



Case Number: 2301837.2016

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs P Levy

and

Respondent

East Kent Hospitals University
NHS Foundation Trust

Held at Ashford on 10 April 2017

Representation

Claimant:

Mr T Pullen

Kent Law Clinic Advocate

Respondent:

Mr R Kohanzad, Counsel

Employment Judge Kurrein

JUDGMENT

The Claimant has been unfairly dismissed by the Respondent.

REASONS

The Claim and Issues

- 1 On 19 September 2016 the Claimant presented a claim to the tribunal alleging she had been unfairly dismissed by the Respondent.
- 2 On the 24 October 2016 the Respondent presented a response in which it asserted that the Claimant had resigned voluntarily from its employment.
- 3 On 10 March 2017 the Claimant, having received legal advice, was given leave to amend her claim so that, instead of alleging unfair constructive dismissal, she was alleging straightforward unfair dismissal.
- 4 The principal issue before me was whether the Claimant had resigned or had been dismissed.

The Evidence

- 5 I heard the evidence of the Claimant on her own behalf. I heard the evidence of Mr Gorton-Davey, operational manager for health records and reception services, on behalf of the Respondent. I considered the documents to which I was referred and heard the submissions of the parties. I make the following findings of fact.

Findings of Fact

- 6 The Claimant was born on 20 July 1960, and started her employment with the Respondent as an Assistant Administrator on 29 March 2006.
- 7 The Respondent, as indicated by its name, is a hospital trust. It has hospitals in Margate, Dover, Canterbury, Whitstable, Ashford and Folkestone. Mr Gorton-Davey is one of three operational managers and is primarily responsible for the hospitals in Margate and Dover. He has day to day line manager responsibility for over 50 staff. The Claimant was based at the Margate hospital.
- 8 Under the Respondent's disciplinary policy it was a potential disciplinary offence for an employee to have more than 10 days, or more than four periods of any length, of sickness absence in any one year.
- 9 Although the Claimant was diagnosed with dyslexia in 2012 it is clear from her annual performance assessments that she performed her duties to a satisfactory standard throughout her employment. It was commonly remarked that she was a good "team player" and always ready and happy to assist her colleagues.
- 10 In August 2013 the Claimant's mother was seriously ill. The Claimant had a single absence from work totalling 37 days in order to support her parents and as a consequence of bereavement. She was made the subject of a verbal misconduct warning for this and other absences in early 2014, and, in respect of further absences, again in October 2014.
- 11 At that time the Claimant discussed the possibility of working reduced hours, in part to assist in caring for her father, but such hours were not then available. Subsequently the Claimant was offered the opportunity to work on weekends rather than solely weekdays, and to thereby increase her earnings. She accepted that offer and then continue to work five days per week including Saturdays and Sundays.
- 12 Unfortunately, the Claimant did not get on well with one of the colleagues she worked with on weekends. She thought him do the uncommunicative and unhelpful. She raised this with her line managers on more than one occasion, but there was nothing specific that the Claimant could identify that those managers could deal with. They did raise the matter with the Claimant's colleague, who expressed surprise at the perception of his conduct.
- 13 On 6 March 2016 the Claimant emailed Mr Gorton-Davey to make what she termed an "official complaint" concerning the colleague of whom she had complained before. She took the view that matters had reached a point at which mediation might be an appropriate intervention. On 7 March 2016. Mr Gorton-Davey responded to offer the Claimant an appointment on 11 March 2016 at which he intended to discuss her concerns. The Claimant was asked to bring with her any examples of the issues that she wished to raise.
- 14 In the interim, on 10 March 2016, Mr Gorton-Davey spoke to the Claimant concerning her sickness absence record since September 2015, during which four periods of sickness absence had been recorded, and again issued her with a verbal misconduct warning. He confirmed this in a letter of 10 March

- 2016 and warned her that further absences might result in more severe sanctions.
- 15 The Claimant attended a meeting with Mr Gorton-Davey on 11 March 2016 to discuss her complaint. Although Mr Gorton-Davey wrote to the Claimant on 14 March setting out his understanding that at that time the Claimant did not wish to undertake mediation or for any other formal action to be taken the Claimant was adamant that she had never received this letter. Regardless of that, the Claimant did not raise any further issue concerning her colleagues conduct before the matters with which I am concerned overtook those events.
- 16 As part of his follow-up to the interview with the Claimant concerning her sickness absence. Mr Gorton-Davey referred the Claimant to occupational health. She attended an appointment on 27 April 2016, and a report was issued to HR the same day, suggesting that the Claimant should carry out a stress self-assessment and that mediation might prove to be a way forward. The Claimant's sickness absences were not thought to be related and no underlying medical cause was identified.
- 17 At this time the Claimant was clearly unhappy with her position in the workplace. She made an application to work for the Respondent's Radiology Department in a clerical role. She was familiar with that department because she had in the past work in it either on secondment or in order to assist it with a backlog by working overtime. That application was made on 7 May 2016 and the Claimant was interviewed for the post on the 26 May 2016. On the following day the Claimant was told in a telephone call that she had been successful and would be offered the new role, subject to occupational health and references.
- 18 The Claimant was extremely happy at that outcome and wasted no time in informing her team leader, Ms T Hancock and Mr Gorton-Davey (who is also the long-term partner of Ms Hancock) of it.
- 19 On 9 June 2016, HR wrote to the Claimant to formally offer her the position of Clerical Officer in the Radiology Department, subject to OH clearance and references. That letter made specific reference to a "Staff Change Form" that the Claimant was asked to complete, in part, and to hand to her new manager when she commenced her new role. The conditional nature of this offer, and the requirements to be satisfied, were also set out in an email from HR of the same date.
- 20 Early in the working day on the morning of 10 June 2016 the Claimant and her colleagues were in conversation when something was said that caused both the Claimant and Ms Hancock to become upset. Ms Hancock left the room. The Claimant immediately thought that she had had enough of the Department and drafted a letter to be given to Mr Gorton-Davey. I accepted the Claimant's evidence that, but for the upset that had arisen that morning, she would not have drafted that letter.
- 21 Ms Hancock had in fact gone to see Mr Gorton-Davey in his office in tears. I accepted Mr Gorton-Davey's evidence that it was not unusual for Ms Hancock and other members of his team to come to his office when upset or otherwise

to “let off steam” from time to time. It was not suggested that Ms Hancock had, whilst in Mr Gorton-Davey’s presence, informed him that the Claimant was the source of her upset. Shortly after her arrival there was a knock on Mr Gorton-Davey’s office door. He opened the door slightly, and saw the Claimant standing outside. She handed him a letter in an envelope.

- 22 I accepted Mr Gorton-Davey’s evidence that he did not read that letter immediately, but waited until Ms Hancock had left the room. The Claimant’s letter was short. It was typed and headed with her name and address and the date of 10 June 2016. It said,

“Dear Simon

Please accept one Month’s Notice from the above date.

Regards,

[Signed]

Mrs P. Levy”

- 23 Later that day, at the request of HR, Mr Gorton-Davey completed a pro-forma reference request concerning the Claimant for the intended new manager in the Radiology Department. It was Mr Gorton-Davey’s evidence that he did so honestly and accurately. His reference, sent to HR shortly before 3 pm on 10 June 2016, set out that the Claimant had had four episodes of absence totalling 18 days and was the subject of a recorded verbal warning for sickness absence due to expire in September 2016. In the course of cross examination Mr Gorton-Davey accepted that he had been in error in asserting the Claimant as having been absent for 18 days.

- 24 It appears that an HR administrator, who also wrote concerning the Claimant’s sickness absence on the same date was also in error in asserting that the Claimant’s absences and totalled 17 days.

- 25 On the basis of the evidence before me I concluded that the Claimant actual sickness absences for the relevant period were as follows: –

25.1 16 September 2015. The Claimant was absent for one day in order to undergo what she considered to be cosmetic dentistry, for which she had requested unpaid leave, but which had been refused.

25.2 11 November 2015. The Claimant was absent for five days with flu and cough symptoms.

25.3 15 January 2016. The Claimant attended at work wearing bandages, having visited A&E because she had fractured a finger. She was told that she could not work and must take sick leave. I took the view that, the Claimant being ready, able and willing to work that day, this was not a period of sickness absence but, in reality, a period of medical suspension by the Respondent.

25.4 25 February 2016. The Claimant was absent with laryngitis for five working days. This was incorrectly recorded as having been a period of eight days absence.

26 Despite my above findings, however, it appears to me that the Claimant would have fallen foul of the trigger points in the Respondent's disciplinary policy regardless of whether the absence with a fractured finger was taken account of or not, and regardless of the error in respect of the length of her absence with laryngitis. Although there may only have been three periods of absence they totalled in excess of 10 working days.

27 It was also on 10 June 2016 that Mr Gorton-Davey responded to the letter he had received earlier that day from the Claimant. His letter was in the following terms,

Dear Patricia,

Re: notice of resignation.

Thank you for your letter dated 10 June 2016, in which you tendered your notice of resignation.

It is with sincere regret and disappointment that I accept your notice of resignation. I can confirm that your last day of work within Health Records will be Friday, 8 ~~June~~ 2016.

July

I would like to [take] this opportunity in thanking you for your hard work, dedication and contributions to a highly successful team over the years, and I wish you every success with your future employment.

Please do not hesitate to contact me if you have anything that you wish to discuss.

Yours sincerely

I accepted the Claimant's evidence that this letter was not handed to her, but left on her desk.

28 At just after 8 am on 13 June 2016 the Radiology Admin Manager emailed the Claimant to ask her to make contact so that they could arrange to talk. They met later that day, and in the course of the conversation the Claimant was asked in detail about her sickness absence record.

29 On 16 June 2016 the Respondent's HR Resourcing Team wrote to the Claimant as follows: –

Dear Patricia,

Withdrawal of Offer of Employment - Clerical Officer

I regret to inform you that the trust is withdrawing the offer of employment to the post of clerical officer with immediate effect in line with East Kent Hospitals University NHS Foundation Trusts' [*sic*] policies and procedures.

Unfortunately, the level of sickness detailed in your references has been deemed unsatisfactory by the manager of the department, meaning we have been unable to complete this clearance and we are therefore withdrawing the offer of employment.

May I take this opportunity to thank you for your interest in this position and wish you every success in finding suitable employment in the future.

Yours sincerely

30 The Claimant telephoned HR immediately she received that letter on 16 June 2016 to seek advice about withdrawing her notice. I accepted her evidence that she was told this was within a manager's discretion. The Claimant raised this with Mr Gorton-Davey later the same day.

31 He wrote to the HR department by email shortly before 3 o'clock that day in the following terms,

Hi

I have a member of staff who has handed in their resignation last week and wishes to retract it. Currently, the post is with the executive team for approval and has not been advertised.

Although I have not been given a reason for the retraction, I understand unofficially it is because of their sickness level declared in a reference, and that they currently have a verbal warning against them for their sickness absences.

Do I have to accept a retraction of resignation?

Many thanks

32 Mr Gorton-Davey accepted in cross examination that: –

32.1 The second paragraph of his enquiry did not accurately record the reason why the Claimant wished to retract her resignation. He had understood at that time that the Claimant's reason was the fact that his reference had resulted in the job offer she had previously received being withdrawn.

32.2 The final line of his enquiry could be read as indicating a reluctance on his part to permit the Claimant to retract what he viewed as her "resignation".

33 On 17 June 2016, shortly before 2 pm, the Claimant emailed Mr Gorton-Davey and his line manager, Ms Tapp, to confirm her conversation of the previous day and used, for the first time in writing, the word "resignation" in asking to retract it.

34 The Respondent sought legal advice on the position. Mr Gorton-Davey disclosed in his statement that he was advised by HR that the Respondent had no obligation to accept the retraction of a resignation because it was a matter for the Respondent, whether it wish to do so or not. He discussed the issue with Ms Tapp, who took the view that the Claimant's sickness absence was such that if she applied for a post in open competition she would not be offered it because of her sickness absence record. Mr Gorton-Davey and Ms Tapp therefore took the decision that they would not permit the Claimant to retract her resignation.

35 The decision was recorded in two ways: –

35.1 On 24 June 2016 at 16:26. Mr Gorton-Davey emailed the Claimant with the subject "Resignation" as follows,

"Hi Trish

Unfortunately, I have been unable to contact you whilst you have been on leave as I would have preferred to discuss your request to withdraw your resignation face to face.

After discussing your request with [Ms Tapp], it is with regret that I cannot accept your request and as a result, your last day of work with us will be on Sunday, 10 July 2016. I also need to inform you that due to the number of days annual leave taken already this financial year, the Trust will be looking to recover 88 hours of pay from you.

As I am on leave this week (from 27 June) should you have any questions then please contact [Ms Tapp] as [the team leaders] will not be able to assist.

I hope to catch up with you face-to-face upon my return.”

- 35.2 On the same day he completed a “Staff Termination Form” containing the Claimant’s basic personnel details. Below those details was a prominent instruction,

“This form is only to be used for employees leaving the Trust and not for internal transfers.”

It also included a space with a number of tick boxes to set out the reason for a “Voluntary Resignation” including “Incompatible Working Relationships” but Mr Gorton-Davey had ticked “Other”. The form also recorded the last day of work and any overpayment of holiday pay.

- 36 On 29 June 2016 the Claimant emailed Ms Tapp to complain about the situation in which she found herself. Ms Tapp responded the same day, to ask the Claimant for details concerning any stress assessment she had carried out, and told her that she wished to seek HR advice on the issues the Claimant had raised. The Claimant replied to say that she had never been provided with or completed a stress assessment.
- 37 On 1 July 2016. Ms Tapp updated the Claimant on her understanding of the position regarding the stress assessment: the onus was on the employee to carry out a stress assessment, not the Respondent. She told the Claimant that she wished to discuss the situation with Mr Gorton-Davey and anticipated that the Claimant would meet Mr Gorton-Davey to discuss matters.
- 38 Mr Gorton-Davey sought HR support for that meeting, which took place on 6 July 2017. The Claimant raised the issues that she wished to, and Mr Gorton-Davey gave his responses. The Claimant’s position did not change, and her employment came to an end on 10 July 2016.
- 39 On 31 August 2016 the Respondent wrote to the Claimant to indicate that there been an over payment to her of a small sum which it sought to recoup. No issue arises in these proceedings regarding that dispute.

Submissions

- 40 I read the opening note prepared by the respondent. I heard the submissions made on behalf of each of the parties. It is neither necessary nor proportionate to set them out here.

The Law

The Issue

- 41 In the early case of Martin v Glynwed Distribution Ltd [1983] ICR 511, Sir John Donaldson, at 519, said this:

"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?"

Ambiguity?

42 I did not accept that the words used by the Claimant in her letter of 10 June 2016, " Please accept one Month's Notice from the above date." were, "clear and unambiguous", as asserted by the Respondent. My reasons as are follows:-

42.1 The letter does not identify the subject in respect of which notice is being given. It might be her role in the Records Department, i.e. notice of an intended transfer of department, or notice of termination of her employment relationship with the Respondent.

42.2 Support for the proposition that the notice given by the Claimant might be solely in respect of her role within the Records Department is provided by the disclosure given by the Respondent following exchange of witness statements of a sample set of documents relating to an employee ("A") who had successfully transferred her employment to a new department. I thought it noticeable that in that case:-

42.2.1 A was sent a conditional offer of a new post on 4 September 2014.

42.2.2 A wrote a letter of resignation to HR on 12 September 2014 in which she specifically stated that she was resigning "from my role", with notice expiring on 10 October 2014.

42.2.3 There was no evidence that this letter was treated as being a letter of resignation from her employment with the Respondent, for instance by her resignation being accepted. There was no evidence of any response.

42.2.4 By letter of 29 September 2014 HR made an unconditional offer to A, with a start date of 13 October 2014.

42.3 I also thought that exchange of correspondence to contradict the Respondent's assertion that all employees who transfer roles within the Respondent are required to resign from their employment and are then offered re-engagement on new terms and conditions. Although A was sent new terms and conditions of employment they only reflected the change of role. There was nothing to suggest a termination and re-engagement.

43 However, even if I am wrong, and these words are clear and unambiguous, I take the view that the context in which they were used gives rise to special circumstances so as to require the words to be construed in that context.

The Principles of Construction

44 Whilst there has been much debate as to the correct approach to take when construing the word used in cases such as this I have concluded that the decisions in Martin v Yeoman Aggregates Ltd [1983] IRLR 49, [1983] ICR

314; **J & J Stern v Simpson** [1983] IRLR 52 are correctly decided and are binding on me. They require that in construing the words used I must adopt an objective test having regard to all the circumstances of the case.

45 It appears to me, to the extent that it is ambiguous, that the principal matters that give a context to the letter in question at the time it was delivered are as follows:-

45.1 The Claimant was not happy in the Records Department.

45.2 The Claimant had applied for a new role with the Respondent, had received a conditional offer for, and intended to take up, that role.

45.3 She was unaware that her employment history might adversely affect the conditional offer.

45.4 She needed to work to support herself and her family and to assist in caring for her father.

46 These were matters of fact. They were known to the Claimant and were, save possibly for that at paragraph 45.3, also within the knowledge of the Respondent.

47 Given that context and the other circumstances of the case I have concluded that an objective consideration of the letter would lead a reasonable observer to conclude that the Claimant was doing no more than informing Mr Gorton-Davey at the earliest opportunity of her intention to accept what was then a conditional offer of a new role: it was not a termination of her employment.

48 I am reinforced in that view by the following factors, which I consider to be relevant to interpreting that letter whether or not it was ambiguous:-

48.1 Mr Gorton-Davey knew that:-

48.1.1 The Claimant was not happy in the Records Department.

48.1.2 The Claimant had applied for a new role with the Respondent, had received a conditional offer for, and intended to take up, that role.

48.1.3 He regularly advised staff in Team Briefings, two or three times a year, that they should not resign their employment until they had received an unconditional offer of a new post.

48.1.4 The terms of the reference he had given about the Claimant were such that it might give the recipient cause for concern.

48.2 Mr Gorton-Davey did not treat that letter as if it were a letter of resignation from the Respondent's employment. In particular:-

48.2.1 His letter in response is specific in referring to the end of the Claimant's work within the Records Department, not to the termination of her employment with the Respondent.

48.2.2 That letter did not deal with the matters one would expect, such as outstanding accrued or overtaken holiday, if the letter had been understood as intending to terminate the employment relationship.

- 48.2.3 He did not complete a “Staff Termination Form” at the time, and probably knew that the Claimant would have received a “Staff Transfer Form” with her conditional offer (as she in fact had).
- 48.3 In contrast, when Mr Gorton-Davey and Ms Tapp decided that the Claimant’s employment should cease, on or shortly before 24 June 2016, he lost no time in:-
- 48.3.1 writing to tell the Claimant that her employment would cease “with us” on the specified date, and that she owed 88 hours excess holiday pay; and
- 48.3.2 completing a “Staff Termination Form” with appropriate particulars the same day.
- 49 In light of these factors I have concluded that Mr Gorton-Davey did not at the time he received it understand the Claimant’s letter giving notice on 10 June 2016 as being a resignation from her employment with the Respondent.
- 50 In my above analysis I have deliberately sought to avoid reference to the evidence I heard as to the witnesses’, whether the Claimant’s or Mr Gorton-Davey’s, subjective views as to what was meant or intended by any particular words, acts or omissions. In my view that is the correct legal approach.
- 51 In light of all my above findings I have concluded that the Claimant has established on the balance of probabilities that she did not resign from her employment with the Respondent.
- 52 I find as a fact that the Claimant was dismissed by the Respondent’s letter of 24 June 2016 as a consequence of the Respondent’s decision to treat the Claimant’s letter of 10 June 2016 as a valid resignation.

Fairness

- 53 The onus is on the Respondent to establish the reason, or if more than one the principal reason, for the Claimant’s dismissal, and that it was a potentially fair reason. It has failed to adduce any evidence on those issues.
- 54 I therefore inevitably find that this was an unfair dismissal.
- 55 The parties will be informed of the listing for one day for a Remedy Hearing in due course. If they wish to submit dates to avoid they should do so without delay.

Employment Judge Kurrein
11 April 2017