

Case number 401128/2002
Dr D. Quigley v University of St Andrews

Conclusions drawn from Legal Precedent
by Dr Declan Quigley (the Applicant)

1 April 2004

- Section 95(1)(c) of the Employment Rights Act 1966 states that an employee is dismissed where:
 - 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.

This is commonly referred to as 'constructive dismissal'.

- In a seminal judgement in relation to constructive dismissal in the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*, Lord Denning ruled:
 - An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.
- As set out by the Court of Appeal in *Western Excavating* and developed by subsequent case law (see below), the contract test sets out four conditions that must be satisfied before a constructive dismissal is made out. To establish the existence of circumstances in which the employee is entitled to terminate the contract without notice, an employee must initially show that:
 - the employer was in actual or anticipatory breach of the contract; and
 - that breach was sufficiently serious to justify the employee resigning, or else it must be in the last of a series of incidents (the 'last straw') that, taken together, justify his or her leaving.

Satisfying these two conditions gives rise to a 'repudiatory' or fundamental breach of contract by the employer. This entitles the employee to consider himself or herself discharged from further performance of the contract, which would, in effect, bring the contract to an end. However, the employee might continue to affirm the contract. So, in order to establish a constructive dismissal, two further conditions must be satisfied:

- the employee must resign in response to the breach and not for some other unconnected reason; and
- the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and affirmed the contract. Where there is a 'last straw' (see below), this is taken to provide the determining date in relation to terminating the contract (*Abbey National plc v Robinson* 20.11.2000 EAT 743/99).

- It is contended that the constructive dismissal claim brought by the Applicant against the University of St Andrews satisfies all four of these conditions.
- Contracts of employment have certain implied terms. The most generally recognised of these terms is:
 - the duty of mutual trust and confidence between employer and employee (see below).

Other implied terms recognised in case law which are pertinent to the present case include:

- The duty to render reasonable support to an employee to ensure that the employee can carry out the duties of his or her job without harassment and disruption by fellow workers (*Wigan Borough Council v Davies* [1979] IRLR 127). This duty overlaps with the duty of trust and confidence.
- The duty reasonably and promptly to afford an opportunity to employees to obtain redress of any grievance they may have (*W A Gould (Pearmak) Ltd v McConnell and another* [1995] IRLR 516).

- The Employment Appeals Tribunal stated in *Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84 that:
 - any conduct which is likely to destroy or seriously to damage [the relationship of trust and confidence] must be something which goes to the root of the contract, which is really fundamental in its effect upon the contractual relationship
- The duty of mutual trust and confidence was recognised in the House of Lords in *Malik and another v Bank of Credit and Commerce International SA* {1997} IRLR 462, where the duty was described thus:
 - An employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Their lordships established *inter alia* that trust and confidence may be undermined even though the conduct in question is not directed specifically at the employee. This has relevance in the case under consideration here with respect to the abusive behaviour that was also directed at the Applicant's immediate colleagues.

- Whether the implicit term of trust and confidence has been breached is a question of fact: the test is objective, the employer's motive and intention being wholly irrelevant (Lord Steyn in *Malik and another v Bank of Credit and Commerce International SA* {1997} IRLR 462). This has particular relevance in the case under consideration here with respect to:
 - the destruction of all of the evidence relating to the Corner/Esler investigation;
 - the attempts by the Principal of the University to require the Applicant to withdraw his professional academic opinion;

- the behaviour of the Principal of the University at a meeting on 2 November 2001;
 - the behaviour of University officials in relation to the Applicant's promotion appeal.
- It is not necessary that either the employee or the employer know that there has been a breach of contract. What matters is that there is an objective causal link between the conduct that in fact amounts to a breach, and the resignation (*Hay v Glasgow City Council* 24.3.1998 Scottish EAT 1301/97).
 - The Employment Appeals Tribunal confirmed in *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316) that an employer is bound by acts done by employees in the course of their employment — and made a finding of constructive dismissal accordingly.
 - The Employment Appeals Tribunal made a ruling in *Whitbread plc t/a Thresher v Gullyes* 1.7.94 EAT 478/92 regarding an employee who was promoted to a position for which she lacked experience and was promised support and resources which were not forthcoming. The employer was found to be in fundamental breach of the implied term that the employer should not act so as to prevent the employee from being able to carry out her part of the contract. This has relevance in relation to the Applicant's resigning the Chairmanship of the Department of Social Anthropology, alleging that his Head of School was not providing him with sufficient support to carry out this role.
 - Last straw. A series of acts may cumulatively amount to a repudiatory breach of the implied duty of trust and confidence, notwithstanding the fact that some of the incidents making up the course of conduct are not sufficiently serious in themselves to establish a repudiatory breach in their own right (*Lewis v Motorworld Garages Ltd* [1085] IRLR 465). In these circumstances, the last incident, which need not in itself be a breach of contract is the 'last straw' (*Irving v Thwaite Holmes Kitchens* 18.12.1990 Court of Appeal, N. Ireland; *Abbey National plc v Robinson* 20.11.2000 EAT 743/99). The relevance of this to the case presented here is clear.
 - In 'last straw' cases it is not relevant that the employee has waived an earlier incident that in itself constitutes a repudiatory breach (*Abbey National plc v Robinson* 20.11.2000 EAT 743/99). The Respondents' barrister suggested that since the Applicant did not react to certain alleged breaches of contract by resigning at the time of the alleged breach (i.e. that he affirmed the contract), then they were not truly breaches. This argument is clearly specious. It is evident that at any time one party to a contract may break that contract but the other party seeks to repair the damage by some means or other. Nevertheless, a series of such breaches may prove to be so damaging that the other party is finally led to conclude that the contract has been repudiated to such an extent that it cannot be repaired. In such a case, the earlier breaches obviously come into the account and this is clearly recognised in constructive dismissal case law.
 - An employer's conduct may also give rise to a *continuing* breach of contract, as in (*W A Gould (Pearmak) Ltd v McConnell and another* [1995] IRLR 516), where the breach consisted of a failure to provide or operate a proper grievance

procedure. There are direct parallels between *McConnell* and the case under consideration here with reference to the Applicant's failure to secure a response from the Principal of the University to his serious complaints [421-423] about the Corner/Esler report and the manner of its delivery. Given that the Corner/Esler investigation was said by the Deputy Principal to be a substitute for a grievance procedure, this clearly indicated a breakdown of the procedure from the perspective of the Applicant.

- The Employment Rights Act makes clear at s.95(1)(c) that an employee who resigns on notice may still claim to have been constructively dismissed. The Applicant in this case resigned on notice.
- The implicit term of trust and confidence has been found to have been breached in the following cases:
 - where there has been a course of unwanted and bullying behaviour amounting to sexual harassment by an employer's manager (*Reed and Another v Stedman [1999] IRLR 299*);
 - where there has been a failure to investigate complaints of sexual harassment where these had been made to colleagues at work (*Reed and Another v Stedman [1999] IRLR 299*), or a failure to treat such a complaint seriously (*Bracebridge Engineering Ltd v Darby*).

The Applicant in the present case made representations to University managers regarding defamation of a sexual nature, and an allocation of students on the back of this defamation which was potentially very injurious to the Applicant's reputation and was construed by him as a very disturbing form of harassment. Representations were made by the Applicant to both the Principal and Secretary of the University without any action being taken. Via the Applicant's Chairman of Department these complaints also reached the Director of Personnel Services and he decided not to take immediate action regarding the allocation of students. It was only after repeated representations by the Applicant to the Chairman of the Department that action was then taken.