

Constructive Dismissal

Christian Marney, Advocate

27th January 2009

Scope of Discussion

- Looking at two areas this evening
- First – recent cases on the correct approach to assessing the employers conduct. Looking at what is to be taken from those cases and what implications they may have for the future development of the law in this area.
- Second - looking at remedy in cases where there has been a course of conduct leading to psychiatric injury which pre dates the resignation.

The resurgence of the band of reasonableness test

- 2 recent cases in which the employers conduct has been assessed with reference to the “band of reasonableness” test
- Abbey National PLC v Fairbrother EAT
12th January 2007 UKEAT/0084/06/RN
- Claridge v Daler Rowney Ltd [2008] ICR 1267

Setting the Decisions in Context

- **The Western Excavating Test**
- *"If the employer is **guilty of conduct which is a significant breach** going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.*
- *The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. **But the conduct must in either case be sufficiently serious to entitle him to leave at once.** Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*
- **Western Excavating (EEC) v Sharp [1978] ICR 221** (per Lord Denning MR at 226)
- This is a statement of the "contract test". In formulating the test that way Lord Denning expressly rejected "the unreasonableness test".

The Malik/Mahmud Implied Term

- “The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee”
- Malik v Bank of Credit and Commerce International S.A. [1997] ICR 606

Section 95 ERA 1996

- 95(1) For the purposes of this Part an employee is dismissed by his employer if...(c) the employee terminates 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.

Abbey National PLC v Fairbrother

- The claimant lodged a grievance in relation to alleged bullying by colleagues
- The grievance failed, as did her appeal.
- She resigned because her grievance was not upheld.
- She claimed constructive dismissal
- She succeeded at the tribunal

Decision in Fairbrother

- The implied term (Malik) is considered within the context of Section 95.
- In considering whether an employee had ***reasonable and proper cause*** for his conduct (part of the Malik test) it is recognised that, *"employers are afforded a measure of discretion in their conduct of their relationship with their employees"*.
- *"In particular, we are satisfied that they have a measure of discretion when deciding how to conduct a **disciplinary procedure** and in deciding how to conduct a **grievance procedure**."*
- *"It means that they must not act **irrationally or perversely** in the course of such procedures. They must not take account of irrelevant material. They must not fail to take account of relevant material. They must not take decisions that no reasonable employer would take. The analysis in **Clark v Nomura International plc** is helpful in that regard."*

Fairbrother (cont)

- *"...we see no reason for the statement of principle expressed not being of general application. Accordingly, in a constructive dismissal case involving resignation in the context of a grievance procedure, when asking the second question we have posed above it seems to us that it is not only appropriate but necessary to ask whether the employer's conduct of the grievance procedure **was within the band or range of reasonable responses to the grievance presented by the employee.**"*
- *"Just as happens when the conduct of a disciplinary procedure falls to be considered (see: **Whitbread v Mills**), the conduct of a **grievance procedure requires to be looked at as a whole.** Only if it has been conducted in a manner in which **no reasonable employer** would have conducted it can it be said that he did not have reasonable and proper cause for his conduct."*

Claridge v Daler Rowney Ltd

- This case also concerned an unsuccessful grievance procedure
- In response to the rejection of a grievance the claimant tendered his resignation.
- The basis of the constructive dismissal claim was that the grievance had not been dealt with properly, “nor within a reasonable or timely fashion”.

Claridge v Daler Rowney Ltd

- The EAT in **Fairbrother** understandably considered that it was unacceptable to have a different result in an unfair dismissal claim where the essential complaint was the same, merely because of the way in which the dismissal was characterised.
- We entirely agree that it is not acceptable that the law should characterise one dismissal as unfair and another as fair depending upon the often fortuitous fact of who actually brought the relationship to an end, and the result should be avoided if there is a proper legal way of achieving that.
- The band of reasonable responses test ought therefore to be applied
- It differed in the stage at which it would apply that test.
- It applied the test at the stage of considering whether the conduct was **calculated to destroy or seriously damage the employment relationship** (ref Malik)
- [See also Bates v Liverpool City Council [2007] UKEAT 0309/06 – demotion/final written warning not repudiatory breach]

Does this approach extend beyond disciplinary and grievance cases?

- If one accepts, in principle, that employers are afforded a measure of discretion in their conduct of their relationship with their employees, should that approach not be of wider application?
- **Clark v Nomura International plc [2000] IRLR 766**
- Concerned the exercise of discretion re a contractual bonus.
- Both sides conceded that the exercise of discretion was not unfettered.
- “On the other hand the concept of “without reasonable or sufficient grounds” seems to me to be too low a test. **I do not consider it is right that there be simply a contractual obligation on an employer to act reasonably in the exercise of his discretion, which would suggest that the court can simply substitute its own view for that of the employer.**”
- “My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) i.e. that no reasonable employer would have exercised his discretion in this way.”
- **Dutton & Clark v Daly [1985] 1 ICR 780**
- *In civil litigation in the High Court the judge has to use his own judgment as to whether the steps taken were reasonably adequate or not. In our case and in the industrial tribunal we may not do this. **We have to avoid using our own judgment.** The question which has to be posed and answered is whether the reasonable employer could be expected to have done more or to have acted differently. **If the answer is that no reasonable employer would have expected the employee to work in the conditions under which she did, then there was a fundamental breach of the contract of employment entitling her to treat it as a repudiation.***
- [Per Sir Ralph Kilner Brown @ 785]

Gab Robins UK Ltd v Gillian Triggs

- UKEAT/0111/07/RN [EAT 13th June 2007]
- The decision in this case was overturned by the Court of Appeal.
- However, the appeal was purely concerned with remedy. The finding of unfair constructive dismissal was not challenged.
- *"33. It therefore seems to us that in a true final straw case **the range of reasonable responses test has no application to the employer's conduct of a grievance procedure where that conduct is the final straw relied on.** We do not understand Fairbrother to say otherwise, notwithstanding the apparently wide wording of paragraph 36; if it did, it simply could not stand in the light of Omilaju and Lewis v Motorworld."*

Gab Robins UK Ltd v Gillian Triggs

- As a matter of logic why should different considerations apply in a last straw case?
- It is plain from *Omilaju* that the test is to be objective.
- ***Omilaju v Waltham Forrest LBC (CA) [2005] ICR 481 at 487***
- *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Mahmud , at p 610h , the conduct relied on as constituting the breach must "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"*
- The requirement in a "last straw" case is to consider whether there are a series of acts which, viewed cumulatively, amount to a repudiation of the contract by the employer.
- If one is assessing conduct over a period of time for that purpose, can one not just as easily consider whether that conduct fell outwith a range of reasonable conduct?

The Second Area - Remedy

- **GAB Robins (UK) Ltd v Triggs [2008] ICR 529 [Court of Appeal]**
- Mrs Triggs developed a depressive illness over time as a result of overwork and bullying.
- Her ongoing depressive illness affected her earning capacity.
- *"...her right to sue in respect of that loss had accrued before dismissal. The loss that she would thereafter suffer as a result of her reduced earning capacity was not therefore caused by, or a consequence of, the dismissal at all"*
- Distinction made between losses arising from unfair dismissal and losses flowing from antecedent breaches of the trust and confidence term.

Triggs (cont)

- **Eastwood v Magnox Electric plc [2004] ICR 1064**
- "...when an employee suffers financial loss from psychiatric or other illness caused by his pre-dismissal unfair treatment. In such cases the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal. In respect of his subsequent dismissal he may of course present a claim to an employment tribunal. If he brings proceedings both in court and before a tribunal he cannot recover any overlapping heads of loss twice over."
- "In cases of constructive dismissal a distinction will have to be drawn between loss flowing from antecedent breaches of the trust and confidence term and loss flowing from the employee's acceptance of these breaches as a repudiation of the contract. **The loss flowing from the impugned conduct taking place before actual or constructive dismissal lies outside the Johnson exclusion area, the loss flowing from the dismissal itself is within that area.**"