Appeal No. UKEAT/0386/14/DXA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 26 February 2015

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MS M COSTELLO — APPELLANT

(1) GLOUCESTERSHIRE COUNTY COUNCIL
(2) MS K WHITTAKER — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS VICTORIA VON WACHTER (of Counsel)
For the Respondents	MS ELIZABETH CUNNINGHAM (of Counsel) Instructed by: Gloucestershire County Council Legal Services Quayside House Quay Street Gloucester Gloucestershire GL1 2TZ

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

The Employment Tribunal dismissed the Claimant's claim that she had been constructively dismissed on the basis that her employer had breached the implied term of trust and confidence.

She appealed on the grounds that the Employment Tribunal had failed to make an objective assessment of the employer's conduct but had considered their subjective intentions and beliefs. On analysis that submission was not well founded and the appeal was simply an attack on a factual finding of the Employment Tribunal that there had been no repudiatory breach by the employer.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against a Decision of the Employment Tribunal sitting in Bristol, Employment Judge Mulvaney and members, dismissing a claim for constructive unfair dismissal, which was sent out on 27 February 2014. The Decision followed an eight-day hearing, in which by my calculation 16 people gave evidence, including 9 witnesses on behalf of the Claimant. Although the Employment Tribunal found some actions by the First Respondent employer to be "regrettable", they found that neither individually nor cumulatively did they amount to a repudiatory breach of the implied term of trust and confidence by the employer such as to entitle the Claimant to resign without notice. On the appeal, the Claimant says that the Employment Tribunal (1) failed to adopt the correct objective approach when assessing whether there had been a breach of the implied term of trust and confidence, and/or (2) that the Employment Tribunal overlooked relevant facts when considering that question.

The Facts

2. The factual background is as follows. The Claimant started work for the Respondent council on 9 July 1990 in the child protection conference (CPC) team. On 1 September 2006 she was made office manager, and in that capacity she was in charge of the minute secretaries. On 2 August 2010 Kathleen Whittaker was appointed team manager and was therefore the Claimant's line manager. Ms Whittaker was a party to the Employment Tribunal claim as the Second Respondent.

3. There were performance problems in the child protection conference team that went back to 2005. The Second Respondent decided to call a meeting with the team to discuss those

concerns. The Employment Tribunal found that that was a reasonable thing to do and that the Second Respondent could reasonably have assumed that the Claimant would support her in that meeting. The meeting took place on 1 November 2012, and it did not go well. The Tribunal found at paragraph 9.21 that the minute secretaries were confrontational in the meeting, they found that the minute secretaries and the Claimant did not behave in a respectful manner but acted in concert to speak with force, and they found that the Second Respondent was shocked at the disrespectful manner in which the team and the Claimant joined together to voice their views.

4. Immediately after the meeting the Second Respondent returned to her desk, which, the Tribunal say at paragraph 9.25, was located in a room she shared with conference chairs - those are people quite separate from the Claimant in the hierarchy - and:

> **"… was reported by Ms Adams and Ms Neath to have said about the claimant 'Maria's done it now' and talked of downgrading her at her next PAR (Performance Appraisal Review). …"**

5. The Claimant went on holiday shortly after that and returned on 19 November 2012, when she was called by the Second Respondent into her office. The Second Respondent told her that she was seeking advice from HR as to whether she should take a grievance out against the Claimant as a result of the way the meeting had gone on 1 November and of her view that the Claimant had stepped out of her managerial role. The Tribunal found at paragraph 9.30 that whatever the motivation, this was an inappropriate and unreasonable step to take and that, not surprisingly, it left the Claimant in a state of anxiety knowing that a complaint of some kind was to be raised but having little information as to what the details of it were. The Claimant left work shortly after that meeting in a distressed state and was signed off by her GP with work-related stress. I think I am right in saying that she did not return to work thereafter.

6. On 22 November 2012 the Second Respondent decided, having taken advice from HR, to initiate an informal performance management procedure in relation to the Claimant rather than herself pursuing a grievance against the Claimant, which was fairly obviously an inappropriate way of going about what had happened at the meeting. Unfortunately, the Claimant was not told that this was the way matters were going to proceed until she attended a meeting with Occupational Health and learned of it by reason of it being on a referral form that had been filled in by the Second Respondent. The Tribunal found that this too was unreasonable behaviour on the part of the employer.

7. On 13 December 2012 the Claimant took out a grievance against the Second Respondent. The Tribunal record that in it she detailed complaints about the Second Respondent's management over a number of years. She said she wished her letter to be interpreted as a formal grievance, she stated she firmly believed that the Second Respondent wanted her out of her job, and she said:

> **"There is no other explanation for her treatment of me which has gradually chipped away at my confidence. I feel singled out and bullied by her."**

8. The Tribunal record that none of the issues raised by the Claimant in her grievance about the Second Respondent's treatment of her had been raised previously by her with the Second Respondent or with Ms Griffiths or any other senior manager.

9. The grievance took some time to investigate, and it was not until 18 March 2013 that a Ms Hylton completed her report and on 19 March submitted it to a Ms Grills. The Tribunal record at paragraph 9.42 that the conclusion of the report was that the Second Respondent had been inequitable in the way that she had managed the Claimant and others in the CPC team, but Ms Hylton concluded that the evidence did not suggest that there was singling-out or bullying

of any individual. Ms Hylton recommended informal performance management for the Second Respondent together with management training. She concluded that there had not been a failure to take the Claimant's grievances seriously and that there had not been unreasonable delay in acting on the Claimant's grievances.

10. On 10 April 2013 the Claimant met Ms Grills to discuss the contents of the report. On 23 April 2013 Ms Grills wrote to her stating that in the light of her continued request for further information and reassurance it seemed unlikely that the informal route to resolution of her grievance was likely to be successful, and Ms Grills said that in the circumstances a formal-grievance hearing would be convened as soon as possible.

11. The Claimant on 29 April responded by tendering her resignation, referring to being subjected to bullying and unacceptable management practice, failure to investigate her grievance in a timely manner, failure to provide sufficient clarity as to the report finding and a failure to provide information about her return to work. Her letter referred to the First Respondent's insistence that she return to work and her repeated request for details of the performance issues that had not been provided. The Claimant also referred to a serious breach of confidentiality arising from the discovery of Ms Whittaker's draft grievance on a child protection file. She referred to this, together with Ms Grills' last letter which she described as unsupportive, as being the final straw.

12. The serious breach of confidentiality is dealt with by the Tribunal at paragraph 9.49. I shall not read the whole of that into this Judgment, but it appears for some reason the Second Respondent managed to leave a copy of the draft grievance that she was going to take out against the Claimant on a completely unrelated child protection file. That document was found

by others in the CPC team, some of whom were close no doubt to the Claimant, and instead of handing the document straight over to senior management one of them phoned up the Claimant and read the contents of the draft grievance to her.

13. After reciting their findings of fact, which I have summarised, the Employment Tribunal made some comments about credibility that are worth recording here. They said at paragraph 9.52:

> **"We had concerns about the credibility of the claimant's evidence. She had a tendency to exaggerate, and there were numerous examples of this. …"**

They then set out a number of examples, including the following:

> **"… Despite claiming to have been shocked by the second respondent's words at the meeting on the 1 November 2012 the claimant did nothing about that until after she was told that the second respondent intended to take action as a consequence of her own conduct at the meeting. …"**

So far as the witnesses called on behalf of the Claimant from the team were concerned, the Tribunal was fairly critical of their evidence in paragraph 9.53. At paragraph 9.54 of the Judgment they recorded that they found the Second Respondent's evidence on the whole to be measured and credible, and they were impressed by the fact that she was prepared to admit that she had made mistakes.

The Law

14. Before turning to the Grounds of Appeal, I shall briefly set out the law, which I do not understand to be controversial, in a number of propositions:

(1) There is an implied term that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously

damage the relationship of trust and confidence between the employer and the employee.

(2) Breach of that implied term, if established, will inevitably be repudiatory by its very nature.

(3) The conduct that is relied on as a breach of the term may consist of a series of acts, some of which may be trivial and which can be looked at as a whole, and there will be cases where even a quite trivial matter can amount to the "final straw".

(4) The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the Tribunal of fact". It is "a highly context-specific question".

(5) That question is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the Respondent employer's conduct on a Claimant employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

The Employment Tribunal's Decision

15. The Claimant relied at the hearing on a fluctuating number of acts that were said cumulatively to amount to a breach of the term of trust and confidence entitling her to resign without notice on 29 April 2013. The Employment Tribunal went through each of these acts at paragraphs 9.63 to 9.79, effectively discounting most of them. At paragraph 9.80 they said this:

> **"9.80. In summary we found some of the first respondent's actions to have been regrettable, notably: informing of the claimant [sic] on the 19 November 2012 that a grievance may be taken against her; failing to inform the claimant directly of the decision not to pursue a grievance but to initiate informal performance improvement measures; failing subsequently to inform the claimant that such measures would be put on hold pending her return to work; and failing to sufficiently clarify the stages of the grievance process.**
>
> **9.81. We considered whether these actions, which we did not find to have been repudiatory individually, might nevertheless cumulatively have amounted to a breach of the implied term of trust and confidence under the principle established in the case of *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. We concluded that they did not. We were not satisfied that**

> **looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the claimant, that the first respondent clearly showed an intention to abandon and altogether refuse to perform the contract. On the contrary it was very apparent throughout the grievance process that the first respondent was working to find a way to secure the claimant's return to work and the resolution of her grievance. The grievance procedure had not been exhausted and with an investigation report that partially upheld the claimant's complaints there was a reasonable chance that she might have achieved a solution that was more acceptable to her than the one that was offered in the informal process. It should have been clear to the claimant that the door was not closed and the first respondent's actions in dealing with her grievance did not suggest that they were unsupportive of her or unsympathetic to her complaints. For these reasons the claimant's complaint of constructive unfair dismissal did not succeed and was dismissed."**

The Appeal

16. Ms von Wachter, for the Claimant, raises, as I have said, two grounds of appeal. First, she says that the Employment Tribunal have not adopted an objective approach but have considered the First Respondent's subjective intentions and beliefs and have excluded consideration of the Claimant's subjective reactions, though she acknowledges, I think, that the Employment Tribunal were not obliged to take into account the Claimant's subjective reactions, accepting that they are entitled to do so if evidence as to that is relevant to the question of the likely effect of the employer's conduct. She referred me to four matters that she says establish this ground of appeal.

17. The first relates to the Claimant's treatment by the Second Respondent at the meeting on 1 November 2012. This was dealt with by the Tribunal at paragraph 9.67, where they say:

> **"The next incident relied on by the claimant was that on 1 November 2012 the first respondent caused or allowed her to be humiliated in front of colleagues. Although it is accepted that the second respondent raised the issue of the claimant spending too much time on administration rather than on management, the comment was made in the context of a general discussion about workloads and responsibility, where the full range of the administration workload was being considered in an attempt to find ways of coping with it within the staff team. To the extent that there was an implied rebuke in the comment it was a mild one and certainly not one which should have caused the claimant to feel humiliated. The suggestion that the claimant might occasionally be able to type minutes was similarly not unreasonable in the circumstances in the light of the fact that the second respondent was unaware of any health issue that might make this suggestion inappropriate."**

I can see no problem with a finding that Ms von Wachter complains about to the effect that what was said at the hearing *should* not have caused the Claimant to feel humiliated. That is

looking at the matter, as the Tribunal should look at the matter, from an objective point of view and making an objective assessment of the likely effect of what was said at the meeting. So far as the Claimant's actual subjective reaction to what was said at the meeting is concerned, the Employment Tribunal, as I have mentioned, found at paragraph 9.52 that she had a tendency to exaggerate in her evidence and effectively later on in paragraph 9.52 in the sentence that I have quoted earlier on rejected her evidence about being shocked by the Second Respondent's words at the meeting.

18. Ms von Wachter also says that the employer had accepted that the Claimant was anxious and stressed and that the Employment Tribunal had somehow failed to factor this into their considerations. The Employment Tribunal saw the protagonists give evidence, would have had their characteristics well in mind and made the findings at paragraph 9.52 about the Claimant that I have referred to already. There is in my view no grounds for saying that that element, namely her anxiety and stress, insofar as it was relevant was not part of the Tribunal's thinking.

19. The second matter relied on by Ms von Wachter was the comments made by the Second Respondent after the meeting on 1 November 2012 when she got back to her office, which I have already quoted. The Tribunal dealt with this at paragraph 9.69, where they said this:

> **"The claimant complained that the second respondent made demeaning and threatening comments about the claimant to other members of staff. We found that the second respondent did make comments about the claimant in her office on the 1 November 2012. She made the comments after a very difficult meeting at which she felt that the claimant had allied herself with the minute secretaries to act against her. She was disturbed by the meeting and let off steam in a room where she believed her remarks would not be repeated. The second respondent did believe that the claimant had conducted herself inappropriately and her comments reflected this. As we considered that her concerns were reasonable and the remarks were not made to the claimant we did not consider that they amounted to a fundamental breach of the implied term of trust and confidence."**

I can see no error in that reasoning. The final sentence focuses on an objective assessment of the employer's conduct through the Second Respondent. The fact that the Claimant was not

present when the Second Respondent made her remarks was indeed highly relevant to an assessment of the likely effect and indeed of the Second Respondent's objective intention. A distinct finding about the Claimant's reaction when she later heard the remarks repeated by the two chairs who shared an office with the Second Respondent was not, in my view, relevant to the issue the Tribunal had to decide.

20. The third matter that Ms von Wachter relies on relates to paragraph 9.33 in the Judgment. First, it is said that there is a contradiction between two sentences in that paragraph. The first is this:

> **"… We considered that the claimant should have been notified directly of the decision following the meeting with HR on the 22 November and that it was unreasonable of the first respondent not to have done so. …"**

And the second is this:

> **"… We concluded that it was reasonable for the first respondent to delay addressing the performance issues until it could be done through face to face discussion with the claimant on her return to work."**

When read properly in context, there is no contradiction between those two statements. One relates to the time at which the Claimant was to be informed of the way forward, and the other relates to the timing of the process that represented that way forward. So, there is, in my view, nothing in that complaint.

21. So far as paragraph 9.33 is concerned, Ms von Wachter also complains that there was no assessment of the Claimant's subjective reaction to being informed that she was to be subject to an informal performance management procedure through the occupational-health referral form rather than directly by the employer. In fact, what the Tribunal said relevant to this is in the first and third sentences of that paragraph 9.33 in the following terms:

> **"The claimant wrote to Ms Griffiths to say that she was shocked to learn of the intention to initiate the informal performance management procedure. We considered that the claimant should have been notified directly of the decision following the meeting with HR on the 22 November and that it was unreasonable of the first respondent not to have done so. However we did not consider that it would have come as a complete shock to the claimant given what had been said to her at her meeting with the second respondent on the 19 November. …"**

As I read it, that is an assessment of the Claimant's true subjective reaction to learning of the fact that she was to be subject to the informal performance management procedure. It is also an objective assessment of what the Tribunal thought her reaction ought to have been. Either way, the Tribunal have asked themselves the right question, namely what the likely effect of the matter complained of would be. I can see no basis for the complaints relating to paragraph 9.33.

22. The fourth point raised by Ms von Wachter relates to the final straw and the fact that the draft grievance that the Second Respondent had written was left on a completely unrelated file. This was dealt with at paragraph 9.76 of the Judgment, where the Tribunal said this:

> **"The claimant contended that the first respondent deliberately or negligently allowed a letter from the second respondent containing a grievance against the claimant, and allegedly malicious allegations against her, to be left in a file where others would find it. We found that this was the result of a simple slip-up which could have happened to anyone. Of course it should not have happened, but it was not deliberate or even negligent. The document did not contain malicious allegations against the claimant. There was no evidence that it had been seen or read other than by loyal colleagues of the claimant who should have known better than to read it once it was clear what it was. The only colleague who read it in its entirety was Ms Perkins who did so at the claimant's request."**

Again, there is a complaint that the Tribunal did not make a finding as to the subjective impact of this on the Claimant, but in paragraph 9.76 and the earlier findings of fact the Employment Tribunal has rightly concentrated on the Respondents' conduct and clearly reached the view in any event that any effect on the Claimant was the result of the behaviour of her colleagues and not the result of conduct by her employer or her line manager. That deals with the four points relied on under ground 1.

23. The second ground of appeal is put in this way in the amended Notice of Appeal:

> **"In considering whether or not [the First Respondent] had been in breach of the implied term of trust and confidence, [the Tribunal] wrongly took no account of …"**

There are then four bullet points, which more or less mirror the four points I have already referred to although not exactly. In the Skeleton Argument that Ms von Wachter put before me today the point is put slightly differently at paragraph 41, where it says:

> **"It is the Appellant's submission that, in considering whether or not the first Respondent had been in breach of the implied term of trust and confidence, the Tribunal wrongly took insufficient account of the effect on the Claimant of [the four matters identified]."**

So, the complaint has changed to "insufficient account" and is focused on the effect on the Claimant. I shall consider the submission as it is put in the Notice of Appeal, because, as Ms Cunningham pointed out, the way it is put in the Skeleton Argument does not seem to add anything to ground 1.

24. Taking the points relied on as (i) to (iv) as they are numbered in the Skeleton Argument, I note first that point (iv) was expressly considered by the Employment Tribunal as part of the cumulative picture in their paragraphs 9.80 and 9.81, which I have already quoted in full. So far as points (i), (ii) and (iii) are concerned, each of them was considered in detail by the Employment Tribunal, as I have already indicated, and in effect discounted when the Tribunal came to its overall assessment of whether the Respondent had repudiated the contract of employment. The Employment Tribunal was, in my view, fully entitled to adopt that approach. I therefore reject the second ground of appeal.

Disposal

25. Overall, the question of repudiation or not was a decision of fact for the Employment Tribunal. I discern no error of law in their Judgment. They went through the whole story, and

they went through each of the complaints in detail. In my view, this appeal has been an exercise in going through a Judgment with a fine-tooth comb in an effort to upset what is really a finding of fact. I therefore dismiss the appeal.