



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mrs L Smith

Herefordshire Council

HELD AT Birmingham

ON

20th and 21st April 2017

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr D Hulse – Counsel

RESERVED JUDGMENT

The claimant's claim for unfair dismissal and breach of contract fails and is dismissed.

REASONS

Background

1. The claimant brought a claim for unfair dismissal and breach of contract following her resignation on 14th September 2016.
2. The respondent is a local authority.

Evidence and documents

3. I heard evidence from the claimant and from her former colleague, Mrs Julie Walker. For the respondent I heard evidence from Ms Gail Bullock, HR Adviser, Mr Carl Edwards, Special Educational Needs Manager and Mr Les Knight, Head of Educational Needs. In addition, I was presented with an agreed bundle of some 492 pages, a cast list and a chronology, which was also agreed during the course of the hearing.

Issues

4. I identified that the issues which I needed to determine were as follows:
 - 4.1 Was an act or omission (or a series of acts or omissions) by the respondent a cause of the claimant's resignation?
 - 4.2 Did the act(s) or omission(s) by the respondent amount to a fundamental breach of contract? The claimant confirmed that she was relying on a breach of the implied duty of trust and confidence as oppose to a breach of an express term of her contract of employment.
 - 4.3 Has the claimant affirmed the contract?
 - 4.4 Has the claimant been constructively dismissed?
 - 4.5 Has the respondent shown the reason for dismissal?
 - 4.6 Did the claimant contribute to her dismissal?
 - 4.7 Was the reason for dismissal a potentially fair reason?
 - 4.8 Did the respondent otherwise act reasonably?

Facts

5. I make the following findings of fact:
 - 5.1 The claimant commenced employment with the respondent on 25th June 2012 as an Assistant SEN (Special Educational Needs) Officer and was promoted to SEN Officer in March 2014, on a secondment basis. The role of SEN Officer was subsequently renamed as EHC Plan Officer. The claimant's immediate line manager was Mr Edwards.
 - 5.2 The SEN team accepts referrals for statutory assessments of children and young people up to the age of 25. This statutory assessment identifies needs by seeking advice from the family, the child and a range of professionals. The result of the statutory assessment can be that an Education, Health and Care (EHC) Plan is produced which sets out any additional support that the child/young person requires, along with who will provide that support. The assessment process is managed by EHC Plan Officers (who were previously known as SEN Officers).

- 5.3 In September 2014, as a part of the Children and Families Act 2014, Statements of SEN were replaced by EHC Plans. The EHC Plan extended the scope of the Statements to include Health and Social Care and also introduced a focus on Outcomes and co-production with families resulting in a significant change in how things were done. These changes required new skills and learning to be adopted by the team. These changes were new to everyone – both management and staff.
- 5.4 Prior to their introduction in September 2014, there was no formal training relating to the EHC Plans as such experience was gained “on the job” so to speak. However, following the implementation of the plans several training opportunities became available and were offered to the claimant as well as others in the team. Mr Edwards was also involved in the review and quality assurance of the EHC Plans prepared by the EHC Officers, including the claimant.
- 5.5 Towards the end of Summer 2015, the atmosphere and working relationships of the SEN team started to deteriorate. Members of the team, including the claimant, began to report issues to Mr Edwards that on the face of it appeared trivial but given how many of these issues were being reported to him started to give Mr Edwards cause for concern. These issues included instances of members of the team saying that people were being left out of tea rounds, concerns regarding the tone of emails and comments which were being made about members of the team in their absence. However, at this stage the relationship between the claimant and Mr Edwards was good and the claimant accepts that Mr Edwards valued the work which she undertook.
- 5.6 On 12th August 2015 the claimant made Mr Edwards aware of the adverse impact the HRT medication she was taking was having on her. Her symptoms included her being teary, quiet and withdrawn. Following this meeting the claimant emailed Mr Edwards to thank him for his “...*caring nature and willingness to ask in spite of the risks involved*”.
- 5.7 The atmosphere in the team continued to deteriorate and by the end of September 2015 Mr Edwards decided to discuss the situation with all the team at a team meeting on 28th September 2015 during which Mr Edwards set out his expectations of the team and made it clear that it was the responsibility of everyone to promote a respectful culture and a positive working environment.
- 5.8 On 6th October 2015 Mr Edwards received a complaint from Sarah Robertson, a colleague of the claimant, in which she expressed concerns about an email that the claimant had sent to her. Ms Robertson felt that the claimant had singled her out for criticism and that she had been the subject of bullying by the claimant. As such Mr Edwards considered whether or not he needed to take disciplinary action against the claimant. However, after reflecting Mr Edwards decided that the email sent by the

claimant did not amount to bullying but was another example of the poor relations within the team. As such on 9th October 2015 Mr Edwards sent an email to the team confirming what had been said at the meeting on 28th September 2015. In his email Mr Edwards indicated “...it is clear in my mind that things will only improve via a genuinely collective effort from everyone (including me) so I hope that you have all taken time during the week to reflect on how you can contribute to improving the atmosphere in the Team.”

- 5.9 Mr Edwards also made contact with the HR team on 27th October 2015 to seek advice. Mr Edwards met up with Mrs Bullock on 2nd November 2017 who suggested that he held individual meetings with each member of staff to discuss the atmosphere and ways in which the situation could be improved. The allegation of bullying was not progressed any further as Mr Edwards took the view that the issue related to the whole team rather than any one individual. As such the claimant was not advised of the complaint that had been raised against her and Mr Edwards focused his attention on resolving the wider issues.
- 5.10 However, the following day the claimant was informed by Cathy Williams, Senior SEN Officer, of the bullying complaint that had been made against her. Mrs Williams also held the claimant responsible for the team atmosphere. The claimant was understandably upset to hear that a complaint had been raised about her and that she had had no knowledge of it. As such Mr Edwards met with the claimant on 6th November 2015 and explained that he had not informed her of the complaint as he had decided not to take any action in relation to it. The claimant accepted that Mr Edwards held the entire team responsible for poor working relationships but she still felt singled out and was upset during the meeting. Following this meeting Mr Edwards sent the claimant an email confirming their discussions and his view that the situation required collective commitment and perseverance. The claimant accepted that it was a difficult situation to manage.
- 5.11 Mr Edwards also held meeting with each member of staff between 10th and 13th November 2015 to discuss communication and how to improve it. Following the meetings Mr Edward sent an email to each member of staff confirming their individual discussions and the need for everyone to work together to improve the situation. During the meetings some of the team members made suggestions on how the situation could be improved.
- 5.12 Mr Edwards also met up with the claimant on 13th November 2015 during which the claimant raised some concerns. Namely, that whilst Mr Edwards had been fair in the past more recently he appeared to be taking sides. Mr Edwards advised the claimant that this was not his intention but he accepted that this was the claimant’s perception and he would reflect on this when considering his communication in the future. Both agreed to

work together to rebuild their trust. Mr Edwards also met the team on 16th November 2015 and re-iterated that everyone had agreed to work together to improve the atmosphere. Evidence from team meeting records of 23rd November, 14th December, 4th and 11th January demonstrate that as a result of Mr Edwards efforts there was an improvement in the team atmosphere.

- 5.13 Mr Edwards also continued to have 1-2-1 meetings with the claimant on 18th and 25th November 2015, which, from his perception seemed to go well. On 24th November 2015 the claimant was asked to deal with a finance query, which required her to obtain information from other members of the team. However, the information the claimant received was not helpful and the claimant approached Mr Edwards for his assistance. In an effort to improve relations between the team, Mr Edwards suggested that the claimant spoke to the team members individually. Subsequently, during a 1-2-1 meeting on 5th January 2016 the claimant advised Mr Edwards that although she had found it difficult to speak to the team members, she had ultimately found it to be productive.
- 5.14 Whilst Mr Edwards was on holiday the claimant requested a meeting with Mr Les Knight, the Head of Additional Needs and Mr Edwards' line manager. The meeting duly took place on 10th December 2015. During the course of the meeting with Mr Knight the claimant raised concerns about the team atmosphere and the way the bullying complaint made against her had been dealt with by Mr Edwards. The claimant also advised Mr Knight that she was experiencing some personal problems which were exacerbating the situation. Furthermore, the claimant also informed Mr Knight that she was experiencing menopausal symptoms and had been prescribed HRT medication and this was impacting how she was feeling. The claimant indicated that she had informed Mr Edwards of her situation and had expected him to share this information with team. Mr Knight advised the claimant that HR had advised Mr Edwards that it was not his place to share this information. Mr Knight also sought to reassure the claimant that the respondent had not taken the view that the claimant's actions amounted to bullying. However, Mr Knight acknowledged that the atmosphere of the team was concerning but that he was satisfied that the situation was being handled appropriately by Mr Edwards. Mr Knight also assured the claimant that he would feed back her concerns to Mr Edwards and also consider how to improve the atmosphere within the team.
- 5.15 On 3rd February 2016 the claimant made a request to work from home to accommodate a hospital appointment for a relative. Whilst approving her request Mr Edwards enquired of the claimant what work she intended to undertake. The claimant indicated that she had some draft plans to complete. The following day Mr Edwards emailed the claimant to ask her whether she had completed any other plans whilst working from

home as he had only received one to check for quality assurance. The request was not made to challenge the claimant as to how much work she has undertaken whilst at home but to ensure that Mr Edward had all the plans he needed to check.

- 5.16 On 16th February 2016 the claimant met with Mr Edwards. The claimant again indicated her unhappiness at the allegation of bullying and how it had been dealt with. She also raised concerns about the team atmosphere. Mr Edwards indicated that the team were trying to improve the situation although he accepted there was more that could be done.
- 5.17 On 25th February 2016 the claimant went off sick. Mr Edwards kept in regular contact with the claimant and arranged for her to see occupational health. On 26th April 2016 a report was received from occupational health indicating that the claimant was suffering from stress due to work related issues which were not identified. As such the claimant was invited to attend a meeting to discuss her absence. The meeting duly took place on 11th May and was attended by Mr Edwards and Mrs Bullock. During the course of this meeting, at which the claimant was accompanied by her trade union representative, the claimant became upset. After the departure of Mr Edwards from the meeting the claimant indicated to Mrs Bullock that her absence was related to Mr Edwards. The claimant was not able to articulate her concerns during the course of the meeting but agreed to document her concerns and forward them to Mrs Bullock.
- 5.18 Following the meeting with the claimant Mr Edwards raised concerns to both Mr Knight and Mrs Bullock about the effect the situation was having on his health. Mr Edwards was clearly concerned that unspecific allegations had been made against him and this was causing him to have sleepless nights. Unfortunately, due to the claimant's union representative having a family bereavement there was a delay in forwarding the claimant's issues to the respondent.
- 5.19 In the meantime Mr Edwards sought advice from Mrs Bullock regarding contract extensions for members of his team as well as the claimant. It was decided that Mr Edwards could not hold off telling the team that their contracts were being extended until the claimant's return to work and they would be informed of the extension in confidence. The claimant would be informed on her return to work that her contract would also be extended.
- 5.20 On 10th June 2016 the claimant and her trade union representative met with Mrs Bullock off site. During the course of this meeting the claimant produced a short statement highlighting, in general terms, her concerns relating to work together with a timeline. During the course of the meeting the issue of mediation as a way forward was discussed. Mrs Bullock made it clear that for any mediation to succeed everyone needed to be clear of the precise issues which concerned the claimant. Following on from the meeting with Mrs Bullock the

claimant agreed to meet Mrs Bullock and Mr Knight and also provided a summary of her issues. The meeting with Mrs Bullock and Mr Knight took place on 20th June 2016. It was acknowledged that the situation was complex and that the claimant's relationship with Mr Edwards had become difficult. However, some of these issues could only be resolved on the claimant's return to work with the assistance of mediation or a phased return to work. The claimant was also offered counselling. In addition, Mr Knight explained the situation regarding the contract extensions.

- 5.21 On 22nd June 2016 Mr Edwards emailed Mr Knight to indicate that the continuing uncertainty regarding the claimant's issues with him was causing him significant anxiety and worry and this was having an effect on his health. As such he felt that he had no option but to resign. After further discussions with Mr Knight this resignation was subsequently retracted.
- 5.22 On 24th June 2016 the claimant was signed off work until October 2016. As such, a further meeting took place with the claimant under the respondent's Long Term Absence procedure. The claimant was accompanied by a friend as her trade union representative was on holiday. During the course of the meeting Mr Knight discussed the options open to the claimant to resolve the issues which were making her unwell. This included raising a grievance which would enable Mr Knight to fully understand the issues of concerns. The claimant sought a case conference but Mrs Bullock indicated that these were only appropriate when someone was ready to return to work as the process was about discussing matters such as any adjustments which were required to facilitate a return to work but the claimant was not yet ready to return to work. It was agreed that some options to resolve the issues would be emailed to the claimant. The claimant was clearly upset during the course of the meeting.
- 5.23 On 6th July 2016 the claimant issued a formal grievance in relation a number of matters including the workload and lack of training received following changes to the SEN Plans, lack of support due to her being menopausal, the poor working atmosphere and the breakdown in her relationship with Mr Edwards.
- 5.24 The claimant's grievance was heard by Mr Adam Scott on 19th July 2016. Mr Scott was supported by Mrs Bullock. The claimant was accompanied by her trade union representative. The meeting was a productive one as the claimant and her union representative but forward proposals for the resolution of the claimant's grievance. This included : (1) Trust being re-established between the claimant and Messrs Knight and Edwards through two separate meetings; (2) a new caseload management systems being introduced so that it was clear how work was allocated and how concerns regarding workload could be raised; (3) clear guidance being provided on the role of managers; and (4) team rebuilding to re-establish trust and

supportive behaviours. Mr Scott agreed to take these proposals forward and after the meeting emailed Chris Baird, the Assistant Director, Education and Commissioning to seek his views in relation to the proposals which Mr Scott viewed as a positive way forward. Mr Baird also wrote to the claimant on 22nd July 2016 to indicate he would be on holiday for two weeks but in the meantime Mr Scott would engage with Messrs Knight and Edwards on her proposals.

5.25 On 26th August 2016 Mr Baird wrote to the claimant to confirm that her proposals were acceptable to the respondent. In his letter Mr Baird also set out the practical steps which would be put in place to give effect to her proposals. The claimant was asked to provide her availability to attend the various meetings required to put her proposals into effect by 2nd September 2016.

5.26 However, on 14th September 2016 the claimant wrote to the claimant tendering her resignation with immediate effect. The claimant indicated that she had no alternative but to resign due to the issues she had raised but also due to the fact that the response to her grievance was to return her to a work environment which had caused her illness. The claimant further indicated that her GP had advised that it was not safe for her to return to work. In view of this, the claimant indicated that she was left “..with no choice but to resign in light of

a) A fundamental breach of contract;

b) A breach of trust and confidence;

c) Last straw doctrine.”

5.27 Mr Baird wrote to the claimant on 22nd September pointing out that the claimant’s proposals for resolving her grievance had been accepted by the respondent. Notwithstanding this Mr Baird indicated that he would be willing to meet with the claimant to understand why she felt that the proposed way to resolve issues was not appropriate for her. The claimant’s resignation was also accepted. The claimant did not avail herself of the opportunity to meet Mr Baird and her employment came to an end following her notice period.

Applicable law

6. Section 95 (1) (c) of the Employment Rights Act 1996 provides:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to (2)...only if)-

(c) 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”.

7. The guidelines set out in the case of **Western Excavating (ECC) Ltd –v- Sharp [1978]ICR 221** applies to this case. Lord Denning stated in this case that:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

8. The test is an objective one – it does not matter whether or not the employer intended to break the contract. It is for the employee to prove that they have been constructively dismissed. In essence, the employee must show that there has been a repudiatory breach on the part of the employer – whether actual or anticipatory; the employee must elect to accept the breach and treat the contract at an end. The employee must resign in response to the breach and the employee must not waive the breach by delaying too long and affirming the contract.

9. Under the “last straw” doctrine an employee can resign in response to a series of breaches of contract which when taken together amount to a breach of the implied duty of trust and confidence even if the final incident in the chain may in itself be insubstantial.

10. In **J V Strong & Co v Hamill [2001] ALL ER (D) 18**, the EAT considered the difference between the last straw doctrine and the principle of waiver. The EAT indicated:

“It seems to us that a Tribunal confronted with this sort of situation must look and see if the final incident is sufficient of a trigger to revive the earlier one. This will, it seems to us, involve looking at the quality of the incidents themselves, the length of time both overall and between the incidents, and it will also involve look at any balancing factors which may have, at any point, been taken to constitute a waiver of earlier breaches.

Finally when considering the issue of waiver, the very nature of the waiver will need to be considered. It is not only a question of seeing whether the facts give rise to an express or implied waiver, but considering the terms of the waiver itself. Is it a once and for all waiver, or do the circumstances give rise to the implication of a conditional waiver, for instance a waiver subject to the condition that there would be no repeat of similar conduct or, as in this case, that the Appellants would not continue the lack of support. Finally, of course, any finding of waiver has to be

identified and based on clear facts or inferences from established facts”.

11. Where an employee shows that they have been constructively dismissed a tribunal must consider whether the dismissal was fair or unfair having regard to section 98(4) of the ERA which provides:

“(4) Where the employer has fulfilled the requirement of sub-section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

12. Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2009 into account in that it sets out the basic requirements of fairness.

13. Section 123(6) of the ERA states:

“where the Tribunal finds dismissal was to any extent the cause or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding”.

Conclusions

14. In reaching my conclusions I have considered all the evidence I have heard and considered the pages of the bundle to which I have been referred. I also considered the oral submissions made by the claimant and the oral and written submissions made by Mr Hulse on behalf of the respondent.

15. Having considered all the evidence before me it is clear that the claimant was genuinely and deeply upset about the matters which she complains of. However, I am not satisfied that there was a fundamental breach of the implied duty of trust and confidence which entitled the claimant to resign and claim constructive dismissal.

16. It is clear that the introduction of the EHC Plans put the whole of the claimant's department, like many others in the public sector, under pressure whilst everyone got used to the requirements of the new plans. Once the plans were implemented training and support was provided to the whole team. It is also clear that the pressure the team were working under resulted in divisions within the team and how they interacted with each other. However, I am satisfied that the respondent, through Messrs Edwards and Mr Knight, dealt with the matter promptly and in a supportive and reasonable manner. The various meetings which Mr Edwards held with the team resulted in an improvement in the team atmosphere.
17. I accept that the claimant was deeply and understandably upset when she found out about the allegation of bullying raised by Sarah Robertson. However, this situation did not arise as a result of the actions of the respondent or Mr Edwards. Mr Edwards had been satisfied that the claimant's actions did not amount to bullying and as such had decided not to inform the claimant of the complaint. However, when the claimant did find out about the complaint from another work colleague Mr Edwards met with the claimant on two occasions to discuss the situation with her. I am satisfied that Mr Edwards dealt with the situation appropriately.
18. I am also satisfied that Mr Edwards dealt with the situation relating to the finance query in a professional manner. Whilst the claimant found the situation challenging she, herself, acknowledged that the conversations she had had with the finance team at the suggestion of Mr Edwards were productive.
19. I also accept that when Mr Edwards emailed the claimant to ascertain the number of plans which she had completed whilst working from home he was seeking clarification on the amount of work he needed to quality check. He was not challenging the claimant on the amount of work she had completed. However, even if Mr Edwards had been challenging the amount of work the claimant had undertaken he would have been entitled to do so as the claimant's immediate line manager.
20. Equally I am satisfied that Mr Knight dealt with the claimant's concerns in a reasonable and professional manner when she approached him in December 2015 and February 2016.
21. In his submissions Mr Hulse asserts that if there was a fundamental breach of contract due to the bullying issue and team atmosphere, which was impacting on the claimant's relationship with Mr Edwards, then the time for the claimant's resignation was when the claimant became absent from work on 25th February 2016. Whilst I am satisfied based on the evidence before me that

there was no fundamental breach of the claimant's contract of employment I agree with Mr Hulse's assertion.

22. Once the claimant went off sick the respondent acted in a supportive manner, keeping in regular contact with her and arranging meetings with the intention of resolving the claimant's concerns and facilitating her return to work.
23. I do not accept that there was any last straw entitling the claimant to resign and claim constructive dismissal. Further, I do not accept that following the grievance outcome the respondent committed an act which was capable of contributing to a breach of trust and confidence. The respondent merely agreed to the proposals which the claimant had put forward herself together with additional suggestions as to how the proposals could be implemented.
24. There is accordingly no need to go further. However, for the sake of completeness, if I am wrong in my conclusion that there was no fundamental breach of contract I am satisfied that the issues about which the claimant complained took place prior to her sickness absence as such by failing to resign at this point the claimant waived any breach.
25. In the circumstances, the claimant's complaint of unfair dismissal and breach of contract therefore fails and is dismissed.

Employment Judge Choudry on 17th July 2017

Judgment sent to Parties on 17 July 2017
C CAMPBELL