Appeal No. UKEATS/0010/20/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12th January 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

Mr CHARLES GORDON — APPELLANT

J & D PIERCE (CONTRACTS) LTD — RESPONDENT

Transcript of Proceedings

JUDGEMENT

FULL HEARING

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

The employee complained that he had been constructively dismissed. The Tribunal held that applying the test in Malik v BCCI the implied obligation of trust and confidence had not been breached. While the Respondents had behaved badly in some ways not all the causes of breakdown were to be attributed to them and the employee was to some degree a contributor to the breakdown. The claimant submitted that it was striking that the Tribunal largely referred to the test in Malik as necessitating destruction of the implied obligation. In fact it was sufficient if the relationship had been seriously damaged. Held that the Tribunal's judgement did not suggest that the wrong test had been applied. It had recited the full test at one point in the Judgement. The likely explanation for the repeated reference to the destruction of the obligation rather than to serious damage, was that the Tribunal was abbreviating the test for convenience. When the evidence was considered, and the Tribunal's reasoning examined the Tribunal's conclusion was consistent with the correct test having been applied. Held further that by engaging in a grievance process available under the contract of employment the Claimant did not affirm the contract. Held further that the Tribunal had erred in law by failing to determine whether the hearing was to be restricted to liability as opposed to liability and quantum. Had that been the sole issue in dispute the case would have been remitted back so that the Claimant had an opportunity to lead evidence relevant to remedy.

Topic Numbers 9 – Contract of employment; 11 – Unfair dismissal.

THE HONOURABLE LORD SUMMERS

1. I heard this appeal on Tuesday 12 January 2021. Due to the crisis caused by the coronavirus the hearing was conducted by means of computer and internet connection to the HMCTS communications platform. Having considered matters yesterday (13 January 2021), I am now in a position to give judgement.

Introduction

2. The appeal arises from a case in which the Claimant alleged that he had been constructively dismissed. He alleged that the Respondents had breached the implied obligation of trust and confidence between the parties. The Tribunal concluded that the Respondents had not breached the obligation of trust and confidence and as a result held that he not been entitled to treat the Respondent's conduct as a repudiation of the contract of employment. As a result the Tribunal held that the Claimant was not entitled to treat the contract as at an end and claim constructive dismissal.

Ground 1 - The Obligation of Trust and Confidence

3. The Claimant appealed the Tribunal's conclusion. He submitted that the Tribunal had erred in law by applying only half of the test articulated in *Malik v Bank of Credit and Commerce International SA* [1997] UKHL 23. There Lord Steyn stated –

> **"The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee."**

Lord Nicholls stated

> ***"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances".***

4. The Claimant drew attention to the fact that when adverting to the test the Tribunal repeatedly referred to conduct that was likely to "destroy" the relationship of trust and confidence rather than conduct that was likely to "destroy or seriously damage

the relationship of trust and confidence". The parties were agreed that there was only one occasion in the judgement when the full terms of the test were quoted (see paragraph 103). The Claimant submitted that the Tribunal had failed to apply the whole of the test and that as a result the judgement was vitiated by an error of law.

5. I am unable to accept this submission. The fact that the Tribunal quotes the test in **Malik** in full at one stage in the Judgement indicates that the Tribunal was aware of the full terms of the test. Cases of constructive dismissal based on breach of the implied term of trust and confidence are commonplace. It would be surprising if the Tribunal's failure to quote its full terms meant that it was unaware or had forgotten that serious damage and not just destruction is sufficient to establish a breach of the term of trust and confidence. The probable explanation of the Tribunal's failure to quote the test in full is that it was engaging in abbreviation, a habit common among Employment Tribunal judges and those that appear before them. Thus understood these references are no more than a convenient way of referring to the test. It is possible of course that the Claimant is correct, but it is improbable. I consider that unless there are proofs of the Claimant's proposition in the Judgement, this submission should be rejected. The Claimant was unable to direct me to any part of the judgement confirming his submission. The Tribunal does not for example hold that the Claimant's claim should be rejected because the conduct although seriously damaging to the relationship had nevertheless not destroyed it.

6. In support of his submission, the Claimant went so far as to say that the facts found by the Tribunal showed so clearly that the parties' relationship had been seriously damaged that the Tribunal could only have come to the conclusion it did if it had been applying the wrong test.

7. I do not accept that the facts require to be interpreted in this way. The Tribunal sets out the circumstances in which the working relationship between the Claimant and the Respondent's Mr Pierce deteriorated. The Tribunal acknowledges there was fault on both sides. Its findings in that connection are set out between paragraphs 107 and 131. The Tribunal set out those matters for which it felt the Respondents were to blame, for example, the mishandled disciplinary meeting (paragraph 117). Equally it takes cognisance of the Claimant's failures, for example, his refusal to attend a directors meeting (paragraph 121). The Tribunal's conclusion is found at paragraphs 129 to 131. It would have been preferable had the Tribunal recited at this stage the whole terms of the test. But I am unable to accept that the Tribunal's reasoning indicates that it must have been ignoring the possibility that the conduct it was considering was capable of seriously damaging the parties' relationship. The thrust of the Judgement is rather that there was fault on both sides. The Tribunal was bound to weigh the degree to which the Claimant had contributed to the situation. It was also bound to weigh up the degree to which factors for which the Respondent bore no responsibility contributed to the situation. The Tribunal held that the Claimant's refusal to attend a directors meeting was a contributary factor. The Tribunal held that some of the Claimant's complaints were not their responsibility. Thus it held that the recruitment of another employee, Mr Kerr, in a role that rivalled that of the Claimant may have damaged the parties' relationship but was nevertheless an appointment justified by business considerations. They bore some responsibility for the damage the appointment did since they failed to consult him. But to attribute this aspect of the breakdown entirely to the Respondents was not a course the Tribunal was willing to take.

8. There was plainly a balancing exercise and I do not consider that I can conclude from the way it was conducted that the Tribunal applied the wrong test. Nor can I be satisfied if I assume that the Tribunal applied the correct test, that its conclusion was perverse

The Last Straw

9. In his Skeleton Argument and before me the Claimant sought to submit that the Tribunal had erred by seeking to identify whether there was a "last straw" that led to the rupture of the parties' contractual relationship. He referred me to paragraph 109 of the Judgement and submitted that it was evident that the Tribunal had erred in failing to appreciate that there may be a breach of the implied term of trust and confidence whether or not there is a last straw. In this connection he drew attention to the fact that the Tribunal This is obviously true and what constitutes a breach will vary from case to case.

10. But there is no notice of this point in the Notice of Appeal. Although some latitude is permissible in the construction of Notices of Appeal, there is no reference to the concept of the "last straw" or why the Tribunal's interest in it was indicative of an error of law. I do not consider that this point arises for decision.

The Resignation Letter

11. In his oral submissions the Claimant submitted that if the Tribunal accepted that the Claimant's resignation letter set out the reasons for his resignation (paragraphs 136, 137 and 139) it should not have been concerned with whether there was a "last straw" that led to his resignation (paragraphs 9, 103, 143) and that in examining matters from the perspective of a resignation based on a "last straw" the Tribunal had led itself into error. I do not consider the Tribunal was wrong to consider whether there was a "last straw". That after all was the Claimant's case. It seems to me that the Tribunal's decision did not depend on whether it was a course of conduct or "last straw". It decided that whichever way one looked at things the Respondent's conduct was not such as to amount to a breach of the implied obligation of trust and confidence. In any event the Claimant is not in a position to submit that the Tribunal examined the conduct that led to his resignation in the wrong way. There is no trace of this argument in the Notice of Appeal or the Skeleton Argument. The issue does not arise.

Conclusion on Ground 1

12. If the contract of employment remained entire, no right of resignation arose and there was no constructive unfair dismissal. That being so, strictly speaking, I do not require to address the next two grounds. Out of deference to Mr Pacey's careful arguments on the question of affirmation and the circumstances in which he came to be precluded from leading evidence on quantum I consider I should offer my opinion.

Affirmation of the Contract

13. The tribunal held that even if there was a fundamental breach of contract that entitled the Claimant to resign, the Claimant could not succeed because he had affirmed the contract of employment by engaging in the respondents' grievance procedure (paragraphs 140-144). Thus the Tribunal held that the Claimant forfeited his right to rely on the breach of the implied term of trust and confidence by taking steps that necessitated an affirmation that the contract continued. The basis for this proposition is, to use the somewhat antiquated terminology of Scots Law, the concept of "approbate and reprobate". A Claimant cannot affirm what he denies. He cannot affirm that the contract is at an end and simultaneously rely on terms that presuppose its existence.

14. The Claimant referred me to **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] 4 All E.R. 238; [2019] I.C.R. 1; [2018] I.R.L.R. 833; [2018] EWCA Civ 978 and Underhill, LJ in the Court of Appeal at paragraph 63 where he wrote –

> **"exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract."**

15. The proposition articulated here is that it does not follow that an employee should lose his right to challenge the continuing existence of a contract because he has

exercised a right of appeal under that contract (in **Kaur** the right to appeal a disciplinary decision). Underhill, LJ does not excavate the foundations of this proposition. But it is evident that he is drawing on the contractual concepts that underpin this area of law. Where a contract is repudiated by a party, the other party to the contract may accept the repudiation. If he does so the contract is rescinded and is brought to an end. The innocent party may choose to accept the repudiatory act or he may choose to affirm the contract. It is evident that Underhill, LJ does not consider reliance on one contractual right necessarily signifies an acceptance that all other contractual rights are intact. I respectfully agree. A contract is a bundle of obligations. Some are mutually interdependent. Some serve distinct and severable purposes. In **Kaur** the employee had written to her employer to say that she both wished to participate in the disciplinary process and maintain her right to treat the contract as at and end. As I understand it Underhill, LJ's comment is designed to indicate that irrespective of the letter, he did not regard her participation in the disciplinary process as "an unequivocal affirmation of the contract".

16. The Respondents referred me to **The Phoenix Academy Trust v Kilroy** UKEAT/0264/19/AT, a decision of Soole, J in the EAT and **Folkestone Nursing Home Ltd v Patel** [2019] I.C.R. 273, a decision of the Court of Appeal. In the latter case Sales, LJ (as he then was) said as follows –

> ***…"if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not."***

17. The decision in **Kaur** was handed down on 1 May 2018 and the decision in **Folkestone** on 8 August 2018. The Court of Appeal in **Folkestone** does not refer to **Kaur**.

18. It is worth comparing and contrasting **Folkestone** with the present case. In the present case the Claimant initiated grievance proceedings whereas in **Folkestone**

the employee appealed the result of a disciplinary hearing. Mr Edward on behalf of the Respondents submitted that this was a material point of distinction between the present case and **Kaur**. I do not consider however that the difference is material. Exercising a right to raise a grievance and exercising a right of appeal both involve the utilisation of contractual rights.

19. In the present case the grievance was not upheld whereas in **Folkestone** the disciplinary appeal was upheld, although the process was found it to be defective in other connections. This is a significant point of distinction since Sales, LJ's judgement draws attention to what he perceives to be the anomaly that would arise if the appeal was successful. He considered it was unreasonable and incorrect that an employee (if he succeeded in the appeal) should have the option of choosing between two mutually inconsistent positions. **Roberts v West Coast Trains Ltd** [2004] I.R.L.R. 788 is authority for the proposition that a successful appeal removes the dismissal. In Sales, LJ's opinion the successful pursuit of the appeal extinguished the rescission of the contract.

20. In **Phoenix Academy v Kilroy** Soole, J (at paragraph 40) considered Sales, LJ's judgement in **Folkestone** and concluded that it supported the proposition that to utilise contractual rights of appeal is to affirm the contract. I do not consider that Sales, LJ went that far. I do accept however that such a proposition is the logical corollary of his reasoning. If so, his reasoning is inconsistent with Underhill, LJ's dictum (above) in **Kaur** at paragraph 63**.**

21. Underhill, LJ's dictum in **Kaur** asserts that whatever the outcome of the appeal, the decision to appeal should not be taken to affirm the contract. He accepts that this is not necessarily the case but that it is unlikely to be otherwise.

22. I do not consider that Underhill, LJ's brief dictum can be reconciled with Sales, LJ's lengthier observations in **Folkestone**. Both are pronouncements of the Court of Appeal and both judges enjoy considerable respect. On balance however I prefer Underhill, LJ's approach. It would not appear to me that exercising a right of grievance or appeal (or for that matter persisting in a grievance or right of

appeal) should be regarded as an affirmation of the contract as a whole. In the law of contract an arbitration clause survives the termination of the contract so as to enable the parties to engage in arbitration. That is presumed to be the intention of the parties. Thus it may be suggested that there is no anomaly in holding a contract to be terminated for some purposes but not for others. Grievance or appeal provisions may be regarded as severable from the remainder of the contract and capable of surviving independently even though the remainder of the contract is properly regarded as terminated through breach. If the employee succeeds in having their dismissal overturned or the outcome in some other way enables the employee to resume employment, it is open to the employee to then affirm the other terms of the contract. If the employee resumes employment the right to claim unfair dismissal disappears.

23. It appears to me that where an employee intimates that he considers the contract has come to an end, he is not to be taken to affirm that the contract has come to an end for all purposes. In particular I do not consider that the parties can be presumed to intend that a clause designed to procure the resolution of differences should be regarded as being evacuated because one party asserts that the implied obligation of trust and confidence has been breached.

24. Although pragmatic considerations are not always a sure guide, it would be unsatisfactory if an employee was unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure. While a breach of contract of contract may have the effect of releasing the parties from their obligation to perform those obligations that are counterparts of one another (having regard to the principle of mutuality of obligation) it should not have the effect of dissolving all obligations (McBryde The Law of Contract in Scotland para. 20-49 and 20-53).

    I would therefore hold that in this connection the Tribunal erred in law.

Procedural Mishap

25. Mr Pacey advised me that when he came to the Tribunal he thought the hearing was to deal with liability and that quantum would be dealt with at a later stage. It was this understanding that led him to close his case. As a result he led no evidence about quantum. There was some evidence about wage loss. But that evidence was limited in scope. Mr Pacey advised me had been led for the purpose of dispelling any suggestion that the Claimant had left the Respondent's employment in pursuit of better wages. The Claimant did not lead evidence in support of a schedule of loss that had been prepared. As a result, a variety of matters including pension loss were not the subject of evidence.

26. Mr Edward, who conducted the hearing for the Respondents understood that both liability and quantum were in issue. Whether or not there was to be evidence on quantum had not been addressed at a Preliminary Hearing or by the parties before they got underway. As a result, after hearing the Claimant's submissions he submitted that the Claimant had failed to lead any evidence of loss and that the Clamant was now precluded from doing so.

27. At this point Mr Pacey realised that he had proceeded on a misapprehension of the position. He sought leave to re-open his case. The Tribunal refused leave. The Tribunal took the view that the hearing had been designed to deal with both liability and quantum. If the Claimant wished to lead evidence on quantum, he would have to re-open his case. Mr Pacey sought to do so but was refused permission.

28. In seeking to resolve this unfortunate position the starting point is the Tribunal's order setting down the hearing. The order stated that the hearing was to be on "liability and remedy, if appropriate" [Core Bundle p. 30]. The wording of the order plainly anticipates the possibility of a hearing confined to liability. The Order however leaves it open to the Tribunal to decide whether it was appropriate to hear evidence on both liability and quantum. It was not for the parties to decide what was "appropriate". The Tribunal had the responsibility of deciding which option to prefer.

29. Neither party made any submission to the Tribunal in this connection. The Claimant did not move the Tribunal to restrict the heating to liability and the Respondent did not move the Tribunal to deal with liability and quantum.

30. I accept that there will be cases where the Tribunal does not need to pronounce a formal order. No doubt there are cases where the position is clear or the nature of the hearing does not require evidence on quantum. But in this case matters were not clear. The Tribunal knew the Claimant had a schedule of loss. It was passed to the Tribunal at the end of day two and before the commencement of submissions. The schedule had not been spoken to in evidence. Second the Tribunal raised the question of splitting liability from quantum at the end of the second day. I consider that since the Tribunal had reason to think that the Claimant had prepared to lead evidence on quantum under reference to the schedule. It had also raised the prospect of splitting liability from quantum but had not advised parties whether it proposed to follow that course or not. In such a situation the Tribunal was bound to advise the Claimant of its decision. It had evidently decided that both liability and quantum should be determined in the one hearing This was not a case where the Tribunal could safely assume that the parties appreciated that it had decided to use the hearing for both liability and quantum.

31. I consider that the Tribunal was obliged in pursuance of its own order to specify whether it was considered appropriate to hear all evidence in one hearing or split liability from quantum. It required to give that direction before the Claimant closed its case. I consider that it had information before it to indicate that the Claimant proposed to lead evidence on quantum. The decision required by the Order was for the Tribunal to make and in the circumstances of this case one that it was obliged to make.

32. I was advised that the mix up was due to a difference in practice between England and Scotland. That may be so. I am not concerned with practice but with the law. In particular I am concerned with the interpretation of the Tribunal's order. I consider the order provided the Tribunal with two options and left the Tribunal to decide which was appropriate.

33. I understand that case management is difficult and that the potential for misunderstanding is considerable. It is clear that the parties misunderstood one another, and the Tribunal may have also misunderstood the Claimant's position. Had this been the only issue I would have remitted the case back to the Tribunal to hear evidence on quantum.

    Given my conclusions above however I refuse the appeal.