

ARTICLE: Repudiatory breach of contract cannot be cured

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Introduction

The Court of Appeal has ruled that once a repudiatory breach of contract has been made, it cannot be cured by the defaulting party. The innocent party must be the one to choose whether the contract is breached or affirmed, and the most the defaulting party can do is to encourage the innocent party to affirm by making suitable amends.

The facts

Mr Buckland held a chair of environmental archaeology at Bournemouth University. Every year he marked exam papers which were then marked a second time to ensure consistency. In 2006, there were 16 students taking exam re-sits and Mr Buckland failed 14 of them. His marks were endorsed by the second marker, Mr Haslam.

Dr Astin was the chairman of the board of examiners and during a meeting at which Mr Buckland was present, the board checked and confirmed the results, noting the need to address the high failure rate. However, Dr Russell (the programme leader) took it upon himself, without Dr Astin's authority, to re-mark the papers. He was concerned about the second marking rather than Mr Buckland's original marking.

When he discovered this, Dr Astin was concerned about potential appeals and Mr Hewitt, another staff member, re-marked the scripts as well. While Mr Hewitt's marks were not far away from those originally awarded by Mr Buckland, nevertheless there were some students whose marks were increased so that, where they had failed before, they were now in a marginal zone where marks in other subjects might save them from failure.

Mr Buckland protested against all this so an inquiry was set up in mid-October chaired by Professor Vinney. Mr Buckland refused to appear, claiming that Professor Vinney was not independent enough, but he nevertheless provided written evidence. The inquiry was only concerned with the unauthorised re-marking and in January 2007 published a report vindicating Mr Buckland and criticising the board of examiners.

Despite this vindication, Mr Buckland was still not happy. He was angry that Dr Astin's evidence during the inquiry impugned his integrity and, without a shred of evidence, he claimed that the report was just an exercise to exonerate management and support both Dr Astin and Dr Russell in their attacks on his integrity. Although the head of department, Professor Darville, sought to mollify Mr Buckland by expressing his gratitude for Mr Buckland's stand during all this and his assurance that Mr Buckland had "won the war", on 22 February 2007 Mr Buckland resigned with effect from July 2007. This was to ensure his obligations to his students were not disregarded. He brought a claim for unfair constructive dismissal.

The Tribunal's decision

Where there has been a repudiatory breach of contract, the injured party may affirm the contract by continuing performance. As such, the Tribunal considered the length of time between the letter and actual date of resignation. It held that this did not amount to an affirmation since the length of time had been motivated by Mr Buckland's desire to fulfil his obligations to his students.

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The Tribunal held that there had been a repudiatory breach by the University in the form of the re-markings which was not a course which needed to be taken to ensure that the students were dealt with fairly. Instead, it was an unequivocal affront to Mr Buckland's integrity.

The Tribunal then asked a question which neither party had raised – could the breach be cured by means of the Vinney inquiry? While the Tribunal disagreed with Mr Buckland's assertion that the inquiry lacked independence, nevertheless the report did not afford "the kind of exoneration and reinstatement" that Mr Buckland was entitled to. It added: "The University had been guilty of a fundamental breach of contract and in our view it needed something very clear to rectify that breach if indeed it were possible to do that."

The Tribunal found that Mr Buckland's resignation had constituted a dismissal but did not go on to decide whether that dismissal had been unfair.

The EAT's decision

The finding that the University had been in breach was upheld, but the EAT overturned the Tribunal's finding that the report had not cured the breach. There had been no constructive dismissal because the breach had been cured. They also held that the tribunal had erred in principle by adopting a subjective test in its decision.

Although the issues as to delay and fairness were rendered moot with the finding that the breach was cured, the EAT considered them nonetheless. They did not differ from the Tribunal on the finding of delay and the EAT concluded that, if they had found that constructive dismissal had occurred, they would have sent the matter back to the Tribunal to decide the question of fairness.

There was an appeal and a cross-appeal to the higher Court.

The Court of Appeal's decision

The Court identified the four issues in the appeal as follows:

1. What is the correct test where an employer commits a fundamental breach of contract – a conventional contract test or a "range of reasonable responses" test?
2. Can a party cure a repudiatory breach of contract?
3. If it can, was it cured in this case?
4. Does the issue of whether the constructive dismissal was fair need to be remitted to the Tribunal?

With regards to the first question, the Court began by noting that employment law is made up of both contract and status, a mixture of statute and common law. While constructive dismissal is defined by statute, details of what circumstances give rise to a dismissal is found in the common law.

The Court noted that the EAT spent some time considering the University's actions following its fundamental breach of contract. This was because of the recent considerable and inconsistent amount of authority. The Court quoted from a previous EAT case by stating "it is unhelpful to introduce into the concept of constructive dismissal a conceptual tool designed for an entirely different purpose". Whether or not a breach has occurred is an objective test, not a subjective one involving an assessment of reasonableness.

While the Court rejected the contention that the band of reasonable responses was the

correct test, it nevertheless insisted that reasonableness was “one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach”. It was to be seen as a useful tool, not a legal requirement.

The Court dealt with the second and third questions together. The Tribunal had found that, despite Mr Buckland’s “petulance” in relation to the inquiry, in a balanced and fair judgment the breach had not been cured because the slur on Mr Buckland’s integrity remained. The EAT had substituted its own view not because it thought the Tribunal’s view was perverse, but because it thought the Tribunal had erred in not using an objective test, but a subjective one based on Mr Buckland’s wounded feelings. The Court disagreed with this, noting that the Tribunal had been careful to say throughout its judgment that this was not merely how Mr Buckland felt, but how he was entitled to feel.

The law of contract has no doctrine which permits a repudiatory breach to be rectified by the defaulting party. Lord Justice Sedley had some sympathy with the idea of introducing such a doctrine, noting that where employment contracts are concerned, in the majority of cases the parties will want the relationship to survive. He stated that things may well be said or done in haste or anger that one party later regrets and wishes to retract, adding with a sense of poetry: “does the law in such cases ignore the olive branch?” However, he felt that introducing such a doctrine for all of contract law or even exclusively for employment contracts was neither desirable nor feasible and would be the equivalent opening a Pandora’s Box into the general law of contract.

Lord Justice Jacob was more robust in his judgment on this issue, stating that: “Once [a defaulting party] has committed a breach of contract so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party’s right to go”. He felt that the very existence of the rule that whether a contract continues is out of the defaulting party’s hands acted as a discouragement to committing a repudiatory breach.

With regards to the fourth and final question, the Court disposed of this swiftly. Lord Justice Sedley posed the question: whether the University behaved reasonably in undermining Mr Buckland’s status? The answer, the Court felt, was that the University could not intelligibly seek to justify something which it said it had not done. Lord Justice Jacob added that he could not see why the matter should be remitted since no more evidence was required on this point and the EAT could have decided the matter for itself. He warned that “ping pong” of cases served litigants badly by increasing time and costs, and remittance to a lower court should be a last resort.

Conclusion

The general consensus of the judges was that an anticipatory breach which, by definition has not yet occurred, can be cured up to the moment of acceptance and if it is withdrawn, it will effectively never occur. However, where a repudiatory breach has already taken place, it cannot be undone and what follows must remain in the hands of the innocent party.

However, this judgment was softened in two respects. Firstly, that although the choice is left to the innocent party, there is nothing to prevent a defaulting party from attempting to make amends and to persuade the innocent party to affirm the contract. Secondly, that an innocent party cannot ordinarily expect the contract to continue for very long after the breach without losing the option to terminate, especially where the defaulting party has offered to make amends. In this case, it was held that giving notice to leave at the end of the academic year was acceptable given Mr Buckland’s commitment to students, but such a long time between breach and resignation may not be acceptable in all cases.

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In addition, the facts occurred in 2006 when the statutory procedures were in place, requiring an employee to bring a grievance before bringing a claim. Now the statutory procedures have been abolished and replaced by the ACAS code which imposes no such pre-proceeding requirement. With no strict requirement to bring a grievance, this could affect how long an employee might delay for before affirming a repudiatory breach.

While the facts of this case may, at first glance, appear to be specific to the university sector, they still boil down to a situation of an employer seriously undermining a member of staff in front of his colleagues. This could occur in any industry – from the dressing down of a manager at a management meeting to the making of derogatory comments to a waiter in the middle of a restaurant. If serious enough, such actions would undermine the mutual trust and confidence between employer and employee and so be a repudiatory breach.

If you would like further information on this case or any of the issues raised in it, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.

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