a period of around 8 months after she resigned. It was also clear that she had asked to extend the notice period on at least one occasion. The tribunal had properly considered her conduct during the notice period, as

demonstrated in the contemporaneous documents, had correctly self-directed, and had reached a conclusion on affirmation that disclosed no error of law.

25. Finally, whilst the tribunal had been in error in concluding that the basis of opposition to the strike out application was contained in an e mail of 15 November 2023, had the judge read the document of 2 November 2023, it would have made no difference to the outcome.

Relevant principles of law

Constructive dismissal and affirmation

26. At common law, an employee who wished to resign and claim constructive dismissal had to do so without notice. To have given notice would have been to affirm the contract. Section 95(1)(c) of the **Employment Rights Act, 1996** provides an express statutory exception to this common law principle by allowing termination of the contract by the employee on account of the employer's material breach to be "**with or** without notice" (emphasis added). In **Western Excavating v. Sharp** (at page 225E), Lord Denning MR explained that an earlier version of this statutory exception to the common law was intended to prevent a situation arising where an employee "who was considerate enough to give notice was worse off than one who left without notice."

27. Thus, as was noted by Simler J in **Cockram v Air Products plc** (at para. [23]), the effect of section 95(1)(c) is that where an employee would have been entitled summarily to terminate the contract by reason of the employer's conduct, the mere fact of giving notice does not, of itself, amount to affirmation. An extended period of delay before giving notice may, in appropriate circumstances, be still taken to have affirmed the breach. Similarly, conduct during the notice period which is consistent only with an acceptance of the continued existence of a contract may be taken to have affirmed the contract. Post-resignation affirmation may be express or implied from actings. Cases of

implied post-resignation affirmation are likely to be rare because the employee will already have expressly communicated to the employer the reason for the resignation (**Cockram** at para. [24]).

28. The question of whether or not a party has affirmed an employment contract is highly fact-sensitive and context dependent. It does not lend itself to bright line or rigid rules. It is always a question of fact and degree whether conduct should properly be regarded as affirmation of the contract. Where an employee resigns on notice and, despite doing so, behaves in a way that is consistent only with affirmation of the contract, such conduct may be so treated by a fact-finding tribunal (**Cockram** at para. [25]). Determination of that question requires an examination of all the circumstances of the case (*ibid* at para. [28]). As was noted by Jacobs LJ in **Bournemouth Universtity Higher Education Corporation v. Buckland** [2010] ICR 908,:

> "[T]he law looks carefully at the facts before deciding whether there has really been an affirmation."

The reasons for mutual agreement of a longer period of notice may be important. This is implicit in what was said in **Buckland** (at para. [55]) about the reasons given by the claimant, a professor with teaching responsibilities, for giving longer notice on exercising his right to accept the employer's repudiatory breach:

> "… it was also entirely proper for him to exercise that right by a long period of notice, given the fact that his students would otherwise have been adversely affected mid academic year."

29. The reason for the extended notice period was plainly also an important factual consideration in **Cockram**. At para. [29], significance was attached to the finding of fact made by the employment tribunal that the extended notice period was solely for the benefit of the claimant, and to the tribunal's rejection of the claimant's evidence to the contrary.

Strike out

30. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospect of success. The test is not whether the claim is likely to fail, nor is it a matter of asking whether it is possible that the claim will fail. The test of "no reasonable prospects" is not one that can be satisfied by considering what is put forward by the respondent either in an ET3 or in submissions and deciding whether written or oral assertions regarding disputed matters are likely to be established as facts (**Balls v. Downham Market High School & College** [2011] IRLR 217).

31. **Tayside Public Transport Company v. Reilly** [2012] IRLR 755 and **Mechkarov v. Citibank** [2016] ICR 1121 each highlight the inherent limitations of strike-out procedure where there are disputes over material facts. There may, of course, be cases where the central facts in the case are entirely undisputed or where it is instantly demonstrable that a claimant's averments in the pleadings are untrue (**Eszias**). In such cases, it may be appropriate to strike out a complaint where the claim is clearly bound to fail. It is not, however, generally open to a tribunal considering an application for strike out to conduct an impromptu mini-trial.

32. These general principles bring to mind the well-known observations of Megarry J in **John v. Rees** [1970] 1 Ch. 345 at page 402D:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

Analysis and decision

33. A key part of the judge's reasoning appears to have been his factual conclusion that it was the appellant who had repeatedly asked for extensions of her notice period for her own benefit. This is clear from the final sentence of ET § 4, the first sentence of ET § 5 and the conclusion at ET § 13.

34. That was never, however, either party's position. In her ET1, the appellant stated unequivocally that extensions of the notice period were requested by the respondent. In her opposition to the strike out application, she stated that she was asked by the respondent to extend her notice, and agreed to do so in order to support the team. Even in the respondent's subtly different account of the circumstances in which the notice period came to be extended, it was not suggested that either of the first two extensions had been at the appellant's behest or for her benefit. The circumstances of third extension were – even on the respondent's averments – significantly more nuanced than the employment judge recorded.

35. In summary, there was nothing either in the pleadings or in the parties' submissions to justify the judge's findings (at ET § 4 and 5) and conclusion (at ET § 13) that the whole of the 7 months of the extended notice period was at the request of the appellant and for her benefit. The precise facts and circumstances of the extensions were, however, important factors in determining whether or not the contract had been affirmed. The judge's failure to recognise the terms of the ET1, his failure to notice what was said in the appellant's opposition document of 2 November 2023, and his apparent misunderstanding of the respondent's position were, individually and in combination, material errors in his approach to the strike out application. To the extent that facts and circumstances about why the notice period was extended and what happened during such extension were either unclear or disputed, those issues should have been resolved after a full hearing of the evidence.

36. That is sufficient to deterimine this appeal. For completeness, however, I have also considered whether – as I understood the respondent to submit – this could be said to be a case where the appellant's pleaded case in response to the suggestion of affirmation was totally and inexplicably inconsistent with undisputed contemporaneous documents.

37. Within the supplementary bundle produced for this appeal are copies of e-mails which bear to have passed between the appellant and the respondent dated 30 and 31 August 2022, an e-mail from the appellant dated 25 November 2022, an internal e-mail to which the appellant was not a party dated 20 February 2023, and documents from around March 2023 which are said to record aspects of the grievance hearings. I was told by counsel for the respondent that these were all before the judge (albeit that no mention is made of any of them in the judge's reasons).

38. In the e-mail from the appellant to the respondent dated 30 August 2022, she stated:

> "I have agreed to work three months' notice to help CIWFI, which means my last day will be 30th November."

Neither in the respondent's initial response to that e-mail (also dated 30 August 2022) or in its formal acceptance of the appellant's resignation in a letter dated 31 August 2022 is there any hint that the respondent disputed the appellant's account of the reason for the first extension.

39. In a further e-mail dated 25 November 2022, the appellant expressed her disappointment at the respondent's stated position on occupational sick pay, "considering my dedication to the Organisation". The e-mail concluded:

> "I will extend my leave date until 28 February 2023."

Whilst the e-mail does not state, in terms, who had requested the extension or why, it is at least consistent with the appellant's position in her pleadings that it was the respondent who had made that

request, to which she agreed in order to help the team.

40. There is then what appears to be an internal e-mail dated 20 February 2020 from the respondent's Global Director of Finance to others within respondent's organisation (but not the appellant) which stated:

> "As discussed just now. Helen approached Surene and I today to offer to stay on a little longer – looks like her plans to move to Montenegro have pushed out. Surene and I discussed and agreed that having Helen to help with the workload over the coming two months while we wait for Natasha to join will ultimately be beneficial as otherwise the work is falling back on the existing team…
>
> Confirmed with Helen the end date to be 28th April. Natasha starts 2nd May and we are not looking for a handover period. It'll be cleaner without one. So 28th April will be the definitive leave date."

41. Whilst this document appears to reflect an approach having been made by the appellant to the respondent to discuss a possible further extension of the notice period, it is again consistent with the appellant's averments that extension of the notice period to 28 April 2023 was of benefit to the respondent in supporting the team until the handover.

42. Finally, within her grievance documents – which related solely to the refusal of her request to work from home – the appellant stated:

> "I agreed to give three months notice to help the Team and the wider Organisation with the condition, I would not visit the office."

In an e-mail dated 3 March 2023, she stated:

> "I offered an extended notice period to aid the Team, and to smooth the transition to my leaving. Each offer of extension has been gratefully accepted by Aoife, and has been to aid the team, and the wider Organisation, and not for my personal gain, and due to recruiting my replacement."

43. None of those documents could form a basis for the findings made by the judge at ET § 4, 5 and 13, nor do the documents clearly and unequivocally explain the whole facts and circumstances of the extended notice period.

Decision and disposal

44. For these reasons, I have concluded that the judge erred in law in his conclusion that the issue of affirmation could be determined on the papers alone and without evidence and in striking out the complaint of constructive unfair dismissal on that basis. I will, therefore, set aside the tribunal's strike out judgment of 4 January 2024 and remit the case to a differently constituted tribunal for it to hear evidence on the merits of the complaint of constructive unfair dismissal, the respondent's defence of affirmation and any other factual matters necessarily incidental to those issues.