



CS

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms S Ratchford

and

Respondents

Warden Parish Council

Held at Ashford on 6 and 7 March 2017

Representation

Claimant:

Mr A Booth, Lay Representative

Respondent:

Mr C Baran, Counsel

Employment Judge Wallis (sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was unfairly constructively dismissed by the Respondent;
2. The Claimant is entitled to wages for the period 10 November 2015 to 9 March 2016;
3. The Claimant is entitled to holiday pay for 15 hours;
4. The claim under section 38 (failure to provide written terms of employment) is dismissed;
5. The Respondent is ordered to pay the Claimant the following sums in compensation:-
 - a. £550 for unfair dismissal;
 - b. £800 for unpaid wages including notice pay;
 - c. £150 holiday pay;
 - d. £1,200 Tribunal fees;
6. The Respondent is ordered to pay the Claimant £360 as a contribution towards preparation time.

REASONS

Oral reasons were given at the end of the hearing. The Respondent requested written reasons in an email dated 3 April 2017.

ISSUES

1. In a claim form presented on 5 May 2016 the Claimant claimed unfair constructive dismissal; unpaid wages; notice pay; and holiday pay. The issues were set out in a case management order, replicated below.

2. 'It is the Claimant's case:-

Unfair Dismissal

- a. The conduct of the Respondent toward her, by its Councillors, was such as to breach the implied term relating to trust and confidence.
- b. She accepted that breach by resigning.
- c. The breach was a significant part of the reason she resigned, she having found alternative employment.
- d. She did not waive the breach or affirm the contract.
- e. She was dismissed.
- f. The onus is on the Respondent to establish a potentially fair reason for the dismissal.
- g. It cannot do so.

Unauthorised deductions/Breach of contract

- h. She has not been paid for the period from 9 November 2016 until expiry of her notice on 10 March 2016 despite the fact that she was ready able and willing to carry out her duties throughout that period.
- i. She was excluded from the premises and the computer system by the Respondent throughout that period.

Holiday Pay

- j. The Claimant has not been paid the holiday pay that accrued up to the expiry of her notice period.

Mitigation of loss

- k. She accepts that she will have to set off against the above claims, save that for holiday pay, the earnings she has received from her new posts during the relevant period of overlap.'

DOCUMENTS AND EVIDENCE

3. There was an agreed bundle of documents and written statements from all of the witnesses. I heard evidence from the Claimant herself Ms Bex Ratchford and from her witness Mr Geoff Partis. From the Respondent I heard from Mrs Patricia Sandle and Mrs Susan Guest.

FINDINGS OF FACT

4. The Claimant was employed as the Parish clerk for the Respondent Parish Council between 4 October 2013 and March 2016. In her witness statement she set out a catalogue of difficulties with Mrs Sandle who was the Chairman of the Respondent's Council. She gave various examples of the rude manner in which Mrs Sandle would address her, both in private and in public meetings.
5. The evidence of the Claimant about those incidents was supported by her witness Mr Partis, who had previously been an elected member of the Respondent Council. I found that the evidence was also partly supported by the Respondent's witness Mrs Guest, when she referred to the Claimant as having been treated badly in a meeting on 8 January 2015. In evidence she accepted that she had said that, but suggested that when she said that she did not know the full story, I found that it indicated that whatever the "full story" was, there had been bullying of the Claimant and that should not have taken place regardless of "the full story".
6. One of the difficulties in the case was that the Claimant had made covert recordings of a number of conversations with Mrs Sandle, and of the Respondent's formal meetings. I understood why she had done this, because of the difficulties she was facing, but I emphasised to the parties that such recordings could not be encouraged.
7. I found that the conduct of Mrs Sandle towards the Claimant was also supported by the fact that there has been an investigation into Mrs Sandle's conduct by an Independent Standards Committee of Swale Borough Council and they had criticised Mrs Sandle and found that she had breached the relevant code of conduct applying to members.
8. The Claimant's grievance letter of 19 September 2015 set out a catalogue of difficulties, principally with Mrs Sandle. The investigation report by the standards committee confirmed that Mrs Sandle had breached the members Code of Conduct and that she and other Councillors had failed to understand the role of the Parish clerk and had failed to show respect to the Claimant and allow her to speak in order to advise Councillors at meetings of the Respondent Council.

9. I found therefore that Mrs Sandle and others had treated the Claimant in the manner that the Claimant alleged. I also noted that the covert recording of a formal meeting of the Respondent on 18 March 2015 showed that Mrs Sandle told Mr Partis to 'shut up' and was rude to him. I found that this was apparently Mrs Sandle's style of addressing colleagues as well as the Claimant.
10. The Respondent suggested that the Claimant had not been blameless and in the standards committee report there was mention of the Claimant's performance being questioned in some areas, although the Claimant denied that. The committee's report said that the Claimant's 'performance was poor...however there is evidence ...that the (Respondent) was trying to address her performance' in 2014 and 2015. The report also noted that the Claimant 'reiterated her comments that the allegations of poor performance against her were based on lies'.
11. I was satisfied that if there were problems with performance, the Respondent as an employer should have taken proper and professional steps to deal with any perceived failings. I noted that this was a very small employer, with one employee (the Claimant) and that Councillors are volunteers. However, as they were in a position of employer, it was incumbent upon them to comply with procedures in order to ensure fairness. Regrettably, I found that the Respondent had no written procedures, although minutes that I was shown referred to these being put in place. That was demonstrated in one instance where Mrs Sandle had issued a verbal warning to the Claimant on 12 June 2015 without following any procedure whatsoever. It was Mrs Sandle's evidence that the warning was later withdrawn on advice from the Respondent's professional association. I found that this highlighted the Respondent's unfair approach to capability/disciplinary matters.
12. I found that as time went on, the parties in effect became more frustrated with each other. The Claimant went on sick leave and presented her grievance on 19 September 2015. I found that the effect of the Respondent's conduct on the Claimant was much more serious than the effects of the Claimant's perceived shortcomings on the Respondent. I accepted the Claimant's evidence that on occasions she left meetings with the Respondent's Council in tears and I found that that was because of the way she had been treated by Mrs Sandle and her colleagues.
13. The Claimant was fit to return to work on 10 November 2015 but had not been given the new key to the office and new passwords for the computer. Neither had the Respondent explained to her how her grievance would be dealt with, save to offer mediation which was unacceptable to the Claimant because the proposal was to involve Mrs Sandle and two other Councillors at the first meeting. I accepted that it was not unreasonable of the Claimant to decline that offer.
14. I found that Mrs Sandle insisted on conducting the Claimant's return to work meeting herself, despite knowing the contents of the Claimant's grievance which

was against Mrs Sandle herself. The Claimant sought assistance from another Councillor, Mrs Guest, who was the vice chairman. Mrs Guest did not assist; she simply copied the email to Mrs Sandle and it was Mrs Sandle who replied. I found that it was not unreasonable of the Claimant to decline to attend such a meeting.

15. On 13 January 2016 Mrs Sandle sent an email to the Claimant reiterating that the offer of the return to work meeting with Mrs Sandle and Mrs Guest “has not changed”. Later that month, the Claimant found that the latest agenda sent from the Respondent was prepared by “an interim clerk”. I accepted that the Respondent was entitled to put in place arrangements to cover the Claimant’s work while she was on sick leave, but no attempt had been made to explain this to the Claimant. In any event, she had notified them that she was fit for work from 10 November 2015 and the Respondent had taken no sensible steps to facilitate her return to work. It was clearly inappropriate for Mrs Sandle to insist on holding a return to work meeting with the Claimant given that the Claimant’s grievance, largely against Mrs Sandle was still outstanding. It was clearly inappropriate to insist that Mrs Sandle would be present at such a meeting, even with Mrs Guest also being there. I found that it was inappropriate for the Claimant to discover that there was an ‘interim clerk’ by chance.
16. The Claimant resigned by letter of 10 February 2016. She set out in the letter a list of events and matters that had caused her resignation, relating to the conduct of the Respondent’s councillors.

SUBMISSIONS

17. On behalf of the Respondent, Mr Baron submitted that the Respondent had not acted in breach of trust and confidence and if they had done then that breach had been waived by the Claimant. He mentioned the small size of the Respondent’s organisation and the nature of that organisation. He suggested that the Claimant undertook her role in a literal and officious manner. He noted that tensions between the parties had not been resolved and that both appeared to be strong-willed.
18. He referred to the standards committee report which suggested that neither party was entirely blameless. He suggested that the Claimant had been difficult to manage over the course of her employment and that was why Mrs Sandle had become forceful. He suggested that the covert recordings done by the Claimant had “hung Mrs Sandle out to dry”. He suggested that the Claimant moderated her own behaviour when meetings were being recorded.
19. He suggested that had there been a constructive dismissal then the Claimant had contributed to that because she was relying on evidence that she had obtained by breaching trust and fidelity. Had the Respondent known that she was secretly recording meetings then she would have been disciplined.

20. On behalf of the Claimant, Mr Booth submitted that the Respondent was obliged to follow employment law. The recordings, although covert, shows that the Claimant's evidence was true. He submitted that Mrs Sandle and the Respondent refused to take the Claimant's advice despite her being trained and them having little knowledge or experience.

THE LAW

21. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, Lord Denning said

"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 intended 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 employers conduct. He is constructively dismissed."

22. In the case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

23. That test was confirmed in the case of **Malik v BCCI [1997] IRLR 462**, by the House of Lords.

24. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see **Lewis v Motor World Garages Limited [1985] IRLR 465**).

25. In the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the

employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it 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.

26. In the case of **Bournemouth University v Buckland (EAT0492/08)**, the EAT confirmed the test in the case of **Malik v BCCI**, that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. The Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows:-

- (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
- (ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
- (iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
- (iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

27. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was *an* effective cause of the resignation; it does not have to be *the* effective cause.

28. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

29. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances.
30. It is useful to note two other decisions. In **Morrow v Safeway Stores plc [2002] IRLR 10**, it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.
31. In **Croft v Consignia plc [2002] IRLR 851**, the EAT held that “the implied term of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the ‘industrial jury’ “.

CONCLUSIONS

32. Having made the findings of facts set out above, I considered the relevant law and then the issues in order to draw these conclusions.
33. I had to consider the cumulative effect of the events on the Claimant and the way in which the Respondent’s course of conduct had affected her. I concluded that the Respondent’s treatment of the Claimant at various meetings, particularly with Mrs Sandle as the chair; the imposition of a verbal warning without any procedures; failure to deal promptly with the Claimant’s grievance; the failure to make sensible arrangements for the Claimant to return to work after her sick leave; the failure to tell the Claimant that an interim clerk had been appointed (although I recognised that this last point was not put in the resignation letter by the Claimant); and the insistence on a return to work meeting involving Mrs Sandle, taken together amounted to conduct which breached trust and confidence.
34. There was no reasonable and proper cause for the conduct of the Respondent. Disputes about hours of work and place of work which had taken place in some of the discussions should never have escalated in the way that they did, but should have been agreed in writing at an early stage. Concerns about the Claimant’s performance should have been dealt with properly and professionally, with agreed targets set and so on. As the parish clerk, the Claimant should have been allowed to give relevant advice to the councillors at formal meetings of the Respondent’s organisations, and not been prevented from speaking.
35. I concluded that the Respondent had breached the implied term of trust and confidence which the Claimant accepted by resigning.
36. I concluded that the breach was the cause of the resignation. No other alternative reason had been suggested by the Respondent.
37. I was satisfied that the Claimant had not waived the breach and affirmed the contract. I concluded that she had put up with a great deal of poor treatment

from the Respondent and then presented a grievance hoping to resolve the problems. She gave the Respondent plenty of time to deal with that grievance, but very little was done about it by the Respondent. That was followed by no steps being taken by the Respondent to get the Claimant back to work. I did not consider that the Claimant's actions constituted a waiver of that breach.

38. In all the circumstances I concluded that there had been a constructive dismissal.
39. I concluded that the dismissal was unfair in the circumstances. The Respondent had not established that there was a potentially fair reason for dismissal at the time of resignation.
40. With regard to contributory conduct, the Respondent suggested that had the Claimant returned to work she would have been dismissed soon after because of the covert recordings and possibly because of other matters. It was my task to try to construct the world as it might have been in order to address this issue.
41. I considered that had Mrs Sandle recognised the role of the clerk and been prepared to take advice, and if the Claimant had adjusted the way in which he advised the Respondent, things may have improved; it was difficult to say. Having seen both parties give evidence, I concluded that there had been a personality clash that had added to these problems. I accepted that had the Respondent found out about the covert recordings then that would have breached their trust and confidence in the Claimant and it was likely that that would have resulted in dismissal. It was likely that they would have found out about those recordings during any grievance process as the Claimant would have been likely to rely upon those recordings. The difficulties about whether the Claimant should work in the office or at home and for how many hours and perhaps performance issues would also have required consideration. Weighing up all of those matters, I concluded that had the Claimant not been constructively dismissed on 10 March 2016 at the expiry of her notice period, she would have been fairly dismissed within a month thereafter for some other substantial reason. Any compensation was therefore limited to that finding.
42. With regard to the claim for wages and notice pay, I noted that this was in respect of the period 10 November 2015 to 10 March 2016. I found that the Claimant was ready to return to work on 10 November 2015 and was prevented from doing so by the Respondent because her grievance had not been dealt with at all; a return to work meeting had not been arranged in the proper manner; and no attempts had been made by the Respondent to provide her with the correct key and the correct passwords. I concluded that the Claimant was entitled to be paid for that period.
43. The Respondent accepted that holiday pay was owed to the Claimant and I explained that I wanted to hear further evidence from the Claimant as to how that was calculated.

44. I also explained that I wanted to hear further evidence about any alleged breach of the ACAS Code.
45. I also noted that the Respondent would have to reimburse the Claimant Tribunal fees of £1200.
46. When I announced the decision, the parties were able to agree some of the figures to be awarded. The basic award was agreed at £100. The loss of statutory rights at £200. The compensatory award, net for one month, was £200.
47. I accepted that there had been a breach of the Acas Code in respect of the way in which the Respondent had dealt with the Claimant's grievance, by not dealing with it at all, and a breach in respect of issuing a verbal warning without any procedure followed. I concluded that it was appropriate to increase the compensatory award by 25% (£50). The award for unfair dismissal was therefore £550.
48. In respect of the wages for the period set out above, including the notice period, the parties agreed that this sum was £800 (net).
49. It was also agreed that the Claimant was entitled to be reimbursed the Tribunal fees of £1200.
50. With regard to holiday pay, after a discussion the parties agreed that the appropriate figure was £150.

PREPARATION TIME ORDER

51. The Claimant applied for an award for preparation time. The Claimant suggested that the Respondent has acted vexatiously, disruptively and unreasonably and that they had no reasonable chance of defending the claim. It was suggested that there had not been full disclosure at the correct time and that a great deal of work had been undertaken by the Claimant and her representative in providing and correcting transcripts of the covert recordings. 100 hours was mentioned.
52. I considered that the 100 hours was excessive in respect of this application.
53. The Respondent submitted that they had not wasted the Tribunal's time and that they had made offers to settle the matter in the sum of £2105 plus holiday pay. They noted therefore that the Claimant had only gained around £500 or so by fighting the case. The Respondent considered that the Claimant simply had wanted her day in court.
54. The Respondent noted that I had said in my judgment reasons that I was not happy with covert recordings being made and then relied on in evidence. The Respondent suggested that they had not been difficult about checking the transcripts and indeed had spent some 18 hours themselves checking that material.

55. I considered the relevant law. Rule 76 of the Employment Tribunals Rules of Procedure sets out provisions in respect of the making of preparation time orders. A preparation time order may be made only where the receiving party has not been legally represented at a hearing.
56. Preparation time means time spent by the receiving party or his employees carrying out preparatory work directly relating to the proceedings up to but not including time spent at any hearing.
57. Rule 76 provides that a Tribunal may consider making a preparation time order against the paying party where in the opinion of the Tribunal any of the circumstances in paragraph (1)(a) apply. Having so considered the Tribunal may make a preparation time order against that party if it considers it appropriate to do so.
58. The circumstances are those that are normally considered in a costs application. They are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the claim or response had no reasonable prospect of success.
59. Rule 79 sets out the provisions in respect of the calculation of a preparation time order. The Tribunal shall make an assessment of the number of hours spent on preparation time on the basis of information on time spent provided by the receiving party and the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work and with reference to matters such as the complexity of the proceedings, the number of witnesses and documentation required.
60. Once the number of hours is assessed, the hourly rate is applied. The current hourly rate is £36.
61. The Tribunal may have regard to the paying party's ability to pay when considering whether to make a preparation time order or how much that order should be.
62. I noted that there was no evidence that the Respondent had put the Claimant to additional cost by failing to comply with the case management order in respect of disclosure. Some documents had been added later in the process; this was a relatively normal situation in litigation.
63. I considered that the Respondent's case had no reasonable prospect of success particularly in view of the findings of the independent report produced by the standards committee of Swale District Council. Given that that report had said that there had been breaches of the relevant conduct code the Respondent could not reasonably expect to succeed in their arguments that there had been no breach of trust and confidence by the Respondent.

64. I noted that an offer had been made to the Claimant, but the Respondent had made no concessions here, save for the holiday pay which was a minor part of the claim.
65. I considered that the Respondent should make a contribution towards the preparation time spent by the Claimant and her lay adviser. I did not think the Claimant's suggestion of 100 hours was reasonable or proportionate for the claims. I considered that 10 hours was proportionate and I therefore made an award of £360.
66. When I announced my decision the Respondent pointed out that, with regard to concessions, they did not know the contents of the standards report until January 2017. I reiterated my finding that in any event once they had the report they had made no concessions at the hearing and it was unreasonable to continue to argue the case in full, knowing the criticisms of the Respondent contained in that report. The Respondent suggested that there would have been no saving of time in any event, but, without wishing to argue, having announced my decision, I noted that there could have been some saving of the time spent in looking through the recordings had it been accepted that there had a breach of trust and confidence and if the issue to be decided had been, for example, contributory conduct.

.....
Employment Judge Wallis
11 May 2017