

Appeal No. UKEAT/0169/20/RN

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 March 2021

Before

JOHN BOWERS QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

Z

APPELLANT

Y

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR Z
(Appellant's Husband)

For the Respondent

MR A HODGE
(of Counsel)
Instructed by:
Birketts LLP
Providence House
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A MR JOHN BOWERS QC (DEPUTY JUDGE OF THE HIGH COURT)

B 1. The Appellant, hereafter called the Claimant, appeals from the Judgment of an Employment Tribunal which heard her unfair dismissal and discrimination case over a four-day period.

C 2. There is a restricted reporting order in place.

D 3. The Claimant asserts that the Tribunal was wrong to conclude that she was not unfairly constructively dismissed and asserts that the Tribunal failed to consider the issue of a continuing act of discrimination for the purposes of establishing its jurisdiction. I will consider these issues in turn.

E 4. I should, however, first pay tribute to the Employment Tribunal's clear recitation of the facts in a complex case. I only need to refer to parts of this. There are very many issues in the case There were 23 paragraphs in the list of issues and one of those issues was divided into subparagraphs A to Q. This appeal only concerns two of them.

F 5. I would also like to thank both parties, Mr Z (not his real name), representing his wife, the Claimant, and Mr Hodge for the Respondent.

G 6. The Claimant worked for a fire and rescue service by an employment contract with a County Council on a permanent full-time contract. She was a risk and statistical data advisor. **H** During 2006 she felt she was being bullied by a colleague. This, along with subsequent grievance

A and counter grievance processes, took a toll on her health and resulted in a prolonged period of sickness from work.

B 7. Putting it broadly, W refused to allow adjustments and indicated that the Claimant should not be allowed to return to her work under any circumstances. There were discussions between the parties, and W found another job, an IT service desk job on a fixed term contract employed by this Council but importantly not with the fire and rescue. She commenced this fixed term C contract on 1 May 2018 subject to references and was confirmed following satisfactory references on 1 June 2018. This is referred to in the Tribunal's Judgment, at paragraph 83.

D 8. While the Tribunal expressly found two aspects of discrimination and a breach of the implied term of trust and confidence, it determined that there had been no constructive dismissal nor discrimination because the two grounds were said not to fall within the time period.

E 9. It is important that I refer to paragraphs 3.1 and 3.2 of the Judgment, which were the findings of disability discrimination. Firstly, that the Claimant was treated unfavourably because of something arising in consequence of her disability, contrary to section 15 of the Equality Act F 2010. The Respondent has not termed the treatment to be a proportionate means of achieving a legitimate aim when W on 31 January 2018 informed the Claimant, he would no longer allow the possibility of her returning to her role under any circumstances.

G 10. Paragraph 3.2 states:

"That the respondent failed to make reasonable adjustments contrary to section 20 of the Equality Act when W enforced a practice that all members of the team needed to be located at a specific desk location in EH for operational reasons."

H *Constructive dismissal*

A 11. I will deal firstly with constructive dismissal. Section 95(1)(c) of the Employment Rights Act 1996 reads: **"the employee terminates the contract, [and I emphasize 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."**

B 12. The Tribunal stated the law and authorities related to this at paragraphs 85 to 89 including **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 CA; **Malik v BCCI** [1997] ICR 606; and **Woods v WM Car Services (Peterborough) Ltd** [1981] 1CR 666.

C 13. The Tribunal was not referred to **Hogg v Dover College** [1990] ICR 39, which I referred to the parties in advance of this hearing and I asked both parties to address me on.

D 14. The Tribunal found as follows in relation to the issue of constructive dismissal at the end of the judgment at paragraph 128:

E **"The Tribunal has concluded it was discrimination arising from disability to advise the claimant on 31 January that she could not return to her role. That and the failure to make reasonable adjustments identified above, must therefore amount to a breach of the implied term of trust and confidence."**

Thus, they found that there was a fundamental breach of contract.

F 15. In the next Paragraph 129, they said "the Tribunal has had to conclude," which is an odd phrasing:

G **"That the claimant did not resign in response to a breach of the implied term. She continued to work for the respondent. For a while she had her new role and her existing role. She only resigned when told she could not have two roles. She did not however leave the employment of the respondent."**

H 16. The Tribunal clearly found it of great importance in this respect that the Respondent was still employed by the same Respondent, albeit in a different job. They say there was not in law therefore a dismissal.

A 17. In Paragraph 130 they go on, "if the Tribunal were wrong then the Claimant waived any
breach by applying for another job with the respondent and continuing to work for it." Again,
the Tribunal found the fact that she was still working for the respondent, albeit under a different
B contract, of importance. Then they wrap it up at paragraph 131, "it follows from those
conclusions that all claims fail and are dismissed."

C 18. Mr Hodge rightly says that the trust and confidence breach is not the end of the matter.
The circumstances in relation to constructive dismissal include: (a) a fundamental breach which
has been established; (b) a resignation in response of that fundamental breach; (c) consideration
of whether the contract was affirmed and/or the fundamental breach was waived. That is correct
D as far as it goes.

E 19. I have, however, to consider on this appeal in turn the findings and the conclusions on
points (b) and (c). As for the reason for resignation, the Appellant says that the Tribunal should
have asked itself whether or not the breach of contract was (a) reason for her resignation rather
than as it did, whether it was the reason. The Appellant relies on the principle set out in Meikle
F v Nottinghamshire County Council [2005] ICR 1, as reiterated in Wright v North Ayrshire
Council [2014] ICR 77.

G 20. In the latter case, at paragraph 15, Langstaff J sitting in the EAT in Scotland says that this
point was, "put in words which I doubt could be bettered by Elias J as President of the EAT in
Abbycars (West Horndon) Ltd v Ford (unreported) 23 May 2008. At paragraph 34 he set out
the passage from *Meikle* which we have cited. He commented, "on that analysis, it appears that
the crucial question is whether the repudiatory breach played a part in the dismissal." He added
H at paragraph 35:

A "It follows that once a repudiatory breach is established, if the employee leaves then even he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."

B Langstaff J goes on, "that expression of principle was not material to the actual decision in the case, but it is one which we wholeheartedly endorse."

C 21. The Claimant's resignation letter is at pages 81 to 83 of the bundle and clearly outlines her reasons for resigning her permanent substantive contract. Her eleven points or so there set out considerably overlap with points which were found to be a breach of the implied term of trust and confidence. The Claimant points out that she would not have been seeking an alternative job had the Respondent not refused to allow her to return to her permanent substantive contract within the fire and rescue service.

D

E 22. I agree with the Claimant that the Tribunal should have addressed whether there was more than one reason for resignation. The letter of resignation clearly refers to the breach of contract, albeit it was written at the time when she was told she could not take two jobs. It seems to me that the Tribunal were in error in deciding that the two jobs were the key rather than looking at whether there was more than one reason. If they had, the Claimant says it is quite clear that they would have found the breach was an effective cause of the resignation.

F

G 23. The second point is whether the Tribunal misdirected itself on waiver. It is worth considering the structure of paragraph 129. The Tribunal said that they had to conclude that the Claimant did not resign in response to the breach of an implied term and she did not, however, leave the employment of the Respondent. They say there was not in law therefore a dismissal.

H

A 24. As I have said, section 95(1)(c) specifically says the termination is the termination of the contract under which the employee is employed. It is clear what this means from Hogg v Dover College that one looks to the particular contract. I refer to p42D of Hogg where Garland J says:

B **"The trite law is that of course employment results from a contract. It is the contract at which one has to look, not the relationship of the employer and employee."**

C 25. Also, at 43G, His Lordship states that the correct question is "was the particular contract under which the employee was employed by the employer at the relevant time terminated by the employer."

D 26. Mr Hodge has sought to persuade me that Hogg has no application here. Firstly, he says it is distinguishable on the facts because there was a solicitor's letter from Mr Hogg which spoke about accepting a new contract without prejudice to his rights under the old. That is indeed quoted at page 41C of Hogg, but I do not think it relevant to the point of law which I have already distilled at page 42D. Secondly, he says that Hogg deals with breach of several express terms, in particular with placement as head of history and at half salary. That is true but I do not think that serves to distinguish it from what is breach of a implied term here.

F 27. Another point to be taken from Hogg is that Garland J at 42(8) says:

G **"The question then arises of whether he accepted the employer's conduct as a repudiation of their obligations or whether it has to be said that by his conduct there was in the event no acceptance or indeed an affirmation. Of course, one asks for affirmation of what it could only be of a totally different contract, that is not the affirmation of the continuance of the contract where one term has been broken. This is a situation where someone is either agreeing to be employed on totally new terms or not at all."**

H Again, the issue of waiver is in relation to the particular contract and not in relation to whether the person continues with the employer under a different contract.

A 28. It is true that in **Cockram v Air Products Plc** [2014] ICR 1065, the Employment Appeal Tribunal said that it is a question of fact and degree whether the conduct amounts to an affirmation, but I do think that there was an error of law.

B 29. The final question is, what is the correct disposal of this matter, since I have found two errors of law. I think it is clear cut looking at the letter of resignation that a reason for resignation, but not necessarily the reason for the resignation from the particular contract was the breaches of
C the implied term of trust and confidence. I put the matter in accordance with the guidance of **Jafri v Lincoln College** [2014] IRLR 544, whether "without the error the decision on the point would have been different." I take that from paragraph 21 of **Jafri**.

D 30. The Employment Tribunal could have reached the conclusion that the resignation was in response to, at least in part the trust and confidence breach.

E 31. I am, however, less confident that this is the only opinion it could reach in relation to waiver and affirmation, so I accordingly remit those points for further consideration. I think it appropriate to allow further evidence to be given by both parties on this question but only on this
F question.

G 32. The question to be considered by the Tribunal, remission, is in accordance with **Hogg**, did the claimant waive the breach of the contract or affirm the contract notwithstanding the breach. The fact that she continued with the respondent is not the complete answer to that question, but it could be one of the factors. To put it another way, on remission the Employment
H Tribunal should not determine that there was no dismissal because she simply did not leave the

A employment of the Respondent but they may still decide in favour of the Respondent on waiver if there are other grounds.

B Continuing act

33. I move on then to the separate question of continuing act under section 123 of the Equality Act.2010 Section 123(3) says, "for the purposes of this section, conduct extending over a period is to be treated as done at the end of the period." The landmark authority is Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96.

34. I have also had my attention drawn to Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA, which may be understood as extending the principle somewhat further than was previously understood to any ongoing state of affairs. This may be seen in Hale at paragraph 42 where Choudhury J addresses Hendricks and says:

E **"By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the respondent would subject the claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such it cannot be said that those steps comprise a "succession of unconnected or isolated specific acts" as per the decision in *Hendricks*, paragraph 52."**

F 35. I have already alluded to the way in which the Tribunal formulated the breaches at paragraphs 3.1 and 3.2 of their decision. The Claimant argues that when viewing the substance of the complaint, W did create a continuing state of affairs by applying the practice that all of the team must be located at a very specific set of desks. In addition, or alternatively, it is said that W's refusal to allow the Claimant to return to work under any circumstances also created a continuing state of affairs.

H

A 36. It seems to me that the Employment Tribunal simply has not addressed issue 11 in the list
of issues, namely do any of the Claimant's allegations amount to a continuing act? Mr Hodge
quite properly accepted that it did not. Mr Z says, somewhat generously to the respondent, that
B it might be inferred that the Tribunal assumed that the act was not continuing but he goes on to
argue that the absence of a decision on any reasoning results in a fundamental gap in the judgment
on which the claims could have hinged. The argument for the Respondent would be that it was
just a one-off act albeit with continuing effects.

C
D 37. Mr Hodge says firstly whilst the Tribunal does not expressly address the question, such a
failure does not amount to an error of law. Secondly, he argues that the burden of proof is on the
claimant to show the existence of a continuing act and that the Claimant gave no evidence as to
the existence of such a continuing act, nor, as noted by the Tribunal in paragraph 120, did the
claimant give any evidence as to why it would nevertheless be just and equitable to extend time.
E I agree with him on that.

F 38. He then asserts that the evidence of a continuing act of discrimination does not exist. I
do not accept that in a case such as this, any evidence needs or indeed probably can be addressed
specifically to this point. Instead it seems to me that the continuing nature of an act is a conclusion
from the facts found by the Tribunal which are clearly and well expressed at paragraphs 55 to 60
in one case and paragraphs 73 to 75. The facts require the application of judgment by the Tribunal
G to them.

H 39. The Respondent also argues that, albeit it was in the list of issues, that an employment
tribunal is not required to stick slavishly to that list of issues and relies on the well known dictum

A of Mummery LJ in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 at paragraph
B 31, as applied by Slade J in **Saha v Capita Plc** UKEAT/0080/18/DM.

40. I agree, of course, that the Tribunal does not slavishly have to apply the list of issues and
can modify them in the light of circumstances arising in a case, particularly one as complex as
this. But the question of continuing act must be addressed if a time point is taken, and it was not.

C 41. I then pay regard to **Jafri v Lincoln College**. It seems to me that this is not a case which
D can only go one way, as Mr Hodge sought to persuade me that it was. On this point, I do not
think that further evidence should be permitted as it is a matter of judgement on the facts already
E very clearly and carefully set out by the tribunal. The decision could go either way but should be
on the basis of further submissions and no further evidence.

Disposal

E 42. The order will include the substitution of a finding that the Claimant did resign in response
at least partly to the fundamental breach of contract. The matter is remitted to the Tribunal to
decide firstly, whether the breach was waived, or the contract had found in relation to which
F further evidence will be permitted. Secondly, the tribunal should consider whether or not there
were continuing acts in respect of the breaches identified at paragraphs 3.1 and 3.2 in respect of
G which there will be no further evidence.

H