

Constructive Dismissal: Unilateral imposition of a pay cut can never be reasonable and proper

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The facts

Mr Mostyn was a sales executive, employed by S and P Casuals Ltd. His sales figures fell over a four year period, and his employer asked him to accept a salary cut from £45,000 to £25,000. Mr Mostyn wrote to S and P Casuals, alleging that it was trying to remove him from the business by the cheapest means possible and asserting that its actions were so severe and underhand as to allow him to treat his contract as having been breached. The employer treated his letter as a grievance, which it rejected, and told him (curtly) that it would go ahead with the reduction in salary. Mr Mostyn resigned with immediate effect. He brought several claims against S and P Casuals, including a constructive dismissal claim.

The tribunal held that, in order for the implied term of trust and confidence to be breached, the employer's action had to be i) when objectively viewed, calculated or likely to destroy or seriously damage the trust and confidence between employer and employee, and ii) carried out without reasonable or proper cause. Both tests i) and ii) need to be met. The tribunal found that Mr Mostyn had resigned because he had been told that his salary was going to be changed, and the change was going to be imposed on him. This action of his employer in doing so met test i). However, the tribunal went on to look at test ii), considering the context for the action. It concluded that S and P Casuals Ltd had reasonable and proper cause for taking the action it did because there had been dwindling sales figures for some time and it believed that the employee was not taking any steps to improve his sales performance and had not put forward any alternative proposals. As test ii) was not met, the tribunal concluded that Mr Mostyn had not proved that there had been any breach of the implied term of trust and confidence, that he had therefore not shown that there had been any breach of a fundamental term of his contract, and as a result he could not prove that there had been a constructive dismissal.

The tribunal also held that, even if there had been a dismissal, it would have found that the dismissal was fair because it was related to Mr Mostyn's capability and would therefore have been within the range of reasonable actions open to the employer.

Mr Mostyn appealed successfully. He argued that the imposition of a salary cut was both a breach of an express contractual term and of the implied term of trust and confidence. He said that the tribunal should not have asked whether S and P Casuals had reasonable and proper cause for imposing the salary change because there had been a repudiatory breach of an express term in relation to salary.

The EAT held that the tribunal should not have considered whether S and P Casuals had reasonable and proper cause to impose a salary cut. The judge said that there would be a "real danger" if tribunals embark on an enquiry about reasonable and proper cause, and quoted a case in which the Court of Appeal considered reasonableness in the context of constructive dismissal and had said "Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due...to a major customer defaulting on payment, not paying the staff's wages is arguably the most, if indeed the only, response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law...". The question of whether there has been a repudiation does not depend on whether the employer had acted reasonably. The judge said that the danger in the tribunal's approach was particularly acute where the conduct was not only a breach of an implied term, but of an express term: where this is the case, no question of reasonableness can arise.

Importantly, the EAT held that no employer could have a reasonable and proper cause for repudiating the contract or for breaching the implied term where that breach consisted of the unilateral imposition of a significant pay cut on an employee.

The tribunal had therefore wrongly concluded that the contract had not been repudiated, and Mr Mostyn had therefore been wrongfully and constructively dismissed.

The EAT also found that the tribunal had erred in finding that Mr Mostyn's dismissal was not unfair. It had been influenced by the question of whether the employer had reasonable and proper cause for repudiating the contract. It had also failed to ask whether the employer had acted reasonably in treating Mr Mostyn's culpability as a sufficient reason for his dismissal. The reasonable and proper cause test is used for addressing what the employer had done in repudiating the contract, whereas the reasonableness test was addressing the totally different questions of whether the employer had acted reasonably in treating the employee's capability as a sufficient reason for his dismissal.

The case was remitted to a different tribunal.

What does this mean for employers?

Employers should note that unilaterally changing terms of contract will be a repudiatory breach if the breach of terms is sufficiently serious, even where it may be fair to change the terms. Significant unilateral changes to base salary will always be a repudiatory breach of contract.

[Mostyn v S and P Casuals Ltd UKEAT/0158/17](#)

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