Neutral Citation Number: [2022] EAT 80

Case No: EA-2018-000948-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 March 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR PARBHJOT SINGH	**Appellant**
- and -	
METROLINE WEST LIMITED	**Respondent**

- -
- -

Mr S Nicholls (Advocate) for the **Appellant**
Mr G Graham (instructed by Ms H Norris for Metroline West Limited) for the **Respondent**

- -

JUDGMENT

SUMMARY

The employment tribunal erred in law in holding that the refusal to pay the claimant contractual sick pay was not a fundamental breach of contract. A determination that it was a fundamental breach of contract was substituted and the matter remitted to consider the remaining component of the constructive dismissal claim.

The employment tribunal erred in law by failing to give reasons for refusing the application of the claimant to admit video evidence. However, the evidence would have been irrelevant to the hearing.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of the Employment Tribunal sitting at Watford between 25 June and 2 July, and in chambers on 17 August 2018, Employment Judge Henry, with lay members.

2. So far as is relevant to this appeal, the claimant brought a claim of constructive unfair dismissal. The claimant was to be invited to a disciplinary hearing. The claimant contended as a component of the conduct that was said to constitute a fundamental breach of contract that Mr Parry, the operations manager, had on 24 January 2017, when seeking to arrange for the claimant to attend the disciplinary hearing, displayed aggressive body language, by throwing his hands in the air, pointing his fingers at the claimant's face and standing with his arms folded. That was set out as issue 3.4. in the judgment.

3. The claimant had commenced sick leave on 25 January 2017. The sick leave was certificated and the claimant attended occupational health while on sick leave. Occupational health did not suggest that his sickness was not genuine. The respondent decided to pay only statutory sick pay, rather than contractual sick pay, because they considered that the claimant was absent in an attempt to avoid a disciplinary hearing to which he had been invited by Mr Parry.

4. The appeal arises out of two matters. The first is the contention that the claimant sought permission during the course of the hearing, by applications made on 27 and 28 June 2017, to submit video evidence of Mr Parry's conduct on 24 June 2017. The claimant stated that he had a pen that was able to record video that he had used to record Mr Parry's conduct. The claimant asserted that the pen had been damaged by damp and it was only on 27 June 2017 that the video footage could be downloaded from it. There is some dispute as to whether there were two separate applications to admit the video evidence, or only one formal application on 28 June. The application to admit video evidence is not dealt with in the judgment. It is contended in the appeal that the employment tribunal

erred in law in failing to deal with the application to admit the video evidence.

5. The tribunal found on a review of the relevant contractual terms, that the failure to pay the claimant full sick pay for a period of some seven weeks was a breach of his contract of employment but was not fundamental. The claimant appeals on the basis that the tribunal erred in law in so finding.

6. The appeal was considered by HHJ Eady QC on the paper sift, when the grounds of appeal were less focused, who concluded there were no reasonable grounds for permitting the appeal to proceed. The matter was considered by HHJ Martin Barklem pursuant to rule 3(10) of the **EAT Rules** who directed that questions be asked of the employment tribunal in respect of the video evidence. The judge was asked to state whether there had been an application for the video evidence to be placed before the tribunal and, if so, the reasons for refusing the application, and whether there were any findings of fact as to whether Mr Parry was aggressive.

7. The matter was sent back to the employment tribunal. The employment judge, who has since retired, provided a response in which he stated that his notes had been destroyed. He had some difficulty in recollecting the matter. He thought that his usual approach if there was some potentially relevant video evidence would be to permit it to be shown. He assumed, from the fact that this had not occurred, that no application had been made, but he went on to say that a specific finding of fact had been made at paragraph 196 of the tribunal's reasoning that Mr Parry had not been aggressive.

8. The respondents have provided a note which shows that an application to introduce the video evidence was made. It appears that the judge was broadly against the material being shown on the basis that the material was not immediately available for the tribunal to view, which was not correct. The employment judge suggested that because the material had been downloaded by a third party, that person would have to attend in order to give evidence. The employment judge considered that the real issue was whether the claimant was genuinely sick when absent due to ill-health, an issue the video evidence would not assist the employment tribunal to determine. However, a final decision was

not given.

9. By consent, the video evidence was made available to me on the basis that I should view it to consider whether there was any basis upon which an employment tribunal could have found it demonstrated behaviour by Mr Parry that could amount or contribute to a breach of the implied term of trust and confidence.

10. I consider that an application was made to the employment tribunal to introduce the video evidence and there was no express final determination of that application. In an extract from counsel's comments, there was a suggestion that the judge would come back to the issue. I consider that the tribunal erred in law in failing to determine an application that was before it.

11. I have viewed the video evidence and have had regard to **Jafri v Lincoln College** [2014] IRLR 544, particularly to the comments of Underhill LJ at paragraph 47 in which he concludes that the EAT should only itself determine an issue where there is only one possible answer, but should give careful consideration as to whether there really could be more than one reasonable answer. I consider that this is one of the limited number of cases where there is only one possible answer. The video evidence, if viewed by the employment tribunal, could not reasonably have been seen as evidence of conduct by Mr Parry that could in any way contribute to a breach of the implied term of trust and confidence. There is no evidence of inappropriate conduct by Mr Parry. A specific allegation was that he had thrown his hands in the air. He moves his arms a little, but no more. It was asserted that Mr Parry pointed his fingers in the claimant's face. He did not. At some stage his hand is on the table pointing in the claimant's direction, but there is nothing aggressive in what he is doing. The claimant asserted that Mr Parry stood with his arms folded. He does briefly, but not aggressively. If anyone is behaving aggressively in the video clip it is the claimant. I consider it is fanciful to suggest that anything in the video evidence could be said to contribute in any meaningful sense to conduct that could be determined to constitute a breach of the implied term of trust and confidence.

12. In the video one can see a person in the background. That is Mr Rashid, who was referred to at paragraph 112 in the judgment, and provided evidence that was consistent with the video evidence and was accepted by the Employment Tribunal at paragraph 113, where they found that Mr Parry was not aggressive, and did not make aggressive gestures.

13. The sick pay issue was dealt with at paragraphs 204 to 212 of the judgment:

> "204. It is not in dispute that the claimant's terms and conditions of employment following his transfer under the Transfer of Undertaking Protection of Employment Regulation, from First to the respondent, Metroline West, are those of First, which are set out at R3.
>
> 205. By the provisions of First's terms and conditions in respect of company sick pay, it provides: *"In cases where a thorough investigation has revealed that the absence was not genuine the company will reserve the right to stop company sick pay payments, if payments have already been made the company will reclaim these in line with contractual entitlements ..."*
>
> 206. It is there evident that company sick pay is only to be stopped in circumstances where following a thorough investigation it is established that the absence is not genuine.
>
> 207. The tribunal is also conscious of the provisions of First's Drivers' Handbook, section 7(i) as relied on by the respondent, which provides that *"Sick pay is only paid on days where the employee was rostered to work and is paid at the company's discretion. Company sick pay may be withheld, for example, if an employee fails to provide a fit note within three days of being required to do so, fails to attend medical review meetings, fails to attend occupational health appointments or submits a false plea of sickness".* It would appear to be the case that this refers to the claimant having failed to furnish relevant documents or in respect of a false plea of sickness, which would appear to follow the earlier provisions, where there has been an investigation determining the same.
>
> 208. It is evident that by these terms and conditions, there are no specific provisions for the respondent to withhold company sick pay, save for the above stated reasons. The claimant's failure to attend an appointed disciplinary hearing is not such a stated reason.
>
> 209. With respect the failure to attend a disciplinary hearing and the use of sick absence as a way to avoiding the same, the tribunal notes that by Metroline West's disciplinary policy and procedure, and that on which Mr Parry based his decision to withhold the claimant's pay, this provision is relevant to suspension, it there providing at paragraph 4 .4, that: *"Where an employee fails to carry out a reasonable and*

> *lawful instruction, or fails to start or continue working having been given an instruction, the employee can be suspended from duty by individuals in a supervisory role, and this will normally be with pay except in the circumstances when an individual refused to work normally or where the employee is deemed to have reported sick as a hindrance to either the disciplinary process, or as a result of being advised by an official of an impending report to their line manager (eg refusal of or going sick on duty without reasonable grounds) when it will be without pay. A local manager will clarify the circumstance when suspension is without pay."* It has not been suggested that the clamant was suspended at any time, this despite the terms being those of Metroline West.
>
> 210. In these circumstances, the tribunal finds that there was a breach of the claimant's terms of employment when he was refused company sick pay from 25 January 2017.
>
> 211. Having found there to have been a breach, the tribunal has considered to what extent is the nature of this breach? On an examination of the circumstance giving rise to this breach, where there was evidence of the claimant going off on sick leave to avoid attending the disciplinary hearing scheduled for the 2 5 January, and were the claimant's subsequent actions of raising grievances and complaint to the CEO, seeking to bring about the dismissal of the disciplinary action against him, and where it was made clear to the claimant that, company sick pay was being withheld pending the disciplinary hearing, the tribunal finds that the respondent had thereby, contrary to displaying an intention no longer to be bound by the employment relationship, were specifically encouraging the continuance of the relationship by having the claimant engage in the disciplinary process, integral to the employment relationship.
>
> 212. In these qualified circumstances, the tribunal finds that the breach was not of a fundamental nature going to the root of the employment relationship, so as to amount to a repudiatory breach."

14. The respondent sought to persuade the claimant to attend a disciplinary hearing by withdrawing company sick pay. The employment tribunal concluded that there were provisions that could be used where it was thought by the respondent that someone was avoiding a disciplinary process by falsely claiming to be unwell, but those procedures had not been applied in this case. It appears that from the amended notice of appeal produced by Charles Ciumei QC, acting pursuant to the ELAAS scheme, that for the seven week period for which the claimant received only statutory sick pay, that meant that rather than receiving his usual weekly pay of £572 he received only £109.95 per week.

15. The tribunal directed itself as to the law by considering only **Western Excavating Ltd v Sharp** [1978] ICR 221 which they quoted at paragraph 185. It also relied on **Post Office v Roberts** [1980] 1RLR 347, in respect of the implied term of mutual trust and confidence.

16. There is longstanding authority about the non-payment of wages contrary to an express contractual right that was not put before the employment tribunal. It was authority that the tribunal needed to consider. In particular, the review of the authorities and the statement of principle set out in **Cantor Fitzgerald v Callaghan** [1999] ICR 639, at 648A to 650A was of particular importance. **Cantor Fitzgerald** was considered in the context of sick pay by the Employment Appeal Tribunal in **Roberts v Governing Body of Whitecross School** UKEAT/0070/12/ZT in which Slade J held that a mistaken view that there was power under the terms of the contract to reduce pay did not prevent there being a fundamental breach of contract.

17. The approach that the employment tribunal adopted, appears to be one in which they considered that for a breach of contract to be fundamental, there must be an intention on the part of the employer not to be bound by the terms of the contract in a manner that meant that the employer no longer wishes to continue with the employment relationship. The tribunal concluded that that was not the case as the employer wished to persuade the claimant to engage in the disciplinary process so that the matter could be resolved and the employment could continue. In adopting that approach, the tribunal erred in law. What is required is that there is an evincing of an intention no longer to comply with the terms of the contract that is so serious that it goes to the root of the contract.

18. There might be many circumstances in which an employer would like to reduce pay by a significant degree but still wishes the employee to remain in employment, receiving the lower rate of salary. If the employer unilaterally reduces pay that is still a fundamental breach of contract.

19. **Cantor Fitzgerald** is authority for the proposition that the determination of whether a non-payment of wages is a fundamental breach may depend on whether there is a deliberate

non-payment of wages.

20. In this case there was a deliberate decision not to pay full company sick pay to which the claimant was entitled, in circumstances in which there were other contractual provisions that would allow the respondent to deal with the situation if they thought that the claimant was not genuinely unwell. There was a substantial reduction in his weekly earnings. I consider that there could only be one possible correct answer; that this was a fundamental breach of contract.

21. Accordingly, the matter will be remitted to the tribunal with a finding that the withholding of company sick pay did amount to a fundamental breach of contract. The tribunal will then have to go on to consider the other component necessary to establish constructive dismissal, whether the claimant did, at least in part, resign in response to that breach.