



EMPLOYMENT TRIBUNALS

Claimant: Mrs AK Taylor

Respondent: Dr Kelpie & Partners (A Partnership)

Heard at: Southampton

On: 1 March 2017

Before: Employment Judge Kolanko
Members Mr P Bompas
Mrs K G Symonds

Representation

Claimant: In Person

Respondent: Mr S Wyeth of Counsel

JUDGMENT having been sent to the parties on 17 march 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Nature of Claims and Issues

1. At an earlier Case Management Hearing on 9 November 2016 Employment Judge Reed identified the issues in this case. He recited that the claimant brought complaints of unfair dismissal and unlawful age discrimination.

2. The issues were recited as follows

2.2.;The claimant says that she was mistreated by the respondent in November 2015 and March 2016, that mistreatment amounted to a fundamental breach of the implied term within her contract relating to trust and confidence. She resigned and says that in the circumstances that resignation can be construed as a dismissal, and furthermore, one that was unfair.

2.3. In addition she says that one of the matters contributing to the decision to resign amounted to discrimination on the grounds of age.

Age Discrimination

2.4. On 19 November 2015 there was an altercation between the claimant and her colleague Ms Rhodes, the claimant says Ms Rhodes was responsible for the incident in question (where it is agreed that she told the claimant to “shut the fuck up”) yet the claimant was sent a letter which criticised her, and to that extent was treated the same as Ms Rhodes. The claimant says that the reason Ms Rhodes was allowed to get away with it in this way was that she was young.

Unfair Dismissal

2.5. The claimant says that the following incidents amounted to mistreatment of her, amounting to a fundamental breach of contract :

2.5.1. Ms Rhodes told the claimant to “shut the fuck up”.

2.5.2. The incident in question was not properly investigated by the respondents and blame was inappropriately apportioned between the claimant and Ms Rhodes.

2.5.3. On 9 March 2016 Mrs Rooke the Practice Manager remonstrated with the claimant for being late when she was not.

2.5.4. On 10 March Mrs Rooke treated her improperly by informing her that two staff members had said that they were unhappy about the events of the previous day and that she should give the claimant a written warning but was prepared to forget it.

2.5.5. That same day the claimant was called to a second meeting with Mrs Rooke at which she was spoken to very harshly about the fact that the claimant had questioned members of staff about who had raised this issue with Mrs Rooke in the first place. Ms Rooke threatened to go to the doctors about this matter.

2.6. The last matter the claimant says was the final straw and she resigned on 30 March 2016.

3. Those are the issues identified in this case.

Evidence and Basic Facts found by the Tribunal

4. The Tribunal heard evidence from:

- The claimant Mrs Audrey Taylor,
- Mrs Cathy Rooke the Practice Manager at Cheviot Road Surgery
- Dr Wilma Boddeke Practice Doctor at Cheviot Road surgery.

5. In addition, the Tribunal was assisted by having a bundle of documents comprising of some 162 pages. Although the Tribunal's attention was drawn to a number of documents in the bundle not all were drawn to the Tribunal's attention. Having heard the evidence of the witnesses and having looked at documents introduced into evidence the Tribunal makes the following findings of fact. Many of the facts are not greatly in dispute in this case.
 - 7.1 In February 2010 the claimant commenced employment with the respondent as a receptionist at its Cheviot Road Surgery in Southampton. In June 2014 the claimant was asked to and agreed to undertake additional duties as Medicine Manager at the respondent's other surgery at Shirley Road Southampton.
 - 7.2 Relevant to these proceedings in a performance appraisal on 7 August 2015 (bundle page 86) the claimant stated in relation to her aptitude and abilities *"I think I have become more mature and hardworking, taking positive steps to be more professional having a positive mind towards helping others trying not to undermine my superiors is !!"*. It is proper to record that the claimant was considered to be a good practitioner who worked efficiently within the practice but that her interpersonal skills at times could be called into question.
 - 7.3 On 19 November 2015 an incident occurred involving the claimant and another receptionist a Miss Sarah Paul. Miss Paul took offence at a comment made by the claimant questioning her rota. Mrs Rooke the Practice Manager spoke to both members of staff and judged that soon after speaking to them the matter had been satisfactorily resolved.
 - 7.4 Later that same day in the morning, another incident occurred between the claimant and a Ms Kara Rhodes a receptionist, when it is common ground Ms Rhodes told the claimant to *"shut the fuck up."* The incident was reported, and it is relevant for it to be noted that the incident was reported by Ms Rhodes herself to the Practice Manager, she appeared to be mortified by her outburst before the claimant and duly apologised to Ms Rooke. The Practice Manager thereafter had an informal meeting with the claimant who confirmed the words used. The claimant and Ms Rhodes were then asked to prepare statements which they duly did. The Practice Manager concluded that Ms Rhodes had spoken to the claimant in an unacceptable manner, but that the claimant had been critical of Ms Rhodes in front of an external visitor from a Tesco Pharmacy, when telling her to do her job properly, which she judged may have contributed to Ms Rhodes' outburst and behaviour. Immediately after that incident the claimant went off sick for two days, self certifying herself as not well.
 - 7.5 On the claimant's return on 27 November 2015 Mrs Rooke the Practice Manager held two separate informal meetings with Ms Rhodes and the claimant. In her notes certainly in relation to the meeting with the claimant it records (bundle page 96) *"It was agreed that Kara's conduct was not acceptable"*. Later on she states *"Cathy informed Audrey that she should not be pointing out errors that had been made by her colleagues as this is inappropriate and is not necessary"*.

- 7.6 In relation to the meeting with Miss Rhodes the notes record (bundle page 97) "*Kara said that she had often been on the receiving end of Audrey's bossy and bullying attitude and on this occasion she responded in the way she did. Kara fully understands the seriousness of her actions and accepts that this kind of behaviour is not acceptable.* Download
- 7.7 In consequence of meeting the two parties to this outburst the Practice Manager Mrs Rooke judged that the issues had been resolved and determined to write letters which we judge to be in similar tone to both the claimant and Ms Rhodes. In the letter to the claimant (bundle page 98) she observed that she seemed to lack insight as to the impact that her conversation had on the people around her and later in the letter said:

"I wasn't really satisfied with your explanation it seems you did not realise the consequences of your actions. The whole discussion at the front desk should not have taken place in the first place".

In her letter to Ms Rhodes (bundle page 99) the letter records:

"Having listened to your explanation I understand why you were cross with your work colleague, however, there is no excuse for bad language in the workplace. I accept that you would not normally have behaved in this way and you understand the seriousness of your action. After discussing this incident you agreed not to engage in conversations such as these within ear shot of other members of staff or patients. Also you have agreed not to use bad language at any time whilst in the workplace".

- 7.8 A matter that was in the mind of Mrs Rooke at the time was that Ms Rhodes had recently lost both her maternal grand parents and in the more immediate past had lost her mother to cancer. These were matters which were judged to be certainly mitigating circumstances together, with the fact that Ms Rhodes herself immediately appeared to be mortified by actions and went straight to the Practice Manager to confess and apologise for her outburst.
- 7.9 This matter appeared to have been resolved so far as Mrs Rooke was concerned, however when the claimant received Mrs Rooke's letter, she wrote a letter of complaint dated 5 December to Dr Boddeke the staff doctor (bundle page 101). Dr Boddeke spoke to the claimant over the phone on 7 December and a note made by Dr Boddeke of the conversation, which we accept as accurate, indicated that the claimant was concerned and believed that Kara had effectively got off lightly. The note records:
- "I explained that we could not put in her letter [that is the letter to the claimant] anything about Kara but that we dealt with Kara as we saw fit. I think this reassured her because it seems she thought Kara had got away with it".
- 7.10 After that incident matters appear to have proceeded normally with the claimant continuing to work seemingly in harmony with staff in particular, Ms Rhodes.
- 7.11 An incident occurred however in March 2016 which is the subject of these proceedings. On 9 March there was staff participation in a fire safety training at the Shirley Avenue practice. It had been apparently scheduled for 14:15 and to last until 16:30. The claimant arrived at or around 14:15

and it appears soon thereafter that she was complaining in critical tones that she was concerned that the training might not finish on time, and spoke, we find, in an abrupt and we judge aggressive manner in front of staff towards Mrs Rookes. The claimant informed Mrs Rooke that she would be leaving at the time regardless of whether the training had finished. In fairness to the claimant we should say that she remained until some 16:35 when the training was then halted. During the course of this dialogue Mrs Rooke indicated to the claimant that had she arrived on time than there will be no risk of the training overrunning.

7.12 Mrs Rooke was concerned about the claimant's outburst towards her that had not taken any active steps, when on the following day two members of staff approached Mrs Rooke expressing concern about the claimant's behaviour towards her the previous day. Mrs Rooke subsequently spoke to the claimant regarding her behaviour, when the claimant attended to get a card signed for the supervisor who was leaving. Mrs Rooke indicated that she judged that the claimant's behaviour was unacceptable especially in front of work colleagues, some of whom had complained to her. Mrs Rooke indicated that although this would normally be dealt with by way of a written warning, she was on this occasion going to overlook the matter and not take the matter further. Mrs Rooke in evidence, and we accept, indicated that that the claimant accepted this and explained that she had been under pressure from her husband to get home. These matters, we judge, would not have been the subject of further action save for the fact that within five minutes of the meeting concluding colour Mrs Rooke was informed by a member of staff that the claimant was downstairs questioning individual members of staff as to whether any of them were the ones who had complained about her to Mrs Rooke. The claimant as a consequence was called back and told that this was wholly inappropriate behaviour as staff at the right to make complaints on a confidential basis to management. The claimant took issue with this and the claimant alleged, we find in a raised voice that she had every right to know who was talking about her. The claimant, we find shouted at Mrs Rooke, and it is common ground indicated she was going to join a Union and was also going to see her doctor, and that she had enough of this place.

7.13 We are satisfied having heard the evidence in this case that the outburst was sufficient for Mrs Rooke to become distressed, and we have heard from Dr Boddeke that she came into Mrs Rooke's office and found her in a flood of tears.

7.14 Following on from this incident the claimant was off sick with sick notes that covered her until 25 April.

7.15 On 29 March 2016 the claimant was offered and accepted new employment with Damira Dental Studios Ltd. On 30 March 2016 the claimant resigned her employment with the respondent by way of letter to the Practice Manager (bundle page 114). Within the letter she stated

"This has been a difficult decision to make, I have been offered an opportunity that I believe will suit my needs better at this present time and in the future

I wish to give 4 weeks notice to start today; Wednesday the 30th March 2016 making my last day Wednesday 27th of April.

I have enjoyed being part of the team and I am thankful for the opportunities you have given me during my time here."

7.16 The claimant was prevailed upon by Dr Boddeke to come into work during her notice period and attended on 14 April 2016. There was some discussion as to the hours she would work, the claimant contending that she would only be able to work two days per week whereas it was understood that the doctor had signed her off so that she could return to work full-time. In any event within a short period of time the claimant left producing thereafter a sick note relating to work related stress and as a consequence of this the claimant's employment ended on 27 April 2016.

Submissions

6. Both parties made oral submissions to the Tribunal. Mr Wyeth reminded the tribunal of the relevant case law in relation constructive dismissal, and the law in relation to the "last straw" doctrine. He submitted that the factual situation was quite straightforward, and that there was nothing that the respondent had done that could be considered to have breached the implied term of trust and confidence. He contended that that this was a textbook example of how a small employer should deal with issues, and that Mrs Rooke did all that she should have done, she spoke to all relevant parties, she took statements and discussed with both individuals and how they might have acted differently. He submitted this was all good industrial practice he submitted that events on 9 March was a storm in a teacup. He submitted that if this constituted constructive dismissal then the tribunal would be inundated with unmeritorious cases.
7. In respect of age discrimination he submitted that the claimant had not shown any less favourable treatment pursuant to section 13 of the Equality Act and in any event nothing to suggest that any action taken towards the claimant was referable to age. There was no mention of age discrimination in documents or in her grievance letter, or resignation letter and that this was simply an afterthought. Mrs Taylor simply repeated her evidence referred to the issues recited in paragraphs 2.5.1 to 2.5.5 above.

The Law

8. The law in relation to this case can be found principally in the Employment Rights Act 1996 which states at Section 95 the circumstances which an employee is dismissed and Section 95(1)(c) states:
"Where 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."
9. Section 98 is not applicable in this case by virtue of the fact that the respondent in the event of a finding of constructive dismissal does not advance any potentially fair reason.
10. In relation to the Equality Act Section 13 of the 2010 Act states in relation to direct discrimination:

"A person (A) discriminates against another (B) if because of the protected characteristic (A) treats (B) less favourably than (A) treats or would treat others. In the road

11. The law in relation to constructive dismissal beyond the statutory definition has been considered over a number of years in a number of settled cases. The starting point is the well known authority of **Western Excavating v Sharp [1978] IRLR 27** which in essence recites the following necessary conditions:

11.2. There must be a breach of contract by the employer;

11.3. that breach must be sufficiently important to justify the employee resigning or else it must be the last in the series of incidents which justify his leaving possibly a genuine albeit erroneous interpretation of the contract by the employer would not be capable of constituting a repudiation in law;

11.4. he must leave in response to the breach and not for some other unconnected reason;

11.5. he must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

12. Mr Wyeth very properly referred the tribunal to the subsequent case of **Mahmud v The Bank of Credit and Commerce International [1997] IRLR 462** where the implied term of trust and confidence which is relied upon in this case was defined as "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence in trust between employer and employee.*"

13. It is proper to observe that in the Mahmud case Lord Steyn at paragraph 70 recited the effect of his earlier conclusions. He stated

"Earlier I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is no reasonable and proper cause for the employer's conduct and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence that circumscribes the potential breach and scope of the implied obligation".

14. The level of the breach was further reflected on in the case of **Gogay v Hertfordshire County Council [2000] IRLR 703** when Lady Justice Hale as she then was, adopted the guidance to Lord Steyn and stated

"Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship".

15. Addressing the issue of the final straw the Court of Appeal in **Omilaju v Waltham Forest London Borough Council [2005] IRLR page 35** held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect was to amount to the breach.

16. Lord Justice Dyson at paragraph 20 said:

“I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred. “

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If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

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Moreover, 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 his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in paragraph 14 above). “

17. That effectively is the law that has to be applied in relation to this case.

Conclusions

18. We first address the complaint of unfair dismissal, and more specifically the breaches of the implied term of trust and confidence alleged to support a complaint of constructive dismissal. The first complaint relates to Ms Rhodes swearing at the claimant on 19 November 2015. Our findings satisfy us that the outburst from Ms Rhodes arose from the claimant improperly criticising her in front of others. It is to be remembered that Ms Rhodes was an employee with no managerial responsibility and arguably less responsibility than that held by the claimant at the time. We do not find that the admitted abuse constitutes a breach of the implied term of trust and confidence in the context of signifying an indication by the employer that it was intending to undermine the employment relationship, of the claimant. We do not find its feet of the implied term

19. The second alleged breach of the implied term related to the investigation not being properly undertaken together with an inappropriate apportionment of blame between the claimant and Ms Rhodes. The suggestion that the incident was not properly investigated we totally reject. We agree with the observations of Mr Wyeth that the actions taken by Mrs Rooke was a model example of an investigation in a small practice which was geared to resolving

matters and strengthening the relationship of the workforce and seeking to resolve matters expeditiously and speedily.

20. The essential complaint appears to be that the respondent did not initiate disciplinary process against Ms Rhodes and unfairly placed some blame on the claimant. The investigation we judge fully justifies the conclusions that were reached by Miss Rhodes and indeed accepted and adopted by the Trust doctor on behalf of senior management. The same blame was placed on the claimant and Ms Rhodes. We do not find any failure on the part of the respondent or any basis for suggesting that their actions in undertaking the investigation breached the implied term. We accordingly do not find this a breach of the implied term.
21. The third complaint on 9 March relates to Mrs Rooke remonstrating with the claimant for being late when she was not. Our findings satisfy us that the claimant was informed that had she arrived earlier, then the training might have started earlier. This was a simple response to the claimant's critical comments that she was unhappy that the training may well over run. We do not find in so far as it was a response to an outburst by the claimant, that it could in any way be said to be anything other than a sensible managerial response and certainly not a breach of the implied term of trust and confidence.
22. The fourth complaint relates to the incident on 10 March Mrs Rooke treated the claimant improperly by informing her that two staff members had said they were unhappy about the events the previous day and that she should have given the claimant a written warning but was prepared to forget it. This is merely a commentary from the manager to a subordinate who had acted disrespectfully towards her. We find that Miss Rhodes was concerned at the claimant's behaviour towards her and raised it with the claimant the following day. This was we find a proper exercise of managerial responsibility and to emphasise her concerns she indicated that staff had also complained about the claimant's behaviour towards Mrs Rooke. There was nothing improper in relation to her actions, it cannot in any conceivable way be seen as a breach, let alone a serious breach of the implied term of trust and confidence.
23. Finally, it is alleged that on the same day the claimant was called to a second meeting with Mrs Rooke at which she was spoken to very harshly about the fact that she the claimant had questioned members of staff about who had raised the issue with Mrs Rooke in the first place. Mrs Rooke threatened to go to the doctors about this matter. To recall the claimant back when Mrs Rooke was informed that the claimant was questioning staff concerning their going behind her back was again, we judge, perfectly proper and reasonable actions of a responsible manager. We find took seriously. We do not find that this constitutes any breach let alone breach of the implied term of trust and confidence.
24. In summary, therefore, we find no substance in the claimant's complaints. It is not necessary therefore to address the issue of final straw. The claimant's employment, we find, ended by way of her resignation, the claimant deciding that she wanted to look for other employment. Her resignation letter accords with our very clear conclusions that there was no basis for making any

criticism or complaint regarding the respondent's treatment of her during her employment.

25. The claim of age discrimination was not the subject of concern in the claimant's statement, or her evidence before us. We heard absolutely no evidence to suggest that the less favourable treatment namely the swearing by Ms Rhodes related to the claimant's age. Unencumbered with absolutely no evidence on this matter this complaint necessarily must stand dismissed.

26. All the matters of complaint are therefore dismissed.

Employment Judge Kolanko

Date 20 April 2017

REASONS SENT TO THE PARTIES ON
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FOR THE TRIBUNAL OFFICE