Acceptance of repudiation and employment contracts
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This paper addresses the vexed question of whether, as a matter of contract law, in order to accept the employer's repudiation of the contract of employment, the employee must immediately leave his employment or may also do so by giving notice and working out the notice period.

There is no doubt that, for the purposes of statutory unfair dismissal, the employee may select either mode of acceptance. The Employment Rights Act 1996 makes specific provision to that effect in s. 95 (1) (c). The question is whether the same principle applies in contractual claims.

In cases where the period of notice to be given by the employee and the employer under the contract is the same and the employee works out his notice after his acceptance of the employer's repudiation, the issue may be academic. In such a case, the employee will usually have suffered no compensatable loss in contract because he will have been paid by the employer during the notice period. However, many employment contracts and, in particular, many modern executive service contracts include clauses providing that the period of notice to be given by employer is longer than that to be given by the employee. In such a case, is the employee who gives notice in response to the employer's alleged breach entitled to claim for the loss of salary and benefits which would have been payable during the employer's notice period? There are many other situations where the issue may be far from academic. For example, some executive contracts contain liquidated damages clauses fixing compensation for the employer's breach at a level which exceeds the remuneration payable during the period of notice to be given by the employee. Others distinguish the bonus entitlement arising during the notice period by reference to whether it is the employee or the employer who gave notice. In these types of cases, the question whether the employee has forfeited the right to damages by giving notice can be crucial. It is also often one of major practical importance since the the employee may occupy such a senior position of responsibility that leaving instantly is simply not feasible. For example, his presence may be crucial to the signing or the fulfilment of a contract.

The question must be addressed both against the general principles of acceptance of repudiation and discharge by breach and in the particular context of employment contracts. Let us begin with a succinct statement of the general principles.

An innocent party faced by a repudiatory breach has the right to elect to accept the repudiation as terminating the contract and bringing to an end the parties' further performance obligations or to affirm the contract and continue with performance.

Acceptance of repudiation is final. The effect is to terminate the contract for the future, excusing the parties from further performance. There is substituted by implication of law for the primary obligations of the guilty party which remain unperformed a secondary obligation on his part to pay damages for the loss sustained by the innocent party in consequence of their non-performance in the future. The unperformed future primary obligations of the party accepting the breach are discharged. Unless and until a repudiation is accepted, the contract continues in existence.

The effect of affirmation is that the *status quo ante* is preserved intact and the contract remains alive for the future for both sides. The innocent party remains subject to all his own obligations and liabilities under it. The wrongdoer is entitled to complete the contract and take advantage of any supervening circumstance which would excuse him from or diminish his liability for his breach.

An act of affirmation may be express or implied. It will be implied if the innocent party having knowledge of the breach and of his right to elect, does something unequivocal which shows that he intends to go on with the contract regardless of the breach or from which it may be inferred that he will not exercise his right to treat the contract as repudiated.

It is traditional for lawyers to say two things in reference to the above principles; first, that acceptance of repudiation or affirmation is the only choice; second, that there is no middle ground. Whilst the former proposition is immutable, the latter requires some care. It is certainly accurate to state that the innocent party cannot at one and the same time affirm the contract but absolve himself from tendering further performance unless and until the party in breach is once again willing to perform. That would negate the contract being kept alive for the benefit of both parties. However, some care is needed before advancing the opposite proposition, namely that the innocent party cannot, at one and the same time, accept the repudiation and tender some further performance before termination takes effect. That, of course, is the scenario envisaged by the question.

We must straightaway distinguish that scenario from the other so called middle ground where the innocent party has not made up his mind what to do and continues with performance and where such continued performance and delay in accepting repudiation may itself be treated as affirmatory conduct (the so called "delayed resignation" case). The scenario in our

question is not one where the innocent party has delayed in making up his mind; he has notified termination as a result of the guilty party's breach. Uncertainty arises, however, because instead of immediately ceasing performance, the innocent party effects termination by use of the notice procedure in the contract (an agreed mechanism for consensual termination) and works out notice.

Is the innocent party's continued performance of the contract's terms pending the termination date so inconsistent with his notification of termination as to amount to affirmation? There is old authority to that effect. In Johnstone-v-Milling [1886] 16 QBD 460, a case concerning a lease, Lord Esher stated (at 467) the general principle as being that the innocent party "cannot however proceed with the contract on the footing that it still exists for other purposes and also treat such renunciation as an immediate breach". That suggests that the innocent party's very use of the notice procedure provided for in the contract as an agreed mechanism for consensual termination is in itself inconsistent with an acceptance of repudiation. That was indeed said to be so in Electro Hydraulic Technology Ltd-v-Husco International, Inc. (Unrep. CA 28 July 2000) a case concerning a technology licence, where, in the judgment of Potter L.J. (with which Mance and Kennedy L.J.J. agreed), the adoption of the contractual termination machinery in order to bring the contract to an end was treated as affirmatory.

The opposite view is that there should be no prejudice to the innocent party's rights if he performs the contract for the notice period because the repudiation has already been accepted by the giving of notice. Should the fact of his giving of notice and the fact that his continued working is only temporary be regarded as clearly inconsistent with the contract remaining in being for the future for both sides and with any intention on the innocent party's part to go on with contract regardless of breach?

In the particular context of employment contracts, Lord Denning M.R. stated in a famous and oft quoted passage that an employee can accept a repudiation by the employer by giving notice of termination rather than leaving immediately, see Western Excavating (E.C.C.) Ltd v. Sharp [1978] 1 Q.B. 761. The famous passage is at 769:

> "If the employer is guilty of a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

Although not part of the ratio of the case, some practitioners tend to regard that as a definitive answer to our question both as regards statutory and common law constructive dismissal. The statement is not, however, free of doubt in the contract context for at least three reasons.

First, the phrase in the last sentence of this passage: "if he continues for any length of time without leaving" seems to suggest that it is only where the notice period before the employee leaves is short that the facts of the giving of, and working out of, notice will be interpreted as an acceptance of repudiation. This seems surprising. If acceptance of repudiation by the giving of notice is permissible, why should the length of the period of notice matter? Even if the employee carries on working for months rather than days, so long as both sides are under no illusion that the *status quo ante* is no longer intact and that the contract remains alive only temporarily, the giving of notice surely ought to be treated as an acceptance of repudiation.

Second, and perhaps more fundamentally, Western Excavating was a case about the statutory remedy of unfair constructive dismissal rather than repudiatory breach of contract at common law. There is uncertainty on the face of the judgment as to whether Lord Denning's description of acceptance of repudiation in the employment context encompassing a termination by notice was intended by him to be limited to the particular statutory context of the case or to be a general statement of the law relating to employment contracts.

The point for the court's determination in Western Excavating was whether the general contract principle of "discharge by breach" ought to be applied to a complaint of constructive dismissal under s. 5 (2) (c) TULRA 1974, a statutory provision which expressly referred to the giving of notice by an employee being consistent with there having been a constructive dismissal. The Court of Appeal held in Western Excavating that the principle of "discharge by breach" under the general contract test should also apply to statutory dismissals under s. 5 (2) (c) TULRA 1974.

There is no doubt that Lord Denning was setting out the contract test. The quoted passage from the judgment falls under the judge's heading: "The contract test". The issue is whether he was setting it out generally or only as it would be applied to interpreting the particular statute. Some support for it being a general statement may be found from the fact that the quoted passage is prefaced by these words: "On the one hand, it is said that the words of paragraph 5 (2) (c) express a legal concept that is already well settled in the books of contract under the rubric "discharge by breach".

The history behind the Western Excavating judgment lends further support to that view. There is historical evidence that Lord Denning intended to recognise for contractual as well as statutory purposes that an employee who gave notice and said he was leaving at the end of the notice was accepting an employer's repudiation rather than affirming the contract on its

terms. Prior to s. 5 (2) (c) TULRA 1974, the statutory definition of constructive dismissal was set out in s.3 (1) (c) Redundancy Payments Act 1965. Section 3 (1) defined "dismissal" as occurring where the employer terminated the contract with or without notice (3 (1) (a)) but as occurring where the employee terminated the contract in response to the employer's conduct only where the employee had terminated without notice. The old section is referred to in Western Excavating at 225 B-C.

The omission from the definition of dismissal in the 1965 Act of a termination by the employee giving notice in response to the employer's conduct could cause injustice. Lord Denning was well aware of this, having remedied the omission in a previous case by applying a judicial interpretation to the Act which extended the concept of termination by the employer in s. 3 (1) (a) to include dismissals where the employee had given notice in response to the employer's conduct. That case was: Marriott-v-Oxford & District Cooperative Society Ltd (No.2) [1970] 1 QB 186.

Marriott, an employee faced with a unilateral demotion and reduction in wages, had protested but worked on before subsequently giving notice (see 187) and then leaving to take up other employment. He had no claim for dismissal under s. 3 (1) (c) because he had not terminated the contract without notice. In order to do justice and uphold his claim, the Court of Appeal treated it as falling within the notion of dismissal in s.3 (1) (a) by reason of the employer terminating. Lord Denning frankly admitted this judicial activism in Western Excavating itself at 227.

Professors Davies and Freedland explained this history of the definition of "constructive dismissal" in the legislation in Labour Law (2nd ed, 1984) at p.448. In doing so, they described what they called the "no notice trap" in the 1965 Act which employees would fall into by giving due notice "in order as they fondly thought, to put themselves in the right". Lord Denning overcame this legislative trap in Marriott by judicial means.

Lord Denning's approach in Marriott was consistent with both commonsense and other legal principle. The 1965 Act did lay a trap for the unwary. Compensation for unfair dismissal was removed from employees who had to work out notice because they did not have the means of providing for themselves and their families whilst looking for new employment. Many practising lawyers fail adequately to grasp the concept of acceptance of repudiation and discharge by breach, so why should employees be expected to? To treat their giving of notice as affirmatory and a waiver of the employer's breach would be inconsistent with the general principle that a waiver must be an intentional act of someone with knowledge of his rights, see Peyman-v-Lanjani [1985] Ch. 457, CA, particularly 482-487 per Stephenson L.J. This theme found some expression in Marriott in Winn L.J.'s statement at 193G of the desirability of a

simple approach in employment cases avoiding academic discussion as to the operation in the law of contract of repudiations and acceptances.

Subsequently, in W.E. Cox Toner Ltd-v- Crook [1981] ICR 823 (a delayed resignation case) Browne-Wilkinson J. stated that the general principles of contract law applicable to repudiation were subject to such modification as appropriate to take account of the factors which distinguish employment contracts of employment from other contracts (828). He referred to Lord Denning's remarks in Western Excavating and how they reflected the earlier decision of the CA in Marriott. He interpreted Western as establishing that "provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time even if his purpose is merely to enable him to find another job" (829 F-G).

That case surely lends support to the view that giving notice can amount to an acceptance of repudiation. Why should an employee who has delayed his resignation for a limited period be in a more favourable position contract-wise than one who resigns early but by notice?

But a third reason to doubt the authority of Lord Denning's statement in Western Excavating, in the context of contract, is that there have been subsequent conflicting statements by other judges in employment cases. Perhaps the most renowned is the dicta of Sir Denys Buckley in Norwest Holst –v-Harrison [1985] ICR 668 at 683 which supports the opposite approach, that is the strict application of the pure contract principles.

Norwest Holst was a statutory unfair constructive dismissal case where the employer was found to have been in anticipatory repudiatory breach by indicating an intention to withdraw the employee's directorship in two weeks or so in the future. It was held on the facts that the employee had not accepted that repudiation when he wrote a letter headed "without prejudice" stating that he was treating the statement of the employer's intention as a determination of his employment taking effect from the date when the directorship was withdrawn, that he would be entitled to damages but was open to discussing an amicable resolution. In his judgment as the third member of the Court of Appeal, Sir Denys Buckley (agreeing with the judgments of Cumming-Bruce and Neill L.J.J. and only wishing to add brief observations of his own) referred to the respects in which the contents of the without prejudice letter could not be said to amount to unequivocal acceptance but added as another ground the following observation (at 683):

> "The effect of an acceptance of an anticipatory repudiation must, in my view, be the immediate termination of the contract. By accepting repudiation, the innocent party elects to treat the contract as abrogated at the moment when he exercises his election. He cannot in my judgment affirm the contract for a limited time down to some future date and treat it as abrogated only from that future date"

That observation appears to rule out the acceptance of repudiation by giving notice and to require an employee to walk out. Sir Denys Buckley was the only judge to rely on this other ground. Interestingly, Western Excavating had been referred to in Cumming-Bruce L.J.'s judgment (at 675) and Marriott had been referred to in argument and in the judgment of the EAT below (see 676). This must suggest that Sir Denys Buckley did not regard the passage from Lord Denning's judgment as a definitive statement of the law of contract as applied to employment contracts. Sir Denys Buckley's dicta was later applied by Tomlinson J. obiter, in Walkinshaw-v-Diniz (2001) 1 Lloyd's Rep 632 at 643.

Where does all this leave us? The only conclusion is that the question remains undecided. It would be a brave practitioner who advised an employee faced with a repudiation by the employer to give notice as his mode of acceptance.

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