

CS



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE J PRITCHARD
(sitting alone)

BETWEEN:

Mr V Alum

Claimant

AND

South West London and St George's
Mental Health NHS Trust

Respondent

ON: 27 and 28 March 2017

APPEARANCES:

For the Claimant: In person

For the Respondent: Mr T Tyler, Solicitor

REASONS

Reasons having been given orally at the hearing, these written reasons are provided pursuant to the Claimant's request received on 29 March 2017.

1. The Claimant claimed that he had been constructively and unfairly dismissed. He alleged that the Respondent had breached the implied term of trust and confidence. The Respondent resisted the claim.
2. The Tribunal heard evidence from the Claimant on his own behalf. On the Respondent's behalf the Tribunal heard evidence from Mrs Kirsty Murray, (Operational Manager for Forensics) and from Mr Kenneth Wong, (Operations Manager).
3. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing the parties made brief

oral submissions and handed written submissions to the Tribunal for consideration during its deliberation.

The issues

4. The issues were discussed with the parties at the outset of the hearing and can be described as follows.

4.1. Could the Claimant show:

4.1.1. That, objectively viewed, there was a fundamental breach of contract on the part of the Respondent, or a course of conduct on the Respondent's part which cumulatively amounted to a fundamental breach of contract, entitling the Claimant to resign;

4.1.2. If so, that the breach caused the Claimant to resign or the last in a series of events which was the last straw; and

4.1.3. That the Claimant did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal?

4.2. If so, and the Claimant had therefore established that he had been constructively dismissed, could the Respondent show that it dismissed the Claimant for a reason relating to conduct or for some other substantial reason; if so, was the dismissal fair in the circumstances?

4.3. If the Tribunal were to conclude that the Claimant had been unfairly dismissed, what remedy should be awarded?

4.3.1. The Claimant told the Tribunal that if he were to succeed in his claim he would like to be reinstated.

4.3.2. If the Tribunal were to decide that a monetary award should be made instead, should the compensation be reduced by reason of:

4.3.2.1. the Claimant's unreasonable failure to follow the ACAS Code, namely failing to appeal against the outcome of the grievance; and/or

4.3.2.2. the Claimant's contributory conduct; and/or

4.3.2.3. the fact, if established, that the Respondent would have dismissed the Claimant in any event (*Polkey*)?

5. The Tribunal distilled from the Claimant's ET1 claim form that he was complaining of the following matters which he said led to a breach of the implied term:

5.1. He was bullied by members of staff and management per his

complaint (in evidence the Claimant explained that this was the formal grievance he had raised);

- 5.2. The Respondent had failed to support him;
 - 5.3. He was humiliated when advised by the Respondent of allegations after his nightshift when he was tired;
 - 5.4. The Respondent undertook a lengthy investigation leading to stress;
 - 5.5. The Respondent took a long time to initiate mediation after conclusion of the disciplinary process;
 - 5.6. Mediation initiated by the Respondent was inappropriate;
 - 5.7. The Respondent provided no outcome for his bullying complaint of November 2015 until August 2016;
 - 5.8. He was moved to a non-clinical area with no unsocial hours working which was detrimental to his ability to maximise his earnings;
 - 5.9. He was not permitted to return to a clinical area following the occupational health report and the Respondent gave no clear explanation why; and
 - 5.10. The Respondent attempted to pass off his complaint by referral to occupational health on the basis that he might be mentally ill.
6. The Respondent confirmed to the Tribunal at the outset to the hearing that these were indeed the matters about which he was complaining.

Relevant findings of fact

7. The Claimant commenced employment with the Respondent at Springfield University Hospital in Tooting Bec on the 1 February 2013 as a Band Three Healthcare Assistant working on Hume ward. Hume ward is known as a forensic ward and is a semi-secure unit. The Tribunal accepted Kirsty Murray's evidence that the forensic wards are some of the most challenging to work on, not least because the patients are acutely unwell with complex conditions. Some of them have committed criminal offences.
8. During June and July 2015 a number of complaints were made by some of the Claimant's colleagues about his conduct and behaviour. The complaints included:
 - 8.1. The Claimant's abusive and aggressive conduct towards a colleague;
 - 8.2. The Claimant intentionally locking a colleague in an airlock in the ward;

- 8.3. The Claimant making colleagues feel uncomfortable by shouting; and
- 8.4. The Claimant refusing to carry out certain roles or comply with reasonable instructions.
9. The Respondent's disciplinary procedure, in the section dealing with suspension, provides, amongst other things:

It may also be appropriate for a member of staff to be moved/ transferred to another post during an investigation

10. At the end of July 2015, the Respondent moved the Claimant to Turner Ward on a temporary basis while an investigation into the complaints was undertaken by Mr Gladman Dimbiri, the manager of Hugh Ward ("the first investigation"). Mr Dimbiri carried out comprehensive interviews with eight members of staff including those who had complained about the Claimant's conduct and behaviour. Mr Dimbiri also interviewed the Claimant as part of his investigation. The Tribunal was unable to identify any evidence given by the Claimant's colleagues which necessarily led to the inference that they conspired against the Claimant as he alleged before the Tribunal.
11. On 28 November 2015, Daniel Ibuken, Turner Ward Deputy Manager, complained in writing to the Respondent about an incident which he alleged took place with the Claimant the previous day. The incident concerned the Claimant's interaction with Mr Ibuken when he asked the Claimant to provide a statement about an incident involving a colleague. An investigation was commenced into this matter ("the second investigation"). The Respondent labelled the Claimant's alleged misconduct in relation to Daniel Ibuken as: threatening and aggressive behaviour and a failure to carry out reasonable instructions. It was also noted that the Claimant was making inappropriate use of the computer on the shift.
12. The Claimant said that he would be complaining about the Daniel Ibuken incident.
13. Mr Dimbiri produced his report consequent upon the first investigation on 1 December 2015. He concluded that the constant theme ascertained from the witnesses he interviewed was that the Claimant had refused to take instruction which was disruptive for the team and the ward. The witnesses confirmed that the Claimant was rude, and sometimes even shouted, and did not communicate in a professional manner. Mr Dimbiri found that the witnesses gave consistent evidence that the Claimant's behaviour had worsened recently but that the reason why could not be ascertained. Although one of the allegations was dropped following the investigation, Mr Dimbiri recommended that there was a case for the Claimant to answer at a disciplinary hearing in relation to the others.
14. In early December 2015, Sallie Williams, Matron, referred the Claimant to occupational health to ascertain whether he was fit enough to return to clinical duties. In the letter of referral she made reference to the Claimant's

relationships with his colleagues and stated that he had been behaving oddly and unable to manage himself emotionally. The letter also stated that the Claimant spoke with a paranoid and persecutory tone. It was agreed that the Claimant would be moved at work at the Harewood House reception.

15. On 21 December 2015, the Claimant raised his formal written complaint about Daniel Ibuken, alleging bullying.
16. On 21 January 2016, Kenneth Wong held a disciplinary hearing with the Claimant as recommended by Mr Dimbiri. Mr Wong concluded that although one of the remaining allegations was not proved, the Claimant's behaviour in relation to the others had been unacceptable and breached the Respondent's standards of conduct. Mr Wong gave full recognition to the Claimant's previous clean disciplinary record and, having taken this into account in mitigation, decided that the Claimant should be issued with a first written warning. Mr Wong also recommended reconciliation work should be carried out between the Claimant and Hume Ward team.
17. Upon the Claimant's return from leave on 27 January 2016, he moved to work at reception at Harewood House within the Respondent trust.
18. The Claimant appealed against the written warning on 1 February 2016. At an appeal hearing which was held on 21 March 2016, the appeal officer decided that the Claimant's appeal should not be upheld.
19. The second investigation was completed on 25 February 2016. Although the second investigation report found that there was a case to answer and recommended a disciplinary hearing, the disciplinary procedure was put on hold pending the outcome of the Claimant's grievance.
20. In March 2016, Patrice Beveney, who had been investigating the Claimant's grievance, left the Respondent's employment. A second investigating officer had to be appointed.
21. In accordance with Kenneth Wong's recommendation, the Respondent engaged external independent mediators to facilitate reconciliation between the Claimant and his colleagues. In early April 2016, the independent mediators reported that due to irreconcilable differences (in particular high levels of anxiety distress shown by the Claimant's colleagues) they could not act. The mediators advised that the Claimant should consider counselling, coaching or psychotherapy.
22. Kirsty Murray, together with a human resources officer, met with the Claimant to inform him that mediation would not proceed and inform him of the mediators' advice about counselling. The Claimant declined to take up counselling. The Respondent offered the Claimant a move to another ward on 28 April 2016 where colleagues would be unaware of ongoing issues.
23. The Claimant subsequently told Ken Wong that he wanted to return to

Hume Ward. However, the Claimant was told that return was not possible until his grievance had been concluded.

24. Upon his return from leave in May 2016, the Claimant worked on Ward 3.
25. On 30 August 2016, Kirsty Murray met with the Claimant and told him there was no evidence to support his complaints of bullying and harassment. On the same day the Claimant handed in his letter of resignation saying that he felt penalised and bullied.
26. By letter dated 7 September 2016, Kirsty Murray asked the Claimant to reconsider his resignation. However, the Claimant declined to do so and the Respondent subsequently confirmed that the Claimant's last day of service would be 26 September 2016. The Claimant's employment ended that day.

Applicable law

27. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
28. In Western Excavating (ECC) v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:
 - 28.1. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach). (The final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR CA. Whether there is a breach of contract, having regard to the impact of the employer's behaviour on the employee, rather than what the employee intended, must be viewed objectively; Nottinghamshire CC v Meikle [2005] ICR 1);
 - 28.2. that the breach caused the employee to resign – or the last in a series of events which was the last straw; and
 - 28.3. that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.
29. All contracts of employment contain an implied term that an employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of

contract; Morrow v Safeway Stores plc [2002] IRLR 9.

30. In his written submissions Mr Tyler referred the Tribunal to the case of Croft v Consignia [2002] IRLR 851 in which the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows.

Conclusion and further findings of fact

31. Was the Claimant bullied by members of staff and management as he set out in his formal grievance? The Claimant's grievance concerned conduct alleged of Mr Ibuken. The Tribunal was unable to discern anything unreasonable or improper about Mr Ibuken calling the Claimant to enquire why he was off sick, asking what medication he was taking, or asking the Claimant to provide a statement as had previously been requested of him. Nor could the Tribunal discern anything improper about Mr Ibuken requesting the statement upon the Claimant's return to work or using the word "reluctantly" in an email when describing the Claimant's actions in response to a request for the statement which, after all, had initially been made on 9 October 2015. As to what took place on 27 November 2015, that was a matter of dispute between the Claimant and Mr Ibuken. The investigation shows that a witness to events supported Mr Ibuken's version. Similarly a witness in the investigation into the alleged altercation of 28 November supports Mr Ibuken's version of events. The Claimant failed to show on the balance of probabilities that his version of how Mr Ibuken allegedly spoke to him and interacted with him was as he alleged.
32. During the hearing the Claimant sought to expand his claim by suggesting that Mr Wong was responsible for bullying him. Regardless of the fact this did not form a part of the Claimant's pleaded case, the Tribunal could find no credible evidence that Mr Wong bullied the Claimant in any way. On the contrary, it was the Tribunal's view that in issuing a first written warning and recommending reconciliation in an attempt to mend the relationships between the Claimant and his colleagues, Mr Wong was both lenient in the circumstances and supportive of the Claimant. The Tribunal found Mr Wong a wholly credible witness.
33. Did the Respondent fail to support to the Claimant? The Tribunal was unable to identify any such lack of support which was, in any event, imprecisely complained about by the Claimant. On the contrary, the Respondent's pattern of dealings with the Claimant suggested that the Claimant was strongly supported throughout his employment. The Respondent went to some lengths, and no doubt with considerable cost, to arrange for mediation with an external mediation company. When this external mediation company made it clear it could not assist, the Claimant was offered counselling from the Respondent's retained provider of counselling services. The Tribunal also accepted Kirsty Murray's credible evidence that she informed the Claimant on a number of occasions that

counselling was available to him.

34. Was the Claimant humiliated when advised by the Respondent of allegations of the time of his night shift when he was tired? The Claimant led no evidence on this aspect of his claim. The Respondent referred the Tribunal to Kirsty Murray's letter of 31 July 2015 recording the discussion that was had at the time. The letter refers to the Claimant reporting that he felt supported at the meeting. That was inconsistent with what he alleged before the Tribunal. The Claimant was unable to persuade the Tribunal that he was humiliated when told of the disciplinary allegations.
35. Did the Respondent undertake a lengthy investigation leading to stress? The Tribunal here deals with both the delay in dealing with the disciplinary matter and the delay in dealing with the Claimant's grievance. It was these aspects of the case that most troubled the Tribunal.
36. The first disciplinary matters were raised at the end of July 2015. Mr Dimbiri did not conclude his investigation until 1 December 2015 and a disciplinary hearing was not held until 21 January 2016, the appeal period not taking place till 21 March 2016.
37. The Claimant raised his formal grievance on 21 December 2015, the report outcome was produced on 30 June 2016, and it was not until 30 August 2016 that the Claimant was informed of the outcome.
38. The Tribunal could make no criticism of the Respondent for putting the disciplinary proceedings relating to the second set of allegations on hold pending outcome of the Claimant's grievance. They were clearly interlinked.
39. The Tribunal accepted that the first investigation was somewhat complex and involved interviews with a number of witnesses. The Tribunal also accepted that Mr Dimbiri had other duties as a full-time employee, as with any other individual in the Respondent trust who might be charged with carrying out an investigation. The Tribunal also accepted that staff holidays would necessarily cause some delay. The Tribunal also had regard to the fact that the Claimant himself took leave.
40. With regard to the grievance investigation, the Tribunal accepted that the Respondent found itself in some difficulties when a fresh investigation officer had to be appointed upon Patrice Beveney's departure. The Tribunal also noted that a number of procedures were running at the same time, including attempted mediation, and that manager's had to find who could undertake independent investigations.
41. Had the Claimant been expressly dismissed, a Tribunal might well find that the fairness of such a dismissal had been adversely affected by such delays. But that was not the issue in this case of constructive and unfair dismissal. Before fairness was considered, the Tribunal's was required first to ascertain whether the Claimant had been constructively dismissed. The Tribunal had to determine whether the delays were such that the

Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. In the Tribunal's view, the delays in themselves could not be said to have led to a fundamental breach of contract – which the Claimant would have to show in order to establish constructive dismissal. In any event, in the Tribunal's view, on the facts of this case the Respondent did have reasonable cause in relation to delays given in mitigating circumstances set out above.

42. Did the Respondent take a long time to initiate mediation after completion of the disciplinary process? The disciplinary hearing took place on 21 January 2016 and the appeal hearing was held on 21 March 2016. Mediation was arranged promptly thereafter. The Claimant himself was on leave from 18 February 2016 until 4 April 2016. In these circumstances, the Tribunal was unable to discern any unreasonable delay on the Respondent's part and certainly no breach of the implied term.
43. Was the mediation initiated by the Respondent inappropriate? The Tribunal failed to understand the Claimant's complaint in this regard. During the hearing the Claimant himself said that the Respondent should have had a round table meeting to deal with the issues that had arisen. In the Tribunal's view, the Respondent went the extra mile in engaging external mediators in an attempt to put into effect the reconciliation measures recommended by Mr Wong. It is unfortunate that the mediators were unable to act but the Tribunal accepted that mediation can only work if all parties agree to it. The fact that the Claimant's colleagues were not prepared to enter in mediation, given their high level of anxiety and distress, was not cause for criticism of the Respondent.
44. Was the Claimant moved to a non-clinical area with no unsocial hours working thus detrimental to his ability to maximise his earnings? Mr Wong accepted in evidence that the Claimant's move to reception duties might have adversely affected his earnings potential since it was a 9 to 5 job. However, given the terms of the Claimant's disciplinary policy, it was the Tribunal's view that in the circumstances the Claimant could not have had a legitimate expectation of working on a forensic ward and thus be paid by reference to the hours he might have worked there. In any event, in circumstances in which the Claimant had been accused of aggressive behaviour, which the Tribunal unhesitatingly accepted might have affected disturbed patients on the ward, it could not be said that the Respondent acted without reasonable cause; on the contrary, the Respondent had every reasonable cause to put patients first and move the Claimant from such a sensitive working area. Further, the Tribunal had regard to correspondence in that hearing bundle which strongly suggested that the Claimant had agreed to the various moves.
45. Was the Claimant not permitted to return to a clinical area following the occupational health report and did the Respondent give no clear explanation why? The occupational health report itself was not produced before the

Tribunal but Mrs Murray told the Tribunal that the report stated the Claimant was fit to work overall. However, Mrs Murray also made it clear that in her view the Claimant had difficulty “regulating” himself in that the evidence gathered in the investigations suggested to her that the Claimant lost his temper and shouted. Working in reception was less stressful and duties less complex. Overall, Mrs Murray’s view was that the Claimant needed a fresh start. The Tribunal accepted that in the circumstances this was a reasonable stance, especially given the Respondent’s primary responsibility to those in its care. Not only was the Tribunal unable to discern a fundamental breach of contract on the Respondent’s part, the Respondent clearly had reasonable cause for taking such actions as it did.

46. Did the Respondent attempt to pass off the Claimant’s complaint by referral to occupational health on the basis that he might be mentally ill? The Tribunal was unable to accept that assertion. There was simply no credible evidence that the Respondent was attempting to pass off the Claimant’s complaint. On the contrary, a full investigation was carried out in considering the Claimant’s grievance.
47. The Claimant told the Tribunal that this complaint also related the fact that occupational health referral was made as well as the content of the referral letter. Firstly, in circumstances in which the Claimant appeared to be displaying unusual behavioural characteristics, it was the Tribunal’s view that such a referral was eminently appropriate and sensible. The reference in the referral letter to the Claimant’s mental state went no further than suggesting that there might have been a problem and informed the occupational health practitioner of the Respondent’s concerns. The Respondent could not be criticised in this regard, in particular given that the Claimant himself told the Respondent that he felt “tortured”. As Mrs Murray said in evidence, she was concerned about the Claimant’s wellbeing.
48. During the hearing the Claimant sought to argue that after his move from Hume Ward he was in contact with some of his colleagues when they were undertaking bank roles or sickness cover. Although this was not a specific issue raised by the Claimant in his claim form, the Tribunal in any event accepted Mrs Murray’s clear evidence that any such contact would be infrequent or not at all.
49. The thrust of the Claimant’s case at the hearing, although not clearly pleaded in his ET1 claim form, was that both staff and management ganged up on him with a view to dismissing him. The Tribunal finds no credible evidence that that was the case nor was there any credible evidence before the Tribunal that Kirsty Murray and Sallie Williams put Daniel Ibuken up to making the complaint as the Claimant alleged at the outset of this hearing.
50. Whether the Respondent’s actions are considered singly or cumulatively, the Claimant was unable to satisfy the Tribunal on the balance of probabilities that, objectively viewed, the Respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy

or damage the relationship of trust and confidence. Accordingly, the Tribunal determined that the Claimant had not been constructively dismissed and his claim of unfair dismissal failed.

51. The remaining issues listed at the outset of the hearing did not therefore fall for consideration.

Employment Judge Pritchard
Date: 17 May 2017