Appeal No. EA-2020-SCO-000084-SH
(Previously UKEATS/0001/21/SH)

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 27 July 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

SCOTTISH BORDERS HOUSING ASSOCIATION LIMITED — APPELLANT

MS JACQUELINE CALDWELL & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR COLIN EDWARD *(of Counsel)* Instructed by: Harper Macleod LLP The Ca'd'oro 45 Gordon Street Glasgow G1 3PE
For the Respondents	Mr Michael Briggs (*Solicitor)* Thompson Solicitors 285 Bath Street Glasgow G2 4HQ

SUMMARY

TOPIC NUMBER(S): 9 Contract of Employment; 10 Unlawful Deduction of Wages; 30 Jurisdictional/Time Points

Where an employer offers new terms and conditions of employment after a process of collective bargaining and then intimates its intention to impose the revised terms on all those who have not accepted the revised terms and conditions, any employee proposing to challenge the new terms and conditions must do so before the end of 3 months of the date(s) of the offer; see s. 145C of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"). **Held** A letter intimating an intention to impose new terms and conditions should not be treated as an offer for the purposes of s. 145C. A claim made within 3 months of such a letter but more than 3 months after the initial letter of offer was accordingly out of time.

THE HONOURABLE LORD SUMMERS

1. I heard this appeal today "in person". It arises from a pay dispute between the Respondent and its staff. The Respondent had over a two-year period negotiated with the recognised trade unions in relation to proposed changes to the terms and conditions of employment of the Respondent's staff. The Respondent wished to move away from a pay scheme based on the RPI to a market-based scheme with benchmarked salaries. The Respondent was unable to reach agreement with the trade unions.

2. The Respondent arranged meetings with its staff. It appeared to the Respondent that their staff were willing to agree to the terms the Respondent offered. The Respondent accordingly wrote on 18 September 2019 to give them the opportunity to agree to amended terms. The letters to staff explained how the proposed change affected them and set out their new pay grades and salary.

3. The letters concluded by stating that if they were willing to accept the variation to contract, they should sign and return their copy of the revised terms and conditions of employment by Wednesday 21 October 2019.

4. 96 out of 104 employees agreed to the variation. The Claimants were among the group that did not agree to the changes. It would appear that they signified their disagreement by failing to return their copy of the revised terms and conditions.

5. On 13 December 2019, the Respondent sent a further letter to the Claimants. It stated that the new terms and conditions would come into effect on 16 January 2020 and gave the Claimants information about the new pay structure and appropriate salary details.

6. Following receipt of the letters the Claimants advised the Respondent that they did not accept the proposed variation to their contracts of employment.

7. The Claimants submitted claims to the Employment Tribunal on 28 January 2020. They asserted that the Respondent had breached section 145B of the **Trade Union & Labour Relations (Consolidation) Act** 1992 ("TULRCA").

8. Section 145B **TULRCA** provides -

> **145B Inducements relating to collective bargaining**
>
> **(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised; by his employer has the right not to have an offer made to him by his employer if—**
>
> **(a) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and**
>
> **(b) the employer's sole or main purpose in making the offers is to achieve that result.**
>
> **(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.**
>
> **(5) A worker or former worker may present a complaint to an employment tribunal on the around that his employer has made him an offer in contravention of this section.**

9. Section 145C sets out the time limits for presenting a claim under 5145B.

> **(1) An employment tribunal shall not consider a complaint under section 145A or 145B unless it is presented—**
>
> **(a) before the end of the period of three months beginning with the date when the offer was made or, where the offer is part of a series of similar offers to the complainant, the date when the last of them was made,**

or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable:

10. A preliminary issue arose as to whether the claims were brought within the time limit set out in section 145C(1)(a) of **TULRCA**. At a hearing convened to deal with the issue, the parties accepted that if the letters of 13 December 2019 could not be said to be offers, the Claims were out of time. While the Claims had been lodged within three months of the letters of 13 December 2019 they had not been lodged within three months of the letters of 18 September 209.

11. The Claimants did not seek to argue that it was not reasonably practicable for the complaints to be lodged within the three-month time period, or that, if this were the case, the complaints were presented within such further period as was reasonable.

12. The Claimants did however submit that the letter of 13 December 2019 was an "offer" and as a result the claims were timeous for the purposes of a 145B **TULRCA**. The Employment Tribunal accepted this submission.

13. The ET accepted that the letter of 13 December 2019 appeared to impose a new set of terms and conditions. The ET concluded however that despite its unilateral appearance it should be treated as an offer since the change proposed could be accepted or rejected.

14. The ET based its decision on the proposition that contracts of employment cannot be varied without mutual agreement, and that express or implied agreement was required to effect a binding change to terms and conditions following the letter dated 13 December 2019.

15. It also reasoned that the wording of s 145B **TULRCA** did not demand that a financial inducement or incentive was required for there to be a valid offer for the purposes of that section.

16. The ET held that the letter of 13 December 2019 followed on from the letter of 18 September 2019. It related to the same proposed change to terms and conditions. The ET concluded that both letters formed part of a series of similar offers to the Claimants, for the purposes of s. 145C **TULRCA** and that the date of the last offer in that series was 13 December 2019.

17. The ET held that since the Clarins were lodged on 28 January 2020 this was before the end of the period of three months beginning with the date of the last offer.

Discussion

18. Mr Edward on behalf of the Respondent submitted that a difference was to be observed between the language of the letter of 18 September 2019 and the letter of 13 December 2019. He accepted that the latter of 13 September 2019 was an offer. He observed that it had been accepted by most of the staff. The Claimants were among the group that did not reply to the offer. In that circumstance they were taken to have rejected the offer. Mr Briggs on behalf of the Claimants did not dispute that this was the position.

19. The letter of 13 December 2019 by contrast communicated the Respondent's intention to impose the change offered in the letter of 18 September 2019. The letter refers to the offer of 18 September 2019 and says -

> **I now write to confirm that the variation will be introduced with effect from 16 January 2020.**

20. Elsewhere the Respondent states -

> **your terms and conditions have been amended**

21. Mr Edward submitted that the objective meaning of these words was that the Respondent intended to make the changes irrespective of the Claimants' rejection of the offer. The

A Respondents had passed from negotiation of the new contract to implementing the new contract. Thus while the Claimants could still have changed their mind and fallen in with the offer made, the letter of 13 December 2019 made it clear that irrespective of possible changes of heart, the Respondents had decided to impose the change on the Claimants whether they were accepted or not (**Miller Fabrications Ltd v J & D Pierce (Contracts) Ltd** [2010] CSIH 27 at para. 11). Mr Edward accepted that this represented a breach of contract and that the corollary of such a breach was access to the usual remedies for breach of contract (**Woodar Ltd v Wimpey Ltd** [1080] 1 WLR 277 at pp 296-297 per Lord Keith).

22. The consequence of the letter of 13 December 2019 was that the Respondents were in anticipatory breach of contract. Anticipatory breach occurs "when a party to a contract unequivocally indicates, by words or conduct, that party's intention not to perform the contract", (**McBryde The law of Contract in Scotland** para 20-23; cf. **White and Carter (Councils) Ltd v McGregor** [1961] AC 413 at p. 427). The parties accepted that in that situation the Claimants would have a potential claim under s. 13 of the Employment Rights Act 1996 if it could be demonstrated that they had suffered a loss through the change to the contract of employment. Parties further accepted that it was unclear whether in fact such a loss could be demonstrated. The new wage scale was not bound to lead to a loss of wages and the position might vary from employee to employee.

23. Mr Briggs referred me to the reasoning of the ET and commended its approach. Its position is summarised above and I do not require to repeat his submissions to me.

24. The parties were agreed that the issue fell to be resolved on the construction of the letters and by reference to general legal principles. I was not referred to any authority on the interpretation of s. 145B and C. It would appear that the question of whether a letter should be regarded as an "offer" under s. 145C has not arisen for decision before.

Decision

25. I consider Mr Edward's submission is correct. The letter of 13 December 2019 is not a contractual offer. The letter intimates the Respondent's intention to impose new terms. It constitutes an anticipatory breach of contract. That in turn entitled the Claimants to rely on that breach for the purpose of any claim they wished to state. An employee who decided to accept the position would normally be said to have "accepted" the repudiation. But such an acceptance could not be regarded as contractual acceptance but acceptance of the repudiation. In that situation the party accepts the breach not the offer. The effect of acceptance is that the employee relinquishes any right to assert breach of contract. But as I understand it acceptance of a repudiation does not create a contract. It rather bars the party from relying on the breach of contract. An employee could in that situation protect his or her position by working "under protest". In that situation they could not be said to have accepted the breach and their right to seek payment of wage loss would be preserved. But if they decided to carry on without protest they would be held to have accepted the repudiation. But that is a different matter from accepting an offer of a new contract of employment. In my judgement an employer that intimates its determination to unilaterally impose new terms cannot be said to offer new terms under s. 145B.

Other Matters

26. Mr Briggs suggested that the question of whether the letter of 13 December 2019 was seen as an offer depended to a degree on the evidence of how it was understood by the parties. Although paragraph 17 of the Judgement states that the Claimants did not "accept" the letter, no evidence was led from the Claimants as to their perception of the letter and whether they saw it as an offer. There is therefore no evidence of the subjective understanding of the Claimants.

27. I consider that the letter should be construed objectively according to its terms. The ET proceeded on the basis that the letter should be construed according to its terms and nothing has been said to persuade me that the ET relied on the evidence led by the Respondents in reaching its conclusion. That being so I do not consider that it is open to me to entertain Mr Brigg's argument that despite the objective meaning of the letter of 13 December 2019, it is possible to read it as an offer. There is no indication that there was any evidence that might indicate that despite its terms it should be understood as an offer and no indication that the ET approached the issue of construction on the basis of any evidence other than the terms of the letter.

Conclusion

28. I am satisfied that the ET erred in law. I do not consider that the letter was a fresh offer that was available for acceptance. The Claimants should have lodged their claim within 3 months of the letter of 18 September 2019. The parties were agreed it was an "offer" within the meaning of s. 145B. The error of the Claimants was to wait until the process of offer and acceptance was over. The letter of 13 December 2019 set out the changes the Respondents had decided to make irrespective of the Claimant's consent.

29. In these circumstances I shall uphold the appeal and dismiss the claims lodged by the Claimants on the basis that they are out of time.