# Kumbu v Primelife

UKEAT/0445/14/LA, (Transcript)

**EMPLOYMENT APPEAL TRIBUNAL**

**JUDGE EADY QC**

**13 JULY 2015**

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R Robison for the Appellant/Claimant

T Brown for the Respondent

Free Representation Unit; Spearing Waite LLP Solicitors

*SUMMARY*

*UNFAIR DISMISSAL – Dismissal/Ambiguous Resignation*

The Claimant's case before the ET had been one of direct dismissal for the purpose of s 95(1)(a) Employment Rights Act 1996, specifically whether the contract under which the Claimant was employed had been terminated by the Respondent's conduct in not rostering the Claimant for any work for the week commencing 4 November 2013. Having rejected the Respondent's case that the Claimant had accepted a bank contract, the ET nevertheless found that the Respondent's conduct, in not scheduling any shifts for the Claimant for the week commencing 4 November 2013, amounted to an exercise of its right to vary his working hours in accordance with local variation, as permitted under his employment contract.

It was, however, unclear whether the ET was thus finding that the Respondent was exercising an existing right to vary the Claimant's working hours or that it was thereby varying the Claimant's contract of employment; the ET's reasoning allowed for

both readings.

If it had found that the Respondent was exercising its right to vary the Claimant's working hours under an existing contractual right, it was unclear – in the light of the ET's other findings – how it found that to be the case given the wording of the clause in question.

If the ET had found the Respondent's conduct amounted to a variation of the Claimant's contract, the question was whether it brought that contract to an end and gave rise to a new contract (*Hogg v Dover College* [1990] ICR 39; *Alcan Extrusions v Yates* [1996] IRLR 327). Although the Claimant's case may not have been expressly labelled as giving rise to a *Hogg*/*Alcan* dismissal, he was clearly relying on the Respondent's conduct as having brought his existing contract to an end such as to give rise to a direct dismissal for s 95(1)(a) purposes. He was thus not raising a new argument on appeal but one that, in substance, he had sought to pursue before the ET. As the ET's reasoning did not properly provide an answer to that case, the appeal would be allowed and this point remitted to the same ET for reconsideration.

**JUDGE EADY QC:**

(reading the judgment of the tribunal)

*INTRODUCTION*

**[1]** I refer to the parties as the Claimant and the Respondent, as below. This is the Claimant's appeal against a Judgment of the Manchester Employment Tribunal (Employment Judge Sherratt sitting with members, on 22 and 23 July 2014; "the ET"), sent to the parties on 18 August 2014, dismissing the Claimant's claims of unfair dismissal, race discrimination and breach of contract in respect of notice pay. The appeal concerns only the unfair and wrongful dismissal claims. At all earlier stages, the Claimant appeared in person. Today he had the benefit of representation by Mr Robison, acting pro bono through the FRU. The Respondent was represented before the ET, albeit not by Mr Brown, counsel, who appears today.

**[2]** The Claimant's appeal was considered by HHJ Peter Clark, at a Preliminary Hearing on 10 March 2015, when it was permitted to proceed to a Full Hearing. The issue raised by the appeal can be stated shortly: did the ET err in law in concluding that the Claimant had not been dismissed for the purpose of s 95(1)(a) Employment Rights Act 1996 ("the ERA")?

*THE BACKGROUND FACTS*

**[3]** I take the factual background from HHJ Peter Clark's helpful summary:

> "3 . . . The Claimant was employed under the terms of a contract of employment, signed by him on 31 October 2007, which provided so far as is material:
>
> 'NORMAL HOURS

Your normal hours will be scheduled by your Manager and the company reserves the right to vary your hours in line with local variations should the needs of the business alter. Any additional hours worked will be paid at the normal hourly rate.'

The contract provided for remuneration by reference to an hourly rate.

4 Whitecliffe is a residential nursing home. The Claimant was a care assistant. It is necessarily a 24/7 operation requiring staff to be on duty at all times.

5 It seems that up until September 2013 the Claimant was able to agree a shift pattern with his then manager which accommodated his educational studies.

6 In September 2013 he was suspended whilst an allegation of misconduct against him was investigated. That seems to have come to nothing. On his return to work he found a new manager from a nearby care home was substituting for his old manager, who was unwell. The new manager took the view, in line with the Respondent's practice elsewhere, that a back-to-back shift system was required whereby permanent staff, such as the Claimant, worked alternate shifts; three days in week 1 and four days in week 2. It is relevant to note that gaps were filled by bank staff, to whom there was no guarantee of work and who were not obliged to work when asked to do so.

7 Rigid application of that shift pattern did not suit the Claimant. He was starting a new college course in September 2013 which required his attendance on a Wednesday: he worked as a volunteer in a charity shop on Tuesdays and wanted a further Friday or another day in the week to prepare for his college course. That pattern was inconsistent with the three-day/four-day pattern favoured by the new manager.

8 Following his return from suspension the Claimant worked on Monday 16, Friday 20 and Sunday 22 September 2013. Thereafter he worked a two-day/three-day shift pattern as opposed to the three-day/four-day pattern which the new manager desired. However, for the week commencing Monday 4 November he was not rostered to work at all. He contended that his non-rostering for that week amounted to an actual, rather than constructive (see section 95(1)(c) Employment Rights Act 1996) dismissal.

9 The tribunal rejected that contention (see paragraph 17). They concluded that in giving him no work for the week commencing 4 November, the Respondent was acting in accordance with the Hours of Work contractual term which I set out earlier. His hours had been varied in accordance with the needs of the business."

**[4]** The Respondent's case below was that there had been a meeting on 26 September 2013, when the Claimant agreed to go on to a bank contract, to work when convenient to both parties, rather than back-to-back shifts. The Claimant denied any such meeting or agreement; the ET accepted his account (para 13). The ET concluded that, on returning from suspension, the Claimant was allocated shifts under the terms of his original contract (para 14).

**[5]** The new back-to-back shift system having come into force, along with the Claimant's own wishes to be able to pursue other activities, the ET found there was a variation in the shift pattern allocated to him. It held that was consistent with the Respondent's right to vary the Claimant's working hours under the original contract and thereafter both parties acted in ways not necessarily inconsistent with the contract of employment having continued:

"16 The Claimant alleges that it was the conduct of the Respondent by not including him on the rota from 4 November 2013 that amounted to a dismissal of him from his employment with the company. There are matters post-dating this that are not necessarily consistent with the Respondent having terminated, or indeed with the Claimant accepting that his employment was terminated; there are emails in which he refers to working under a bank contract and having told the Respondent's management what days he was prepared or able to work.

17 Looking at the situation on 4 November when the Claimant says his employment came to an end we have considered the contractual terms that were outlined above, the ones that say his hours would be as indicated by management and could be varied in line with the needs of the business. We find that management were not giving the Claimant hours during the week of 4 November but were acting in accordance with his contract. They were varying his contract in accordance with the needs of the business and that as such they did not dismiss the Claimant."

*THE APPEAL*

**[6]** The point raised by the appeal (as identified by HHJ Peter Clark) is whether (given the ET's finding as to the meeting of 26 September 2013), by treating the Claimant as a bank employee – when assigning or not assigning shifts for the week commencing 4 November 2013 – the Respondent was unilaterally withdrawing the original permanent contract and substituting a wholly different contract, thus giving rise to a dismissal from the former for the purposes of s 95(1)(a) of the ERA, see *Hogg v Dover College* [1990] ICR 39 and *Alcan Extrusions v Yates and others* [1996] IRLR 327. The Respondent resists the appeal and contends this raises a new argument that was not taken before the ET.

*THE RELEVANT LEGAL PRINCIPLES*

**[7]** The starting point is s 95(1)(a) ERA, which, relevantly, provides as follows:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and . . . only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice)"

**[8]** It is common ground that an employer may reserve a right to vary a contractual term in the future provided that power is spelt out in clear language, see *Wandsworth LBC v D'Silva* [1998] IRLR 193 CA, *obiter* (in particular per Lord Woolf MR, at para 31).

**[9]** Where, however, an employer has, in truth, terminated one contract and replaced it by another, that gives rise to a dismissal, even if the employee has accepted – and is working to – the new contract, see *Hogg v Dover College* [1990] ICR 39 and *Alcan Extrusions v Yates and others* [1996] IRLR 327. *Alcan* involved the introduction by the employer of a new shift system, which it considered it could impose absent a collective agreement. The EAT held "25 . . . whether or not the action of an employer in imposing radically different terms has the effect of withdrawing and thus terminating the original contract must ultimately be a matter of fact and degree for the industrial tribunal to decide, provided always they ask themselves the correct question, namely, was the old contract being withdrawn or removed from the employee?"

**[10]** There is an issue here as to whether the case permitted to proceed to a Full Hearing was in fact the case put by the Claimant below. There is limited discretion to permit a new point of law to be argued on appeal, usually only to be exercised in exceptional circumstances; see the guidance laid down by HHJ McMullen QC in *SoS for Health v Rance* [2007] IRLR 665.

*SUBMISSIONS*

*The Claimant's Case*

**[11]** Mr Robison started by conceding that the appeal raised a new legal point but relied on the EAT's discretion to permit new points to be taken on appeal; see para 50(6) of *Rance*. Although it would be wrong to allow new points to be taken where those points raised new issues of fact, that was not this case. Here the issue was a pure question of law about the contract between the Respondent and the Claimant. The contract was before the ET and the contractual right to vary was considered in some detail. The fact the ET made a finding about the September meeting showed it was considering the evidence about the way in which the changes were made and was looking at the nature of the working arrangements (para 17).

**[12]** The facts necessary to the Claimant's argument were not new, albeit the specific legal argument was. It was unsurprising given the Claimant was acting in person below. This was not a case where the point was not taken because of some tactical decision (*Rance*, para 50(7)(c)). The exception allowed in *Rance* at para 50(6)(d) applied. That allowed that there might be cases where it would be a glaring injustice to refuse to allow an unrepresented party to rely on evidence which could have been adduced at the ET save that in this case the injustice related to a point of law that could have been advanced below. The Claimant also relied on *Rance* at para 50(6)(g), which allowed that the EAT might exceptionally allow a new point to be taken where there was sufficient public importance to allow the point to be determined without requiring further factual investigation or further evaluation by the EAT.

**[13]** On the material before the ET and the facts found, this case could be seen as an *Alcan* or *Hogg* dismissal. Here, the original contract was terminated because the Respondent clearly took the view the Claimant was working on a bank contract and treated him accordingly. Having found the Claimant had not been put on a bank contract, the ET proceeded on the basis he was working on his original contract. Whilst it found that the Respondent had a right to vary the Claimant's hours under that contract, the change made amounted to a change in the way the Respondent operated that contract to such an extent as to amount to an *Alcan* dismissal. Accepting, however, that the ET did not ask itself the right questions as to the changes to the contract and their effect, those matters would need to be remitted to the ET for reconsideration.

*The Respondent's Case*

**[14]** On behalf of the Respondent it was contended that the point identified by HHJ Peter Clark at the Preliminary Hearing was not in fact the Claimant's case as put below. In any event, the ET's findings provided a complete answer to the case as now put.

**[15]** Dealing with the substantive point first, the ET plainly had in mind that the Claimant was putting his case as one of actual, not merely a constructive dismissal (eg see paras 2 and 8). The ET further made findings of fact as to the relevant terms of the contract and how it had operated in the past (paras 9, 10 and 12). It had in mind that, in the period under consideration, the change in circumstances came not solely from the Respondent but also from the Claimant. Whilst rejecting the Respondent's primary case (consensual change to the nature of the contract; para 13) the ET went on to find (para 14) that the allocation of shifts then continued under the terms of the old contract. Paragraph 17 then set out the crucial finding: the Respondent was varying the Claimant's contract in accordance with its contractual right to do so. It was only possible to understand para 17 as engaging with the question whether there had been a direct dismissal under s 95(1)(a); the ET concluded there had not. It was asking itself the right questions in a *Hogg*/*Alcan* sense; were the Respondent's changes such as to amount, assessed objectively, to the ending of the old contract.

**[16]** The Claimant had relied on the Respondent's decision not to schedule him for any work in the week commencing 4 November 2013 and was saying that, in itself, amounted to a direct dismissal. The ET took that argument at face value and found there was no dismissal. What was being done was in accordance with the power to vary the Claimant's hours. It was not being said that the Claimant would not be offered hours for future weeks.

**[17]** To the extent that the Claimant criticised the ET for inadequately engaging with the *Hogg*/*Alcan* case, that was unfair because the point had not been taken below. It did not fall within one of the exceptional categories of cases allowed by *Rance*; there were no exceptional circumstances. The failure to raise this argument below was not because of any deception or unfair conduct by the Respondent. Moreover, there were inconsistencies in how the Claimant had run his case. Some of the facts apparently taken into account by HHJ Peter Clark (relating to a draft bank contract in October 2013) were not findings on the part of the ET.

**[18]** Ultimately it was a question of fact and degree in every case whether a change in contractual terms was sufficiently radical to

involve not merely a variation of the contract but its termination and replacement with a new contract. An analysis based on *Hogg* or *Alcan* thus required findings of fact by the ET, which were absent in this case because the point had not been taken below. This case fell squarely within the circumstances envisaged by *Rance* (para 50(7)(d)). What had been required was an evaluation and an assessment of the material and an application of the law to it by the specialist first instance ET.

**[19]** This had not obviously fallen to be considered as a *Hogg*/*Alcan* case. The Claimant had walked away, apparently considering he was dismissed and there was no continuing relationship. To the extent the ET was criticised for failing to make sufficient findings on the reasonableness of the right to vary working hours, that case had not been before it.

**[20]** Paragraph 17 of the reasoning was oddly-worded: a variation in the manner of performance which is consistent with a contractual right reserved to the employer did not amount to a variation of the contract but was an application of the contractual right. But the ET had not found what was done was so radically different to what had happened previously as to amount to a dismissal. That had to be the final answer to the case, however put.

**[21]** If the appeal was allowed, the matter should be remitted preferably to the same ET.

*The Claimant In Reply*

**[22]** Paragraphs 16 and 17 in the ET's reasoning made clear why the case should be remitted and not dismissed. It was unclear how deliberate the ET was being in its use of language. If talking of variation at para 17, the ET needed to assess whether that amounted to a *Hogg*/*Alcan* dismissal. Although it was accepted that the Claimant had not specifically labelled his case as a *Hogg*/*Alcan* dismissal before the ET, his claim had raised sufficient to mean that the ET should have engaged with those arguments more fully.

*DISCUSSION AND CONCLUSIONS*

**[23]** The first issue before me related to the way in which the case was put before the ET. In seeking to answer that question I bear in mind that the Claimant was representing himself below. I do not expect a litigant in person to adopt the language of lawyers or to label arguments by reference to particular case law. A failure by a litigant in person to specifically adopt the label of a *Hogg v Dover College* or *Alcan v Yates* dismissal does not mean to say that they have not put that case before the ET. In such circumstances the ET is concerned with the substance of the case before it, not simply the label.

**[24]** In this case the ET had clarified that the Claimant was not putting his case as one of constructive dismissal (see paras 2 and 8). In his ET1 he had put his case as follows "I had no letter dismissing me, but as I was not being given work, and when I asked for information as to why I was not being put on the rota, I was told that I had been put on 'bank' (which means that I could be called on if required, but had no definite work), I therefore concluded that I had been effectively dismissed from my full time job without notice . . .".

**[25]** The ET did not make a finding that the Claimant was told that he was being put "on bank"; indeed, it found that, on his return from suspension, the Claimant was not "on bank" but worked shifts allocated under his original contract. That contract, as the ET had expressly observed, included the right for the Respondent to vary the Claimant's hours "*in line with local variations should the needs of the business alter*" (see para 9 of the ET's reasoning, set out under the recitation of the facts above).

**[26]** The ET did, however, accept the Claimant's case that he was not scheduled to work during the week commencing 4 November 2013. The Claimant contended this amounted to a direct dismissal for the purposes of s 95(1)(a) ERA, albeit he did not expressly label that case by reference to the case of *Hogg v Dover College* or *Alcan v Yates*. Equally, however, he was not saying he had resigned in response to a breach of contract by the Respondent; it was not a constructive dismissal case. Regardless of the label, the ET had to assess – applying the definition at s 95(1)(a) ERA – whether the conduct of the Respondent, in terms of the failure to schedule the Claimant for work in the week commencing 4 November 2013, amounted to a direct dismissal. Regardless of the

precise terminology used (or not used) by the Claimant, it is hard to see why that was not a *Hogg*/*Alcan* case. As Mr Robison has argued, accepting that the legal case was not put by the Claimant in precisely those terms, all the relevant material was before the ET as part of the Claimant's case.

**[27]** Thus, putting the labels to one side, I am satisfied that the issue for the ET was whether the Respondent's conduct, in not scheduling the Claimant for work for the week commencing 4 November 2013, amounted to a termination of his existing contract of employment. The question raised by this appeal is whether it properly determined that case.

**[28]** The Respondent's submission is that it plainly did. Although the argument was not clearly made out before the ET, it came to a clear conclusion at para 17 that what the Respondent did, in not scheduling the Claimant for work that week, was in accordance with its contractual right under the existing contract.

**[29]** The difficulty as I see it with that submission is that the clarity of the ET's apparent conclusion in that regard is then undermined by its next sentence, in which it finds that the Respondent was "*varying his contract in accordance with the needs of the business*". As Mr Brown accepts (and I adopt his neutral terminology), that is an odd way of expressing the exercise of an existing contractual right. Of course, I have to accept that an ET's Judgment is not to be tested against the highest standards of legal draftmanship; it has often, and correctly, been said that such a Judgment may well contain infelicities, awkwardness of expression and apparent inconsistencies that derive from the pressures under which ETs operate. It is trite that a Judgment must be taken overall and viewed as a whole. Taking the ET's conclusion in that context, however, I find that yet further questions arise.

**[30]** Thus I note that, on the ET's finding, the new local arrangement that had been introduced by November 2013 saw non-bank employees working four days one week, three days the next (see para 15). What then was the local variation in line with which the non-rostering of the Claimant in the week commencing 4 November 2013 took place? It might be that the answer to that question is to be found simply in the difficulty in rostering the Claimant to work given his own other commitments and I further note there is no finding by the ET that what the Respondent proposed for that week was intended – let alone stated – to apply for future weeks. That said, the Claimant was relying on that conduct – the Respondent's failure to roster him for any shifts for the week commencing 4 November 2013 – as giving rise to a direct dismissal; the termination of the contract under which he was employed.

**[31]** If the ET was finding this was a variation to that contract, the question thus arises as to whether it was such as to amount to the termination of one contract and its replacement by another. If, instead, the ET found this was the exercise of a right to change working hours that already existed under the employment contract, how was it saying that right had been exercised given the wording of the contractual term in question? Either possibility might be allowed by para 17. In neither case is the answer to the Claimant's argument clear.

**[32]** Part of the difficulty for the ET may well have arisen from the fact the Claimant's case was not as clearly identified as it has perhaps been in the appeal proceedings. That said, however, I consider Mr Robison correct in his submission that the substance was before the ET even if the correct legal label was not used. I do not consider it right to characterise this as a wholly new point raised on the appeal. It was an argument that was in substance properly before the ET and the reasoning provided does not provide an adequate answer.

**[33]** That being so, I must allow the appeal. The question then arises as to the appropriate disposal. As both parties have correctly identified, the answer will be one for the ET and not the EAT. Having allowed further representations to be made on this question and having expressly considered the guidance laid down by the EAT in *Sinclair Roche & Temperley v Heard and fellows* [2004] IRLR 763, I consider it appropriate that this matter be remitted to the same ET, although, as both parties agree, it need not be the entire three-member panel but can be the Employment Judge sitting alone. I cannot see that there is any requirement of any further findings of fact or hearing of evidence. As my Judgment makes clear, what is needed is an answer to the Claimant's case on the basis of the findings of fact that have already been made. The ET might wish to receive and hear further submissions from the parties in the light of the Judgment I have given and there will be a transcript of that available in due course.

*Appeal allowed.*