



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mr C Thwaites

AND

Pioneering Care Partnership

PRIVATE PRELIMINARY HEARING

Heard at: Teesside

On: 3 April 2017

Before: Employment Judge Johnson (sitting alone)

Appearances

For the Claimant: In person (assisted by his wife Mrs Thwaites)

For the Respondent: Mr G Vials, Solicitor

JUDGMENT

- 1 The claimant's complaints of unlawful disability discrimination are dismissed upon withdrawal by the claimant.
- 2 The respondent's application to strike out the claimant's complaint of unfair dismissal is refused.

CASE MANAGEMENT SUMMARY

Listing the hearing

- 1 After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 2 days. It has been listed at **Teesside Justice Centre, Teesside Magistrates Court, Victoria Square, Middlesbrough, Cleveland, TS1 2AS** to start at **9:45am** or so soon thereafter as possible on **Monday and Tuesday, 19 and 20 June 2017**. The parties are to attend by **9:30am**.

The claims and issues

- 2 There have been several preliminary hearings in this case, with case management orders having been made by Judges Garnon, Wade and Johnson. The original claims were of unfair constructive dismissal and unlawful disability discrimination. The Tribunal and the respondent have encountered considerable difficulties in extracting from the claimant the appropriate details relating to his allegations of unlawful disability discrimination. The respondent by letter dated 21 March 2017 submitted a formal application for the claims to be struck out, due to the claimant's alleged failure to comply with earlier orders and in particular with an "unless order" made by Employment Judge Johnson on 14 February 2017.
- 3 The claimant today appeared in person, with the benefit of assistance from his wife Mrs Thwaites. The respondent was again represented by its solicitor, Mr Vials. Mr Vials had helpfully prepared a short bundle of documents, comprising the relevant orders made by the Employment Tribunal, copies of documents supplied by the claimant and copies of correspondence from the respondent.
- 4 The claimant alleges that he suffers from depression and that this amounts to a mental impairment which has a long term, substantial adverse effect on his ability to carry out normal day to day activities. The respondent concedes that the claimant suffers from depression, but denies that his depression amounts to a disability as defined in section 6 of the Equality Act 2010. If the claimant is unable to satisfy the Employment Tribunal that his depression amounts to a disability, then none of his allegations of unlawful disability discrimination could possibly succeed.
- 5 Mr Vials reported to me today that the claimant has failed to comply with the earlier orders made by the Employment Tribunal, in that he has failed to provide copies of that medical evidence which he was ordered to provide. In particular, he has failed to provide "all medical records held by the claimant's GP for the period from 1 January 2011 to date." That is what the claimant was ordered to do by Employment Judge Wade at the preliminary hearing which took place on 28 November 2016. The claimant insisted today that he had provided his medical evidence, which had included the relevant GP notes and records. However, the claimant was unable to refer to any of those documents today and did not have with him copies of the relevant notes and records. Mr Vials, as a solicitor and officer of the court, informed me that the claimant had failed to comply with that earlier order and had not provided those GP notes and records which he had been ordered to provide. I accepted Mr Vials' submissions on this point. I am satisfied that the claimant remains in breach of that particular order.
- 6 I am satisfied that the claimant is in breach of my "unless order" made on 14 February 2017. That particular order makes it perfectly clear to the claimant that should he fail to provide the information which he had been ordered to provide, then his claims were likely to be struck out. In the absence of the appropriate medical evidence to support his contention that he suffers from a mental impairment which amounts to a disability, I cannot see how the

claimant could possibly persuade an Employment Tribunal that he suffers from depression which amounts to a mental impairment and which amounts to a disability. In those circumstances, his complaints of unlawful disability discrimination could not possibly succeed.

- 7 I carefully took Mr Thwaites through these matters. I was satisfied that he fully understood what I was saying. I am further satisfied that Mrs Thwaites also understood exactly what was being said.
- 8 I then took both Mr Thwaites and Mr Vials to the claim form ET1, which contains basic details of the claims brought by Mr Thwaites. Mr Thwaites accepted that he resigned from his employment, but maintains that his resignation was in response to a fundamental breach of his contract of employment by the respondent and thus that he was unfairly, constructively dismissed. I carefully explained to Mr Thwaites in terms which I was satisfied that he fully understood, that there is implied to every contract of employment, a term that the employer will not without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously harm the mutual relationship of trust and confidence which must exist between employer and employee. I explained to Mr Thwaites that his allegations relate to things that were said or done, or not done which may well amount to conduct calculated or likely to destroy or seriously harm that mutual relationship of trust and confidence, yet not amount to unlawful disability discrimination. It remains the claimant's case that it was things said or done, or not done by the respondent, which led him to resign and that these acts or omissions may in some way have been influenced by his depression and the respondent's attitude towards it. I then invited Mr Thwaites (with the assistance of his wife) to consider whether much was to be gained by pursuing the allegations of unlawful disability discrimination when they may well add little if anything to his principal complaint of unfair, constructive dismissal. I carefully explained that in terms of remedy, the only material difference would be the possibility of an award for injury to feelings should his complaint of unlawful disability discrimination succeed, whilst no such award could be made in a complaint of unfair dismissal. After retiring for ten minutes, Mr Thwaites returned to confirm that he wished to pursue his complaint of unfair constructive dismissal, but wished to withdraw his complaints of unlawful disability discrimination.
- 9 During this exchange, I specifically enquired of Mr Vials on behalf of the respondent, as to whether, on the information available to him, he was satisfied that there could be a fair trial of the issues between the parties, should the claim be limited to one of unfair, constructive dismissal. Mr Vials very properly and very fairly conceded that there could be a fair trial of those issues and that such a trial would take no more than two days. Mr Vials confirmed that, in his submission, there could be no such fair trial of the complaints of unlawful disability discrimination, because the claimant had failed or refused to provide the very basic information which was required to enable the respondent to properly respond to those claims, and which information the claimant had been ordered to provide by specific dates, on a number of occasions.

- 10 Upon the claimant's withdrawal of the complaints of unlawful disability discrimination, Mr Vials wished to maintain his application that all of the claimant's claims should be struck out on the grounds that the claimant was in breach of the unless order made by the Tribunal on 14 February 2017. Mr Vials specifically referred to the decision of the Employment Appeal Tribunal in **Scottish Ambulance Service v Laing UKEAT/0038/12**, where Mr Vials said it was decided that a Tribunal has no discretion over whether a claim can be struck out once it decides that there has been non compliance with an unless order. Mr Vials also submitted that his application to strike out related to both the unfair dismissal claim as well as the disability discrimination claims and that the Tribunal should follow the decision of the Employment Appeal Tribunal in **Johnson v Oldham Metropolitan Borough Council [2013] UKEAT/0095/13**, where the Employment Appeal Tribunal held that the fact that a claimant had provided information about some of her claims but had failed to provide information about the others, meant that all of the claims should be struck out.
- 11 The Employment Tribunal must remain conscious at all times of the requirements of the Overriding Objective, namely to deal with the case justly. In Mr Thwaites' case, he has presented complaints of unfair constructive dismissal and unlawful disability discrimination. He has before me today formally withdrawn the allegations of unlawful disability discrimination. Mr Vials for the respondent honourably concedes that there can be a fair trial of the issues relating to the unfair constructive dismissal claim. Mr Vials apologises profusely for failing to provide me with copies of the Employment Appeal Tribunal authorities to which he has referred. I regret that those are not cases with which I am immediately familiar. I consider it incumbent upon Mr Vials to have produced those authorities, and that properly they should have been provided to the Employment Tribunal with his written submissions, well in advance of today's hearing. Mr Vials failure to do so means that I am unable to give those cases proper consideration. It is impossible to identify the extent to which those cases were decided on their own particular facts.
- 12 Mr Vials accepts that there can be a fair trial of the issues between the parties regarding the allegations of unfair constructive dismissal. That complaint can be dealt with at a two day hearing. From the information before me today, I cannot see how it would be fair or just to prevent the claimant from pursuing his complaint of unfair constructive dismissal, when he has provided sufficient information for the respondent to be able to reply to it, disclose the relevant documents, prepare the necessary witness statements and conduct a full hearing of that complaint. I am satisfied that the claimant's failure to provide information and to comply with the earlier orders, relates entirely to the complaints of unlawful disability discrimination. In all of the circumstances I do not consider it fair, just or appropriate to prevent the claimant from pursuing his complaint of constructive unfair dismissal.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

- 1 **Bundle of documents**

By not later than **19 April 2017** the respondent is ordered to provide to the claimant a full indexed page numbered bundle of all of the documents relevant to the remaining complaint of unfair constructive dismissal.

2 Witness statements

By not later than **28 April 2017** the claimant shall send to the respondent a copy of the witness statement which he has been ordered to provide in these proceedings. That statement must contain all of the oral evidence which the claimant intends to give to the Employment Tribunal relating to his complaint of unfair constructive dismissal. The statement must be full, but not repetitive and must set out all of the facts which the claimant intends to tell the Tribunal. The statement must not include generalisations, argument, hypothesis or irrelevant material.

3 By not later than **26 May 2017** the respondent shall serve upon the claimant copies of all of the statements of the witnesses whom the respondent intends to give evidence at the final hearing. Those statements shall be prepared on exactly the same basis as is set out above in respect of the claimant's witness statement.

4 All witness statements must set out the facts in numbered paragraphs on numbered pages and in chronological order. If the witness intends to refer to a document in the hearing bundle, then that document must be referred to by the page number in the bundle.

5 Other matters

The respondent shall ensure that there is included at the very front of the final hearing bundle, a cast list showing in alphabetical order of surname the full name and job title of all the people from whom or about whom the Tribunal is likely to hear together with a short neutral chronology for use at the hearing.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Johnson

Date 11 April 2017

Sent to the parties on:

13 April 2017

For the Tribunal:

Miss K Featherstone

APPENDIX

- 1 At the conclusion of today's hearing, I proposed to Mr Thwaites and Mr Vials that I set out as an Appendix to this order a brief description of what is meant by "unfair constructive dismissal". Mr Vials accepted that it would be helpful to both the claimant and the respondent for this to be done, particularly because it is likely to enable the claimant to properly focus his case and his evidence upon those factors which the claimant must establish to succeed in a complaint of unfair constructive dismissal. At the final hearing it will be for the claimant to give his evidence first. The relevant issues are:-
 - 1.1 Did the respondent engage in conduct, without reasonable and proper cause, calculated or likely to destroy or seriously damage the implied trust and confidence between employer and employee?
 - 1.2 Did the claimant affirm any such breach and thereby accept that breach?
 - 1.3 Did the claimant resign at least in part in response to any breaches found above, including any "last straw".
 - 1.4 If a last straw case, did the last straw contribute something or was it objectively viewed, an innocuous act?
- 2 The following cases are decisions of the higher courts which give guidance to the Employment Tribunal as to the interpretation of the relevant statutory provisions and also as to the meaning of unfair constructive dismissal. These authorities are intended to give guidance to the parties and are not intended to limit the parties to any further submissions which they may wish to make. Similarly, they are not intended to be in anyway indicative as to whether the Employment Tribunal is likely to find in favour of the claimant or the respondent:

Western Excavating (ECC) Limited v Sharp [1978] IRLR 27;

"If the employer is guilty of conduct which is a significant 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 those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must deny the case be sufficiently serious to entitle him to leave at one. 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."

Woods v WM Car Sales (Peterborough) Limited [1981] ICR pg 690;

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. To constitute a breach in this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.”

Lewis v Motor World Garage [1981] ICR CA;

“The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract – the question is, does the cumulative series of acts taken together amount to a breach of the implied term? This is the last straw situation.”

London Borough of Waltham Forrest v Omilaju [2005] IRLR 35 CA;

“The essential quality of the last straw, is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee’s trust and confidence has been undermined is objective.”

Malik v BCCI [1997] ICR 610;

“Conduct must have of course impinged on the relationship in the sense that, looked at objectively, it is likely to destroy, or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. Proof of a subjective loss of confidence in the employer is not an essential element of the breach.”

Wright v North Ayrshire Council UKEAT-S0017/3;

“In deciding whether there has been a “last straw” breach, the issue is whether that breach played a part in the resignation. It is enough that the employee resigns in response, at least in part, to fundamental breaches of contract by the employer.”

Marriott v Oxford Co-operative Society [1971] QB196;

“The fact that an employee continues to work for a period of time after the alleged fundamental breach of contract does not necessarily mean that the contract has been affirmed. Provided the employee makes clear his objection to what is being done, he is not to be taken to affirm the contract by continuing to work and draw pay for a limited period of time, even if his purpose is only to enable him to find another job.”