[2003–04 Gib LR 132]

ATTORNEY-GENERAL v. RASSA

COURT OF APPEAL (Glidewell, P., Neill and Stuart-Smith, JJ.A.): May 21st, 2003

Employment—dismissal—constructive dismissal—Industrial Tribunal no jurisdiction to hear constructive dismissal claim—constructive dismissal not within definition of "dismissal" in Employment Ordinance, s.64

Employment—dismissal—repudiatory conduct—employment not automatically ended by repudiatory conduct of employer—employee may choose to accept repudiatory conduct and terminate contract himself, or continue with employment

The respondent brought a claim in the Industrial Tribunal that he had been unfairly dismissed by his employers.

The respondent was employed as a Consultant Radiologist by the Gibraltar Health Authority (G.H.A.). His relationship with his colleagues and the Clinical Director had clearly been extremely antagonistic, and following complaints that he had received a lack of support from his employer, he wrote to the G.H.A. on October 11th, 2000, in terms which, for the sake of this appeal, the court considered brought an end to his employment (although it was in fact expressed in conditional terms). On October 13th, 2000, the G.H.A. wrote to the respondent, officially dismissing him and giving reasons for this dismissal. The respondent

brought a claim that (a) he had been "constructively dismissed" on October 11th, 2000, by reason that his employer had given him no reasonable option other than to terminate his employment; or (b) in any event, he was unfairly dismissed on October 13th, 2000. The appellant submitted that constructive dismissal claims did not fall within the definition of "dismissal" in s.64 of the Employment Ordinance and therefore the Tribunal did not have jurisdiction to hear a complaint based on constructive dismissal. The Tribunal disagreed and found that constructive dismissal did fall within the meaning of "dismissal" as defined by s.64 of the Employment Ordinance. The appellant appealed to the Supreme Court, but his appeal was dismissed.

On further appeal, the appellant submitted that (a) the respondent's contract of employment had not been terminated by the employer on October 11th, 2000, as the letter of that date was an acceptance by the respondent of the alleged repudiatory conduct by his employer, and as this alleged repudiatory conduct did not bring the contract automatically to an end, it was the respondent who had terminated it; and (b) constructive dismissal did not fall within the statutory definition of "dismissal" in the Employment Ordinance, and so it was not within the jurisdiction of the Industrial Tribunal to hear the complaint on this ground.

The respondent submitted in reply that the actions of his employer meant that he had had no option but to tender his notice, and so it was his employer who had terminated the contract; he was therefore effectively dismissed as of October 11th, 2000, and this "dismissal" fell within the definition in the Employment Ordinance, so as to confer jurisdiction on the Industrial Tribunal.

Held, allowing the appeal:

(1) The Industrial Tribunal had no jurisdiction to hear the respondent's claim, as constructive dismissal did not fall within the definition of "dismissal" in s.64 of the Employment Ordinance (para. 49).

(2) The Tribunal did not have jurisdiction on the alternative ground that the contract had been "terminated by the employer," under s.64(2)(a), as the respondent's contract of employment had not been terminated by the employer on October 11th, 2000. The letter from the respondent was an acceptance of alleged repudiatory conduct by his employer and this alleged repudiatory conduct did not automatically bring the contract to an end. In law, the respondent had a choice either to accept the repudiatory conduct and thus himself terminate the contract or continue with his employment, albeit under protest. In fact, he chose to and did (this having been assumed for the purpose of this appeal) accept the alleged repudiatory conduct and terminate the contract. It could not be said therefore that the contract was "terminated by the employer" under s.64(2)(a), as it was the respondent, not the employer who actually terminated the contract (paras. 42–48).

Cases cited:
(1) *Gunton* v. *Richmond-upon-Thames L.B.C.*, [1981] 1 Ch. 448; [1980] I.R.L.R. 32; [1980] I.C.R. 755, followed.
(2) *Heyman* v. *Darwins Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337, followed.
(3) *Maher* v. *Fram Gerrard Ltd.*, [1974] 1 All E.R. 449; [1974] I.C.R. 31, considered.
(4) *Marriott* v. *Oxford & District Co-op. Socy. Ltd. (No. 2)*, [1970] 1 Q.B. 186, considered.
(5) *Rigby* v. *Ferodo Ltd.*, [1988] I.C.R. 29; [1987] I.R.L.R. 516, followed.
(6) *Sheet Metal Components Ltd.* v. *Plumridge*, [1974] I.C.R. 373, considered.
(7) *Shields Furniture Ltd.* v. *Goff*, [1973] I.C.R. 187, considered.
(8) *Sutcliffe* v. *Hawker Siddeley Aviation Ltd.*, [1973] I.C.R. 560; [1973] I.R.L.R. 304, not followed.
(9) *Western Excavating (E.C.C.) Ltd.* v. *Sharp*, [1978] Q.B. 761; [1978] 1 All E.R. 713, considered.

Legislation construed:
Employment Ordinance (1984 Edition), s.59(1): The relevant terms of this sub-section are set out at para. 17.
s.64: The relevant terms of this section are set out at para. 19.
s.65: The relevant terms of this section are set out at para. 18.

Industrial Relations Act 1971, s.3: The relevant terms of this section are set out at para. 28.
s.23: The relevant terms of this section are set out at para. 33.

Redundancy Payments Act 1965, s.3: The relevant terms of this section are set out at para. 28.

Trade Union and Labour Relations Act 1974, s.23(2)(c): The relevant terms of this paragraph are set out at para. 35.

L.E.C. Baglietto for the appellant;
N. Cruz for the respondent.

1 **NEILL, J.A.:**

Introduction

This appeal raises a question as to the construction of s.64(2)(a) of the Employment Ordinance. It will be necessary, however, also to set out and consider some of the facts relating to the claim by Dr. Manoucher Rassa (the respondent).

2 Dr. Rassa was employed as a Consultant Radiologist at St. Bernard's Hospital. His employment began on March 31st, 1999. Quite soon,

however, difficulties arose between Dr. Rassa and the Gibraltar Health Authority.

3 On October 11th, 2000, Dr. Rassa wrote to Mr. Ernest Lima, the Chief Executive of the Gibraltar Health Authority. His letter was in these terms:

> "Following your recent correspondence of October 2nd and 3rd and my telephone conversation on October 10th, in which you informed me that the Minister is not willing to discuss the issues that I have raised and these must be dealt with by the G.H.A. and the management board, I therefore inform you I shall not be able to perform my duties which need the highest degree of concentration and peace of mind, unless—
>
> (1) the threat of dismissal is publicly removed immediately;
>
> (2) the expenses for study leave that I had to pay long ago, when I submitted my application form in April 2000 and G.H.A. failed to respond to my request for provision of the locum cover;
>
> (3) extra-sessional payment for the reports on the X-rays which were taken on the month of September if you so wish, if not the hospital doctors and G.P.s must be informed of the reason for not providing reports for those X-rays; and
>
> (4) finally and above all, you must recognize and inform me in writing that the Clinical Director has no managerial role on the other consultants and I refer you to my letter of September 6th, 2000."

4 On October 13th, 2000, Ms. Grant replied on behalf of the Government of Gibraltar. She wrote:

> "I write further to your letter of October 11th, 2000, addressed to the Chief Executive of the Health Authority and to the public statements that you have recently made to the G.B.C.
>
> In your letter of October 11th, you indicate that you are absenting yourself from work at St. Bernard's Hospital and will continue to do so until the demands made in your letter are met.
>
> Quite apart from the fact that no threat of dismissal against you has previously been made other than in the form of warnings of the consequences of repeated instances of earlier misconduct on your part, the demands made in your letter are unreasonable and unjustified. Moreover, you are not entitled to abandon your work as you have done, based on those demands.
>
> This constitutes a serious neglect and abandonment of your duties, which neither the Authority nor the Government, as on previous occasions concerning you, can tolerate.

> The Government also notes your demand No.4 where you indicate that (contrary to the terms of your contract) you are not prepared to accept the Medical Director's managerial authority over the other consultants, including yourself.
>
> The statements that you have made to the G.B.C. also constitute serious misconduct and a flagrant breach of your contractual duties not to broadcast or disclose information without authority, which authority has never been sought or obtained.
>
> It is particularly regrettable that you have disclosed information on television, including X-rays concerning a patient, without the permission or prior knowledge of the Authority or that patient. You have also publicly disclosed internal correspondence in breach of contract.
>
> In addition, you have made very serious, unsubstantiated allegations in public against colleagues. In doing so, you have wrongfully, and in breach of contract, sought to undermine public confidence in the Authority and its professional staff.
>
> This sort of behaviour is totally unacceptable, whatever may be the merits of the criticism you have seen fit to make (which, if properly made, will be duly investigated).
>
> In view of your neglect and refusal to perform your contract on the agreed terms and in view of the repeated serious misconduct and/or breaches of contract on your part, the Government, pursuant to Clause 6 of your contract, hereby forthwith terminates your contract.
>
> In the circumstances, you may from now on only enter G.H.A. premises with the Chief Executive's authorization or that of his substitute. Should you wish to collect any personal belongings, you may contact the Chief Executive or his substitute to make arrangements for you to collect your belongings at a mutually convenient date and time.
>
> The Government notes with regret that your latest actions are the latest in a history of serious breaches of contract on your part in respect of which repeated warnings were given to you, both verbally and in writing."

The application to the Industrial Tribunal

5 On January 5th, 2001, Dr. Rassa issued an originating application to the Industrial Tribunal claiming unfair dismissal. In attachment "A" to the originating application, Dr. Rassa set out the grounds on which he claimed that the dismissal was unfair. He claimed in the first instance that he had been "constructively dismissed on or about October 11th, 2000." In the

alternative, he claimed that he "was dismissed unfairly on October 13th, by letter." In attachment "B" to the originating application, Dr. Rassa sets out what in his opinion was the principal reason for his dismissal.

6 In attachment "A," Dr. Rassa explained his claim for constructive dismissal as follows. He said that he had been constructively dismissed when his employer "refused or otherwise failed to address important issues relating to matters of public interest and health and directly and/or indirectly related to his employment which had been brought to their attention on numerous occasions." Dr. Rassa then set out a number of examples of the matters to which he had drawn attention:

> "(A) The treatment of patients by certain consultants.
>
> (B) The carrying out of private work by certain consultants in breach of their employment and consequently of the code on private practice, to the detriment of the complainant's ability to carry out private practice in accordance with the terms of his employment.
>
> (C) A sustained and continuous attack by certain consultants on the management of patients' treatment by the complainant by way of spurious unfounded allegations and innuendo.
>
> (D) A sustained and continuous campaign of criticism by certain consultants on administrative matters aimed to bringing into question the professional integrity of the complainant and his ability to properly perform his employment as Consultant Radiologist.
>
> (E) The failure of the employer, its servants or agents to give the necessary support to the complainant to enable the complainant to properly perform his employment as Consultant Radiologist including (but not exclusively) lack of locum cover for periods of study leave and vacation."

7 In further support of his claim for constructive dismissal, Dr. Rassa complained that he had been constructively dismissed as a result of the breach of the implied term of trust and confidence that existed between him and his employer. He said that this implied term had been breached (a) by the employer by "not facilitating the carrying out of private practice by the complainant in an honest and sensible way in accordance with the needs of private and National Health Service patients," and (b) by introducing the "Principles of Private Practice."

8 In paras. 3–6 of attachment "A," Dr. Rassa set out his alternative claim that he had been dismissed unfairly on October 13th, 2000 by letter. He said that he had been dismissed "for reasons which cannot be properly or justifiably substantiated as the complainant's actions did not constitute misconduct and/or breach of his contract and were at all times in the public health and interest of the people of Gibraltar." Attachment "A" continued:

"(4) Further and/or alternatively [if] (which is not accepted) the complainant's actions did constitute a breach of his contract, the circumstances in which that breach was committed were such that it did not constitute serious misconduct or any reason that would have justified a dismissal.

(5) Further and/or alternatively, the dismissal of the complainant was unfair as the reasons given by the employer were in direct contravention of the complainant's constitutional rights, including the right to [protection of] Freedom of Expression as enshrined in s.10 of the Gibraltar Constitution Order 1969, and the common law of England and Wales, directly applicable to Gibraltar, related directly and indirectly to the right to Freedom of Expression and Public Interest Disclosure.

(6) Further, if (which is not accepted) the complainant's actions did constitute a breach of contract, the employer failed to warn the complainant clearly, properly or at all of the consequences of his action and moreover the employer failed to employ any fair procedures in dismissing the complainant."

9 In attachment "B" to the originating application, Dr. Rassa set out what in his opinion was the principal reason for his dismissal. He said that in the spring of 1999, there was a hostile reaction by certain consultants to his willingness to make radiology services available to general practitioners, because the effect of this arrangement was unintentionally to deprive certain consultants of income earned by them "from unauthorized private practice." He added that this reaction translated into a campaign to discredit him. He complained that his employer had failed to take steps to resolve matters and by its inaction acquiesced in the consultants' behaviour, and that when he took steps "to encourage the employer to act" he was dismissed unfairly.

10 The notice of appearance was dated February 2nd, 2001. This document was later amended in July 2001 to substitute the Attorney-General for Gibraltar as the correct respondent to the application.

11 I have set out the words used in the originating application at some length so as to make clear the scope of Dr. Rassa's contentions, both in relation to his claim for constructive dismissal and his complaint that the dismissal by the letter of October 13th, 2000 was unfair. It is not necessary, however, to refer to the notice of appearance in as much detail.

The notice of appearance

12 In summary, the notice of appearance included the following contentions:

(1) There was no breach of contract, repudiatory or otherwise, by the employer and no breach of any implied term of trust and confidence.

(2) Dr. Rassa was not dismissed on October 11th, 2000.

(3) If, in fact, Dr. Rassa resigned or terminated his contract of employment on or about October 11th, 2000, this was not in response to any repudiatory breach by his employer.

(4) Dr. Rassa's dismissal was fair in that his employer was entitled to treat his misconduct as a sufficient reason for dismissing him based on the reports and recommendations made by the G.H.A. The particular acts of misconduct relied on were then set out in a number of paragraphs. They included absence from work, repeated defiance of the managerial authority of the Medical Director at St. Bernard's, making serious allegations against professional colleagues and giving an unauthorized interview on Gibraltar television.

Reference was also made to the repeated warnings that had been given to Dr. Rassa about his misconduct.

13 It will be seen from this recital of the mutual recriminations between Dr. Rassa and his employer that, throughout his period of employment from March 1999 to October 2000, the relations between Dr. Rassa and his colleagues, including in particular the Medical Director, were increasingly antagonistic. Finally, in October 2000, Dr. Rassa's contract of employment was terminated.

14 Dr. Rassa's primary claim is that he was the victim of a campaign by his colleagues to discredit him and of the failure of his employer to protect him. He was therefore forced to write the letter of October 11th, in circumstances in which his employer had constructively dismissed him. The employer on the other hand, from a different standpoint, contends that Dr. Rassa was guilty of serious misconduct that merited his dismissal.

15 In these circumstances, it might have been thought that the claim by Dr. Rassa that he had been unfairly dismissed, could have been adequately investigated on the basis of a submission that he was dismissed unfairly by the letter of October 13th. If the matter had proceeded on this basis, the hearing before the Industrial Tribunal could have taken place much earlier and the costs of the proceedings on jurisdiction would have been avoided. It appears, however, that the parties were unable to agree that all the matters that Dr. Rassa wished to raise on his complaint that he had been constructively dismissed would have been relevant to his alternative claim, based on the letter of October 13th, 2000. But I am glad to say that in this court it has now been accepted by counsel on behalf of the employer that, even if the claim based on constructive dismissal is not proceeded with, Dr. Rassa will be

entitled to refer in his evidence to any of the matters that were a source of friction between him and his employer or were the subject of warnings about his alleged misconduct. This will include any problems associated with the private practice carried on by Dr. Rassa.

16 Nevertheless, in view of the course that these proceedings have taken, it is necessary for this court to consider and come to a conclusion on the point of law that has been the subject of the decisions in the Industrial Tribunal and the Supreme Court.

The legislation

17 Section 59(1) of the Employment Ordinance provides that in every employment to which it applies "every employee shall have the right not to be dismissed unfairly." It is common ground that this section and the other relevant sections of the Employment Ordinance apply to the contract under which Dr. Rassa was employed.

18 Section 65 of the Employment Ordinance provides that in determining for the purposes of s.59 whether the dismissal of an employee was fair or unfair, it is for the employer to show the reason or principal reason for dismissal and that the reason was one falling within s.65(2) or some other substantial reason of a kind "such as to justify the dismissal of an employee holding the position which that employee held."

19 Section 64 of the Employment Ordinance is an interpretation section and contains a definition of "dismiss" and "dismissal." Section 64 was originally enacted on June 6th, 1974, as s.28(B) of the Regulation of Wages and Conditions of Employment (Amendment) Ordinance 1974, and followed s.23 of the UK Industrial Relations Act 1971. So far as is material for the present appeal, the section provides as follows:

> "(1) In sections 65 to 68, unless the context otherwise requires,—
>
> 'claimant' means an employee who claims that he has been unfairly dismissed by his employer;
>
> 'dismiss' and 'dismissal' shall be construed in accordance with the provisions of subsections (2), (3) and (4);
>
> (2) Subject to the next following subsection, for the purposes of sections 65 to 68 an employee shall be taken to be dismissed by his employer if, but only if—
>
> (a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice; [or]
>
> (b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract."

20 Section 64(2)(b) has no relevance in the present case. We are concerned with the meaning of s.64(2)(a) and in particular, with the words "the contract under which he is employed by the employer is terminated by the employer."

The hearing before the Industrial Tribunal

21 At the outset of the hearing before the Industrial Tribunal, counsel for the employer submitted that the Tribunal had no jurisdiction to hear a complaint that was based on an allegation of constructive dismissal. The Tribunal had earlier rejected a submission that it should strike out this part of Dr. Rassa's notice of application.

22 It was argued on behalf of the employer that constructive dismissal claims arose from a termination of the contract of employment by the employee following a breach by the employer, and that such claims did not fall within the definition of "dismissal" in s.64 of the Employment Ordinance. In the course of the hearing, however, the Chairman of the Tribunal, Mr. H.K. Budhrani, Q.C., was referred to the employment legislation in England and to some of the authorities decided under that legislation, including *Marriott* v. *Oxford & District Co-op. Socy. Ltd. (No. 2)* (4) and *Sutcliffe* v. *Hawker Siddeley Aviation Ltd.* (8). I shall have to refer to these authorities later.

23 In giving his ruling, the Chairman said that the *dicta* in the *Sutcliffe* case expressed a judicial view on statutory provisions that were identical to those applicable in Gibraltar and that therefore he was persuaded that a constructive dismissal would amount to a termination by the employer of the contract under which the employee was employed and would therefore "amount to a dismissal as defined by s.64(2) of the Employment Ordinance."

24 The Attorney-General appealed to the Supreme Court, arguing that the chairman of the Industrial Tribunal had erred in law. Pizzarello, A.J., however, dismissed the appeal. In a careful and valuable judgment, the judge reviewed the English authorities to which he had been referred and compared the history of the legislation in England and in Gibraltar. He said that it seemed to be plain that the words of s.59 of the Ordinance were wide enough "to apply to any unfair dismissal whether it be direct or constructive" and that this wide meaning was not cut down by s.64(2).

25 Pizzarello, A.J. treated direct dismissal (where the employer says "You must go") as falling within the primary and obvious meaning of dismissal, and constructive dismissal (where the employee says "I can't stand it any longer. I want my cards") as falling within the secondary meaning of dismissal. He considered that both meanings were comprehended by the definition in the Ordinance.

The appeal to the Court of Appeal

26 The Attorney-General has now appealed to the Court of Appeal. The question for our consideration is whether Pizzarello, A.J. was correct in treating "constructive dismissal" as falling within the statutory definition of "dismissal," in the Employment Ordinance.

27 It is clear from reading the judgment of Pizzarello, A.J. that he was influenced (as had been the Chairman of the Industrial Tribunal) by the development of the law in England and by some of the decisions of the courts in England, particularly in the period between 1971 and 1974. I therefore propose to start by referring to the relevant legislation in England and to some of the cases decided under it.

The English authorities

28 The concept of "unfair dismissal" was introduced into English law by the Industrial Relations Act 1971. Six years earlier, however, Parliament had made provision for redundancy payments to be made in circumstances in which an employee was dismissed by reason of redundancy. The circumstances in which an employee qualified as being "dismissed" by his employer, were set out in s.3 of the Redundancy Payments Act 1965 in these words:

> "(1) [A]n employee shall, subject to the following provisions of this Part of this Act, be taken to be dismissed by his employer if, but only if,—
>
> (a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or
>
> (b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or
>
> (c) the employee terminates that contract without notice in circumstances . . . 'such that he is entitled so to terminate it by reason of the employer's conduct.'"

29 In 1969, the Court of Appeal in England considered the meaning of s.3(1)(a) of the 1965 Act, in *Marriott* v. *Oxford & District Co-op. Socy. Ltd. (No. 2)* (4). In that case, Mr. Marriott was employed by the company as a foreman. After he had been working for them for some years, the company found that there was insufficient work for the foremen they employed, and decided to offer Mr. Marriott the position of supervisor at a reduced wage. Mr. Marriott protested and tried to obtain work elsewhere. A little later, the company wrote to Mr. Marriott to the effect that at the end of the month, his wages would be reduced by £1 per week.

Mr. Marriott again protested and after a few weeks left to obtain another job. The question arose as to whether he was entitled to redundancy pay. The court held that he was so entitled because the letter notifying him of his reduction in pay amounted to a termination of his contract unless he accepted the terms in the letter. Lord Denning, M.R. analysed the position as follows ([1970] 1 Q.B. at 191):

> "This letter in effect told the man: 'We are not going to perform our existing contract with you. We are going to reduce your grading as foreman and we are going to pay you £1 a week less, whether you like it or not.' That statement was a breach of contract . . . It evinced an intention no longer to be bound by the contract."

30 A little later, Lord Denning, M.R. added (*ibid.*, at 191): "By insisting on new terms to which [Mr. Marriott] never agreed, the employer did, I think, terminate the old contract of employment. The case falls within section 3(1)(a) of the Redundancy Payments Act, 1965."

31 The decision in the *Marriott* case was followed by decisions by the National Industrial Relations Court in 1973 and 1974 in *Shields Furniture Ltd.* v. *Goff* (7); *Sheet Metal Components Ltd.* v. *Plumridge* (6); and *Maher* v. *Fram Gerrard Ltd.* (3). It is apparent from an examination of the facts in each of these cases, however, that the employer, by unilaterally insisting that the employee should work at other premises or on terms and conditions other than in his previous employment, could be said to have terminated the contract that was in existence between them. Accordingly, it is easier to see that each of these cases fell within the definition of "dismissal" in s.3(1)(a) of the 1965 Act. I shall refer again to the decision in the *Marriott* case at the end of this judgment.

32 Some doubt, however, was thrown on the matter by a passage in the judgment of Lord Denning, M.R. in *Western Excavating (E.C.C.) Ltd.* v. *Sharp* (9), when in a reference to the decision in *Marriott*, he said ([1978] Q.B. at 770):

> "It was not really an (a) case: but we had to stretch it a bit. It was not the employer who terminated the employment. It was the employee: and he was entitled to do so by reason of the employer's conduct."

33 As I mentioned earlier, the concept of unfair dismissal was introduced into English law by the Industrial Relations Act 1971. When it was originally enacted, s.23 of the 1971 Act contained the following definition of "dismissal":

> "(1) In this Act 'dismissal' and 'dismiss' shall be construed in accordance with the following provisions of this section.
>
> (2) Subject to the next following subsection, for the purposes of this Act an employee shall be taken to be dismissed by his employer if, but only if,—

(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract."

34 It will be seen that s.23 followed s.3 of the Redundancy Payments Act 1965, but with the important difference that it did not contain any provision similar to s.3(1)(c) of the 1965 Act.

35 In 1974, however, s.23(2) was amended by the addition of a new paragraph (c). This new paragraph was in these terms:

"the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

This new paragraph came into force in England only a few weeks after the Gibraltar Ordinance was enacted here.

36 It will be seen that the new para. (c) in s.23(2) covered the situation of a termination by an employee both with and without notice. Accordingly, the gap exposed in the *Marriott* case (where it was accepted that Mr. Marriott gave notice of termination so that his case could not come within s.3(1)(c) of the 1965 Act) was therefore closed.

37 In September 1973, however, the case of *Sutcliffe* v. *Hawker Siddeley Aviation Ltd.* (8), had come before the National Industrial Relations Court presided over by Sir John Donaldson. The case was one under the Redundancy Payments Act 1965, but, in the course of this judgment, Sir John mentioned the question of constructive dismissal and whether such dismissal fell within the definition that existed at that time in the Industrial Relations Act 1971. I should refer to this passage in Sir John's judgment at some length because it had an important impact on the reasoning of Pizzarello, A.J.

38 Having set out the relevant facts relating to Mr. Sutcliffe, Sir John continued ([1973] I.C.R. at 563–564):

"On those facts, the tribunal found, first, that Mr. Sutcliffe was dismissed. In their judgment, his resignation was forced and was to be regarded as being a dismissal by the employer, rather than the giving of notice by an employee. The members of this court fully accept that an employer can place his employee in a position in which the employee really has no option but to tender his notice. In such a situation the reality is, and the finding of any court or tribunal ought to be, that the employee is dismissed.

. . .

> We have referred to the matter because we are aware that there is some concern in trade union and other circles as to whether it is possible to have what is known as a 'constructive' dismissal under the Industrial Relations Act 1971. The point, which has no attractions at all, except perhaps to the most dedicated and academic of lawyers, is based on a comparison between the wording of two Acts."

Sir John then set out the relevant wording of the Redundancy Payments Act 1965 and of s.23 of the Industrial Relations Act 1971. He continued (*ibid.*, at 564):

> "There is no equivalent to '(c)' in section 3(1) of the Act of 1965.
>
> That comparison points, it is said, to Parliament having intended that there should be no room for an 'unfair constructive dismissal.' We entirely reject that contention. We consider that the omission arose solely because the draftsman thought it unnecessary to include the subsection. We have no doubt that there can be constructive unfair dismissals and that any amendment of the Act of 1971 to include a subsection (c) equivalent to that contained in the Act of 1965, would have no effect other than to dispose of a misconstruction of the Act."

39 As I have already pointed out, the wording of s.23 of the 1971 Act was amended in the following year to include a new para. (c). Sir John and his colleagues would have regarded this amendment as unnecessary.

40 The Gibraltar Ordinance, of course, remains in the unamended form.

Dr. Rassa's claim for constructive dismissal

41 I understand that, if the claim for constructive dismissal proceeds, it may be contended hereafter on behalf of his employer that the letter dated October 11th, 2000 did not in any event terminate the contract because it was expressed in conditional terms. I shall assume, however, for the purpose of this judgment that the letter was a clear acceptance of the employer's alleged repudiatory conduct. Dr. Rassa would argue in the words of Sir John Donaldson in the *Sutcliffe* case (8) "that he had no option but to tender his notice," and that therefore it was his employer who terminated the contract.

42 In this court, however, we have had the advantage of being referred to two English cases of high authority that underline, in the context of the law of employment, the basic principle of the law of contract that repudiatory conduct by one party to a contract does not automatically terminate the contract. There may be two exceptions to this principle in the field of employment—that is, where there is a walk-out by the

employee or a refusal by the employer any longer to regard the employee as his employee—but, subject to these exceptions, the principle is of general application.

43 In *Gunton* v. *Richmond-upon-Thames L.B.C.* (1), Buckley, L.J. referred ([1981] 1 Ch. at 467) to the general doctrine enunciated by Viscount Simon, L.C. in *Heyman* v. *Darwins Ltd.* (2) ([1942] A.C. at 361): "But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other." In *Gunton* (1) ([1981] 1 Ch. at 468), Buckley, L.J. stated that he could see no reason why this doctrine should operate differently in the case of contracts of personal service.

44 The matter was examined later in the House of Lords in *Rigby* v. *Ferodo Ltd.* (5). Mr. Rigby was employed by Ferodo as a lathe operator. In 1982, as a result of a severe financial crisis, Ferodo sought to agree a wage reduction with Mr. Rigby's union. No agreement was reached but after a time Ferodo promulgated new wage rates. This had the effect of reducing Mr. Rigby's earnings by £30 a week. Mr. Rigby continued to work but issued proceedings for damages. The House of Lords held that the courts below had correctly concluded that Ferodo's unilateral reduction of Mr. Rigby's contractual wages, although a repudiatory breach of contract, did not automatically bring the contract of employment to an end without the need for acceptance by the employee. Accordingly the damages payable by the employer were not limited to the amount of the shortfall from the original contractual wage over the period of notice (12 weeks) provided for under Mr. Rigby's contract.

45 I should refer to a passage in the speech of Lord Oliver of Aylmerton, with which the remainder of their Lordships agreed, where he said ([1988] I.C.R. at 34–35):

> "Whatever may be the position under a contract of service where the repudiation takes the form either of a walk-out by the employee or of a refusal by the employer any longer to regard the employee as his servant, I know of no principle of law that any breach which the innocent party is entitled to treat as repudiatory of the other party's obligations brings the contract to an end automatically. No authority has been cited for so broad a proposition and indeed [counsel for Ferodo] has not contended for it. What he has submitted is that where there is a combination of three factors, that is to say, (a) a breach of contract going to an essential term, (b) a desire in the party in breach either not to continue the contract or to continue it in a different form and (c) no practical option in the other party but to accept the breach, then the contract is automatically brought to an end. My Lords, for my part, I have found myself unable either to accept this formulation as a matter of law or to see why it should be

> so. I entirely fail to see how the continuance of the primary contractual obligation can be made to depend upon the subjective desire of the contract-breaker and I do not understand what is meant by the injured party having no alternative but to accept the breach. If this means that, if the contract-breaker persists, the injured party may have to put up with the fact that he will not be able to enforce the primary obligation of performance, that is, of course, true of every contract which is not susceptible of a decree of specific performance. If it means that he has no alternative to accepting the breach as a repudiation and thus terminating the contract, it begs the question. For my part, I can see no reason in law or logic why, leaving aside for the moment the extreme case of outright dismissal or walk-out, a contract of employment should be on any different footing from any other contract as regards the principle that 'an unaccepted repudiation is a thing writ in water and of no value to anybody.'"

46 In the light of the analysis of the law in these two cases, which is entirely in accord with general principle, I find myself unable to accept that Dr. Rassa's contract of employment was terminated by the employer on October 11th, 2000. The letter from Dr. Rassa, dated October 11th, was an acceptance by Dr. Rassa of alleged repudiatory conduct by his employer. If the law in Gibraltar were the same as in England, Dr. Rassa could have advanced a claim under para. (c) on the basis that he was entitled to terminate the contract by reason of the employer's conduct, but that conduct, though repudiatory, did not automatically bring the contract to an end. In law, Dr. Rassa had a choice either to accept the repudiatory conduct and thus himself terminate the contract or continue with his employment, albeit under protest. I would add that it does not seem to me that Sir John Donaldson's *dicta* in the *Sutcliffe* case (8) can survive Lord Oliver's analysis.

47 It is possible to test the matter by considering the cases of two employees working for the same employer. Both are exposed to the same bad treatment by the employer. One employee chooses to stay though protesting vigorously at his treatment. The other employee chooses to leave, saying: "I cannot stand this any longer." The contract of the second employee is terminated but it is terminated by the employee. The employer's treatment may have caused the termination, but in the light of the principle explained by Lord Oliver, the second employee's contract is not terminated by the employer.

48 The importance of the decisions in *Gunton* v. *Richmond-upon-Thames L.B.C.* (1) and *Rigby* v. *Ferodo Ltd.* (5), to which neither Pizzarello, A.J. nor the Industrial Tribunal was referred, was that they underlined the fact that the general rule that an unaccepted repudiation is

"a thing writ in water" applies to contracts of employment. It is, however, also clear that in the field of employment, there will be cases where the employer makes it plain, not only that he has been acting in a manner that is in repudiatory breach of the contract between him and the employee, but that he has put an end to the existing contract. The classic example is an outright dismissal where the employer says: "You must go." But there are other examples, such as the *Marriott* case (4), where the employer terminated Mr. Marriott's employment as a foreman at a foreman's wage and proposed that he could be employed thereafter as a supervisor at a different and lower wage. Mr. Marriott could have accepted that new position but it would have been pursuant to a new contract. Mr. Marriott's existing contract as a foreman was terminated by the employer. In effect Mr. Marriott was told: "Your existing contract of employment is terminated forthwith. You are fired as a foreman." In other cases, where the employer proposes a change in the terms of employment—for example, the actual place of employment—it may be a question of fact whether the contract is to be terminated and a new contract substituted or whether the existing contract is only to be varied. However that may be, in Dr. Rassa's case the employer's allegedly repudiatory conduct was not accompanied, before October 11th, 2000, by any statement by the employer that he intended to terminate the contract or even to modify its terms. Accordingly, I see no escape from the conclusion that in the light of the decided cases, Dr. Rassa's contract was not terminated by the employer on or before October 11th, 2000.

49 In these circumstances, I am satisfied that Dr. Rassa's claim, in so far as it is a claim for constructive dismissal, cannot proceed. I would allow the appeal and grant a declaration that where an employee terminates his contract of employment and claims that he was entitled to do so by reason of his employer's conduct, the Industrial Tribunal has no jurisdiction to hear or determine a claim by him that he was dismissed unfairly.

50 **GLIDEWELL, P.** and **STUART-SMITH, J.A.** concurred.

Appeal allowed.
