

Dr Kate Barry v Upper Thames Medical Group and Others: When does delay in resigning affirm the contract?

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[Dr Kate Barry v Upper Thames Medical Group and Others: \[2025\] EAT 146](#)

In this case, HHJ Tayler provides guidance and a summary of the law of affirmation. In particular he explains that if an employer is in repudiatory breach of contract, then multiple factors may be relevant to the question of affirmation, not just delay.

Factual Background

Dr Barry is a GP who had been working for the Respondent for a few years. She became unwell and had to take sick leave on a number of occasions. The practice invoked the attendance management process and she was invited to two capability meetings. After the second meeting in August 2020 she became unwell again and was unfit to work for several months. On Boxing Day 2020, she sought to return to work but the parties agreed that she would take annual leave instead. She did not return to work.

The practice stopped paying Dr Barry sick pay in August 2020, on the basis that she had exhausted her entitlement. Dr Barry argued that this was a repudiatory breach of contract. The contractual position was not obvious. She entered into negotiations which were unsuccessful. In February 2021, the practice manager stated that Dr Barry was in fact owed around £9,000 in sick pay. This was subsequently said to be an error and on 26 March, Dr Barry was told she would not be getting any more sick pay. She resigned on 6 April.

The ET's decision

The ET found that Dr Barry was not willing to return to work until the pay issue had been sorted out. It also found that there was a breach of an express term regarding contractual sick pay. This was enough to be a repudiatory breach. However, the ET found that Dr Barry had affirmed

the contract, citing (1) the long delay in resigning, given that she had first been told she would not be getting sick pay in September 2021 and (2) the fact that she was ready and willing to return to work from 26 December 2020. The ET therefore concluded that Dr Barry had not treated her contract as at an end due to the sick pay issue, as she was willing to continue working.

The EAT's view

HHJ Tayler emphasised that affirmation is about communication. This may be express or it may be communication inferred from conduct. He referred to *W. E. Cox Toner (International) Ltd. v Crook* [1981] which is authority for the principle that if an employee makes clear her objection to the state of affairs, she will not affirm her contract by continuing to work for a limited time.

He also referenced the more recent case of *Chindove v William Morrisons Supermarket Plc* UKEAT/0201/13/BA which suggests that the key factor in affirmation is conduct, not time, specifically noting the big difference regarding affirmation between an employee who is off sick and one who is working. He also cited *Leaney v Loughborough University* [2023] EAT 155 in which the EAT found that continuing to work may risk affirmation but if the employee communicates that he is reserving his position, or is trying to get the employer to put right the breach, then affirmation is less likely. It also found that whether the employee is off sick is a relevant factor to be considered.

In Dr Barry's case, the EAT found that the ET should have taken more into account when deciding on affirmation. Specifically, the ET erroneously failed to take into account the fact that there were ongoing discussions between the parties about sick pay and that as late as February 2021, Dr Barry had been told (whether correctly or not) that she was owed around £9,000 in sick pay. In other words, there was a continuing dispute.

Regarding Dr Barry's willingness to return to work as a factor pointing to affirmation, the EAT found that this was inconsistent with the finding that she was not prepared to return before the issue was resolved. This meant that this factor actually pointed *against* affirmation, not towards it. HHJ Tayler did not consider that the fact that Dr Barry accepted holiday pay whilst off sick in early 2021 assisted the case for affirmation.

The ET had therefore erred in law by not considering relevant factors. HHJ Tayler considered that when those factors were considered, the answer was so obvious that it did not require remission back to the ET. He therefore substituted a finding that Dr Barry had not affirmed her

contract. Given that the ET had said that affirmation was the only factor preventing a finding of unfair dismissal, Dr Barry was deemed to be unfairly dismissed.

Comment

This case is a useful reminder that delay is not the key factor when considering affirmation. Communication is crucial and needs to be analysed.

Employees who want to make sure that they are not said to have affirmed ought to make very clear that they are continuing to dispute whatever the breach was. Whilst it is more difficult to avoid a finding of affirmation whilst continuing to work (rather than being off sick), it is not impossible.

Respondents ought to rely on more than just delay in order to argue affirmation. For example, the fact that discussions about a dispute have stopped or the fact that an employee has continued to work. In the case of employee who is off sick, a statement that she wants to return to work (without qualification) may also assist in demonstrating that the employee does not really consider the contract had come to an end.

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