Appeal No. UKEAT/0093/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 26 October 2017
Handed down
On 9 November 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

PRESIDENT

MRS A CONRY APPELLANT

WORCESTERSHIRE HOSPITAL ACUTE NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SHAEN CATHERWOOD (Of Counsel) Instructed by: Elliots, Bond & Banbury Solicitors Shaftesbury House 49-51 Uxbridge Road London W5 5SA
For the Respondent	MS JESSICA SMEATON (Of Counsel) Instructed by: Capsticks Solicitors LLP 35 Newhall Street Birmingham B3 3PU

CONSTRUCTIVE DISMISSAL

HARASSMENT

Having made relevant findings about the events of a mishandled office reorganisation and its consequences for the disabled Appellant, the Employment Tribunal failed in error of law to consider and address these findings when dealing with the Appellant's claims for constructive dismissal and unlawful harassment. The case was remitted to the Employment Tribunal accordingly.

THE HONOURABLE MRS JUSTICE SIMLER DBE

1. This appeal from the judgment of the Birmingham Employment Tribunal (comprising Employment Judge Cherine Warren, Mr Parvin and Mr Howard) promulgated on 23 May 2016 proceeds on two grounds. Although they concern different causes of action (constructive unfair dismissal and harassment related to disability), they both relate to the delays, lack of consultation and inadequacy of an office reorganisation at Mrs Conry's place of work on 13 April 2015. It is her case that the Tribunal took the wrong legal approach in its assessment of that reorganisation, failing properly to consider whether the overall circumstances of the reorganisation amounted to a fundamental breach of contract entitling her to resign and/or to unlawful harassment on disability grounds.

2. The Respondent resists the appeal, contending that at the heart of this judgment are findings of fact made following a six day hearing, at which witnesses were called on both sides, that the Claimant's view of what happened during her employment was tainted by her perception that others were "out to get her". Further, where there was conflict in the evidence, the Employment Tribunal preferred the evidence of the Respondent's witnesses. The Respondent accordingly contends that the appeal is no more than an impermissible challenge to factual findings and an attempt to re-run the claim in a way which was not presented below.

3. I refer to the parties as they were before the Employment Tribunal for ease of reference. The Claimant appeared in person below assisted by her husband, a practising barrister in crime. Mr Shaen Catherwood appears on her behalf on this appeal. Ms Jessica Smeaton appears on behalf of the Respondent, as she did below.

A

The facts and the Employment Tribunal's judgment

4. It is unnecessary for the purposes of this appeal to summarise the Employment Tribunal's factual findings in full. These extend well beyond the narrower scope of this appeal. The relevant findings in summary follow.

B

5. The Claimant worked as a specialist nurse (TB) and had an impeccable attendance record. Her small department moved to the cardiac unit of Kidderminster Hospital in May 2013. By the time of the move the Claimant was walking slowly using crutches. The Claimant subsequently attended a meeting with Dr Elekima of the Occupational Health Department on 18 August 2014, who produced a report saying the Claimant was fit for work with adjustments and identifying recommended adjustments (paragraph 30.19).

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6. The Claimant's manager, Mrs Steadman sought a meeting with her to discuss the recommendations. The Employment Tribunal found that Mrs Steadman had never managed anyone with a disability before and was out of her depth. Mrs Steadman discussed her decision to reduce home visits for the Claimant with her and this decision caused the Claimant great upset (paragraph 30.29).

E

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7. A number of access to work assessments were carried out in October 2014 and the reports produced in consequence painted a picture of an office that was "far from ideal and the layout could be better. The Claimant needed a properly adjustable office chair…." Among other recommendations, a new desk repositioned in the corner next to the door entry (requiring removal of the cardio rehabilitation department's bookcase) was also recommended.

G

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8. Nothing was done to implement these recommendations by 10 April 2015 (paragraph 30.45). On the weekend of 11 and 12 April the office furniture was rearranged. The Claimant was only told about the changes after they had happened, on 13 April (paragraph 30.52). The Claimant described the office move and its impact on her in her witness statement as follows:-

> **"43. On the following Monday, 13th April 2015 I had a clinic at Warndon, Worcester in the morning. When I finished my appointments I went to turn off the computer before I left to go to Kidderminster Hospital. I noticed an email had been sent from Mary Steadman at 10.31 am that day. I was aware that Mary Steadman was on holiday that day. I did not register the contents, but when I arrived at Kidderminster at about 12.30 pm I was shocked by what I saw. I could not believe what had been done. Gemma Case was sitting at the desk which had easy access to phone and printer. My papers had been moved to the right hand side of the office on a shelf above a table, where it was made clear that I was now expected to sit.**
>
> **44. The place where my work was placed was an old table which I had obtained from the Oncology Department and had previously been used as supplementary work space. It was contrary to the type of desk recommended by Occupational Health. The table was flanked on either side with filing cabinets. On top of the right hand side one was the vaccine fridge which was buzzing loudly. My contact telephone numbers had been moved from their easy access to a wall behind a computer monitor, which required me to stand up to see them. My files were placed on a shelf above my head and they fell on top of me when I reached up to get them. A large old printer had been placed on my table which did not work and which restricted my workspace. There was a phone on my table but it had a new extension and was not connected to the office phone or the answer-machine. I now had to cross the room to answer any phone which rang or to get to the one printer which was working, putting me at risk of tripping over trailing telephone wires. The whole space presented hazards for me.**
>
> **45. I could not believe what I was seeing. The changes appeared to be designed to make the office an obstacle course for me. It appeared that the only beneficiary was Gemma Case who was established at the desk that was more suitable for my needs, in spite of only being in the office one day a week. This struck me as discriminatory for my disabilities.**
>
> **46. I was very upset. I felt that I had been badly let down. I had gone through an unsettling process with Occupational Health; and now changes had been implemented without warning me or consulting me in any way. They made the office more unsafe for me than it had been before. None of them assisted me. I was staggered that I had not been consulted by Mrs Steadman in advance of these changes being made. She had not only not bothered to consult me in advance of such changes but had not even bothered to inform me of what had been done after so many months of inertia. I still do not understand why she did not phone me. She had regularly contacted me on my work mobile or my personal mobile to speak to me about work matters in the past. Indeed she rang me later on that day (13th April)".**

9. In her letter to Mrs Steadman of 15 April 2015, a few days later, the Claimant said:

> **"You will recall that the meeting with Occupational Health was arranged by you last September. That meeting was over six months ago, but nothing has been done to assist me or the office in the interim. That did not concern me. As you know, most of my work is carried out away from the office.**
>
> **It was, therefore, both a great surprise and a huge disappointment when I came into the office on Monday to see that I now had to sit at a special desk (table) in a special place, which was considered to be more convenient for me. It was not. I am afraid to say that the opposite was the case. This could have been avoided but I was not informed, let alone consulted, in advance.**
>
> **I was then told that it had been done for my benefit; and that it had taken Gemma some time and effort, and that I should thank her. I was stunned. I would indeed like to know what guidelines she and her husband were following, and what instructions they had been given.**

> **I hope that you will appreciate that sending me an email at 10.31am as I was leaving Warndon clinic on Monday was unlikely to be read and digested by me before I arrived at the Kidderminster office. I do not consider this adequate warning in advance."**

10. Subsequently, by letter dated 6 May 2015, also to Mrs Steadman, the Claimant asked for answers about the office reorganisation to questions as follows:

> **"2. Why nothing was done to assist me following the meeting last September for over 6 months?**
>
> **3. When you made the decision to rearrange this office?**
>
> **4. What was the reason for the sudden action without informing or consulting me?**
>
> **5. Why was I not consulted before the changes were made, which were designed to assist me, so that I could ensure that they did do so rather than the opposite? The repositioning of the phone is just one example of how badly this rearrangement was carried out.**
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> **6. Why was I not informed about them in advance?**
>
> **7. Why did you not ring me to warn me, however late in the day, rather than send an email, which I was unlikely to see before I was confronted by the unhelpful rearrangement of the office?**
>
> **I feel that it is important for me to state how distressing your whole approach has been. When I have received your written response I will need to consider the position and, if necessary, seek advice, as to what action it would be appropriate for me to take."**

11. By letter dated 14 May 2015 the Claimant resigned "by reason of the behaviour that I have had to endure". In a subsequent letter dated 26 May 2015 she said:

> **"I did not just resign, I resigned by reason of constructive dismissal, the main reason for which was your bullying behaviour towards me. Frankly I was devastated that I was compelled to take this step because I enjoyed doing the job, which I regarded as important. It has upset me greatly and caused me considerable stress and distress.**
>
> **Please do not write to me again. I suggest that any further communication should go through HR or the Trust's legal department.**
>
> **I do not propose to respond in detail to your letter, save for the matters with which I feel compelled to deal. My complete response will be contained in the chronology which I am preparing in support of my claim for constructive dismissal. I am waiting for a copy of my Occupational Health file to complete it."**

The rest of the letter responded to certain matters raised in Mrs Steadman's letter but did not refer back to the events of the office reorganisation.

12. The Employment Tribunal dealt with that evidence making findings as follows:

> **"30.51 The claimant now had a table without drawers, and a telephone with it's own external line, but no number on it. Her table and computer had been moved closer to the door, but not**

to where recommended by Rose Davis. The claimant's files had been put on a shelf above the desk, which required her to stand and reach for them. There was no recommendation for this arrangement in the assessment. The claimant had a large printer on her desk – but it was marked as not working. She did not have the recommended office chair.

30.52 Mrs Steadman sent the claimant an email to advise her that the office layout had changed. The claimant was at a clinic, and read the message as she left to return to the office.

30.53 By the time she arrived at the office, Mrs Steadman had left, leaving Gemma Case, and a colleague, Jackie Hewlitt, in the office. Mrs Steadman recognised that the recommended changes had only partially been implemented, in particular, the claimant's work space had not been moved to the closest point because the book case containing the cardio rehab material had not been moved.

30.54 The claimant arrived at the office and saw the changes. She was upset. She sat down at her new desk. She was unhappy that she did not have fixed drawers (although it had been a recommendation that she did not have fixed drawers) and appears to have ignored or not heard Gemma's explanation that drawers would be obtained for her, and a working printer would be ordered to replace the broken one on the desk.

…

30.62 The claimant had written to Mary Steadman on 15 April 2015, indicating that she thought the matter was closed. She believed she was entitled to a full note of what was proposed to be discussed so that she could consider having a union representative present. The claimant agreed to meet subject to knowing who would be there, and what it would be about. Mrs Steadman gave evidence that she simply wanted at that stage to talk through what had happened and to understand what had happened from the claimant's perspective.

30.72 On the 6th May the claimant replied – p.298 – stating Mrs Steadman had not defined the status of the meeting or its purpose and the claimant required that it be put in writing.

30.74 She then made further demands – before she could attend any meeting she required written responses to the following:-

(1) Full details of what Mrs Steadman asserted was the incident on 13th April;

(2) Why nothing had been done to assist her;

(3) When Mrs Steadman had made decision to rearrange the office;

(4) What was the reason for sudden action without informing or consulting the claimant;

(5) Why she was not consulted before the changes were made;

(6) Why she was not informed in advance;

(7) Why not ring to warn rather than sending an email;

She then made the following comment;

'You appreciate it would not be appropriate for you to conduct such a meeting in the light of the matters raised in this letter'

…

30.78 The claimant was in the vicinity of the OH department on the 11th May and chose to drop in. She met with C Allen, the office manager (and a nurse).

30.79 She made complaints about her manager, saying she has major issues with her, and expressed her upset explaining about the office move. She insisted on complete confidentiality, although in evidence she accepted that such confidentiality could not extend to practitioners exchanging information without the OH.

…

30.142 Later the same day the claimant resigned 'by reason of the behaviour I have had to endure'. She indicated she would make a claim for constructive unfair dismissal, and make a formal complaint to the General Medical Council about Dr Basheer.

30.143 Mrs Steadman responded to the claimant's letter of resignation, inviting her to reconsider, and at least to meet with her to discuss matters. The claimant refused the offer accusing her of defamation, attempting to rewrite events retrospectively and potentially presiding over a kangaroo court."

13. Accordingly, on the Employment Tribunal's findings, a critical feature of the reorganisation that occurred by 13 April 2015 was that the Claimant was very upset by it:

(a) The Tribunal found she was "upset" (paragraph 30.54) and "was very bothered once [the furniture] had been moved" (paragraph 51);

(b) She acted angrily, using the words (of herself) "fucking cripple" (paragraph 30.55);

(c) She expressed "huge disappointment" in her letter of 15 April 2015;

(d) She made clear her concerns about the circumstances of the reorganisation in her letter of 6 May 2015; and again on 11 May when she spoke to the office manager and the nurse (paragraphs 30.78 and 35.79);

(e) In her witness statement she stated that she was "shocked" by the changes and that she "could not believe what had been done".

14. The Employment Tribunal reached conclusions in relation to these matters in the context of harassment (paragraph 46) and in its conclusions on reasonable adjustments (paragraphs 49-55) and constructive dismissal (paragraphs 56-71) as follows:

(d) Failing to advise the claimant adequately in advance of the rearrangement of her office (amounting to harassment)

"46. Before the claimant arrived she was aware, that changes had been made. In October 2014 Occupational Health recommended changes and the claimant had seen that report. This did upset the claimant however we do not consider it was done with the intention to create an intimidating environment, but in an attempt to meet the requirements of the Occupational Report. We can see that it would have been good management practice to advise and consult all the staff before making the move, but we do not consider this amounts to harassment because of the claimant's disability.

Reasonable adjustments

49. Occupational Health undertook a workplace assessment and made recommendations on 29 October 2014. The recommendations involved giving the claimant a dedicated telephone on her desk, and moving her desk to the nearest point to the office door. There then followed

a lengthy delay of nearly 6 months whilst a dedicated phone line and computer line were fitted in the office. Mrs Steadman chased the financing of it. The layout recommended involved moving a bookcase and materials belonging to the cardiology rehabilitation unit, to ensure that the claimant was close to the door, and to remove trip hazards. The move did not happen until 11/12 April 2015 some 23 weeks after the recommendations. Then all that happened was a tidy up, and the movement of a table without drawers by a few feet. The book case remained in situ and we heard nothing to suggest any attempt had been made to agree its removal or repositioning. The claimant did then have a dedicated phone and would have had a printer once it had arrived.

Requiring the claimant to continue to work in an environment which was known to be unsuitable, because of the lack of a proper office chair, and the situation of her desk, which was further into a small room, requiring her to navigate cables, desks and chairs to get out, and without a fixed line phone she could use, had been recognised in 2 reports as inappropriate. Having seen the reports the respondent delayed by nearly 6 months before beginning to implement the changes. At the time of the claimant's resignation, not all of the changes had been implemented. The adjustments were accepted as reasonable by the respondent, but attempts to make them were lacklustre.

50. We consider that the respondent failed to make reasonable adjustments in a timely fashion. That said we did note the claimant's comment that she wasn't bothered by the furniture positioning, before it was moved.

51. It is clear she was very bothered once it had been moved.

52. We find that it would have been reasonable for the respondent to comply with the requirements of the report in a timely fashion and to ensure that there were no delays.

53. The lack of urgency on the part of the management is deprecated. We were really concerned at the number of times witnesses indicated that they had to accept these delays because 'that is the way it is in the NHS' without recognising their own and collective responsibility to make things happen when the recommendations are reasonable.

54. At the date of the claimant's resignation the chair which had been recommended, and accepted as a reasonable adjustment by the respondent in November 2014, still had not been provided. The recommendation was specific and reasonable, and affordable. It should not have been left to the claimant to take responsibility for obtaining and trialling chairs when there was a specific measured recommendation which simply had to be implemented. However, the claimant in her evidence made it clear that she was not that worried about the chair. This was however a failure to make a reasonable adjustment. She was placed at a disadvantage, as it had been recognised that she should have a specific chair with wheels, and she did not get it.

55. The respondent did in fact provide a dedicated telephone line to the claimant's desk, but not in a timely fashion. This suffered the same 23 week delay without any reasonable explanation. In the circumstances we find this to have been a failure to make a reasonable adjustment. In this case we noted however that the claimant was adamant she did not want a dedicated line, and did not welcome its arrival. She said in evidence that she had a mobile phone which she was happy to make calls on. It cannot be said therefore that this caused her a detriment".

Constructive dismissal

"56. We have found in favour of the claimant on 2 allegations of a failure to make reasonable adjustments. In each of these failures we have found that the claimant did not express any real concern about the particular adjustments. These cannot therefore be, and have not been pleaded by the claimant, as the reasons for her resignation.

57. We note that despite a catalogue of complaints of the way in which the claimant alleges she was treated, at no time during her employment did she lodge a grievance or make any sort of formal complaint.

58. We learned from the claimant's own evidence that she considered there to be some form of conspiracy involving almost every work colleague whom she has named in this case, including staff in OH, her own manager, and a junior administrator, HR and matron. We found this not to be credible".

59. It was put to Mrs Steadman that she was a close friend of Rose Davies, when in fact there had been little or no contact between them since training together, about 20 years previously.

60. The claimant also alleged that Mrs Steadman was a close friend of Gemma's because she had been invited to her wedding. This level of suspicion did not assist the claimant's own credibility.

61. When we unpicked the alleged links between the conspirators, we found it highly improbable that there was any form of collusion. Dr Basheer, in OH, for instance had never met the claimant before.

62. Mrs Steadman was making conscious decisions to avoid the claimant being suspended for an investigation into misconduct, against the express wishes of Matron Cupper.

63. Gemma Case was a junior administrator working mainly from home, with no power to impact directly on the claimant's position at work.

64. Rose Davis worked in Occupational Health and had no obvious motive to do anything more than her job.

65. There was no evidence that HR wanted rid of the claimant – indeed they advised that the £800 chair should be bought for her.

66. Matron Cupper wanted the claimant suspended (which may not have been unreasonable at that time to enable an investigation to be completed) but added that she recognised that the claimant had contributed 30 years as a nurse and wanted to keep her.

67. Even Mr Conry in his statement said that the claimant was suspicious of Mrs Steadman's real motives as early as July 2014. This suspicion appears to have clouded the claimant's interpretation of the events which followed.

68. Mr Conry's statement reflected what we have found to be the true position. After leaving Dr Basheer the claimant was desperate not to return to work, indicating that they were 'going to suspend her'. We do not find that to be the case, but do judge that to be the reason why she resigned, as almost immediately a letter of resignation followed.

69. We do not find that the claimant was bullied by anyone in the respondent organisation. We do find however examples of her own assertive behaviour being perceived as aggressive and intimidatory, words often used to describe bullying conduct.

70. We did note that there is no mention of the respondent's alleged discriminatory behaviour because she is a disabled person in the letter of resignation.

71. We do not find that there was any fundamental breach of the condition of confidence and trust by the respondent such as to justify the claimant's resignation. We have considered whether this was a series of breaches, with the meeting with Dr Basheer being the 'last straw'. However, with the exception of the failures to make reasonable adjustments, about which the claimant was specific in saying they didn't bother her, we found no potential breaches of the terms of the claimant's contract. The breaches of the statutory duty to make reasonable adjustments we do not find to be breaches of contract. One the facts we found no breach of either an express or implied term such as to enable the claimant to resign and claim unfair constructive dismissal.

15. It is clear from the Claimant's own evidence and the conclusions at [46] and [49] that there were a number of concerns the Claimant had with the reorganisation. In particular she was not consulted prior to the change (paragraph 46); her desk was changed to a table that was not suitable (witness statement paragraph 44); the new desk was not by the door as required, and the obstructing bookcase was still in place (paragraph 49); she no longer had easy access to

A the incoming general enquiries phone, which was moved to the other side of the office and meant she would have to get up to answer it (witness statement paragraph 44); her files were placed on a shelf above her head so that she had to stand to reach them and they fell on top of her when she tried to get them (paragraph 30.51 and paragraph 44 witness statement); a large printer was on her desk, which did not work and restricted her workspace (paragraph 30.51 and paragraph 44 witness statement); there were trip hazards including wires that she had to navigate, and other obstructions (paragraph 49 and paragraph 44 of her witness statement).

B

C

Ground one: constructive dismissal

16. There is no criticism of the Employment Tribunal's summary of the applicable principles of law in this appeal. The real issue is whether, having set out the relevant law, the Tribunal applied the law to the facts it found.

D

17. In relation to constructive dismissal, it is trite law that four conditions must be met:

E

(i) there must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;

(ii) the breach must be sufficiently serious to justify the employee resigning, or it must be the last in a series of incidents which justify resignation;

F

(iii) the employee must leave in response to the breach and not for some other unconnected reason;

G

(iv) the employee 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 or agreed to vary the contract.

H

18. In London Borough of Waltham Forest v Omilaju [2005] IRLR 35 the Court of Appeal (Dyson LJ) set out the approach to constructive dismissal where the breach relied on is of the implied term of trust and confidence:

> **"14. The following basis propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27.**
>
> **2. It is an implied term of any contract of employment that the 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: see, for example, *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.**
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> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is 'calculated or likely to *destroy or seriously damage* the relationship' (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at p.464, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).**
>
> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para.[480] in *Harvey on Industrial Relations and Employment Law:***
>
> > **'[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.'**
>
> **15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. Neill LJ said (p.468) that 'the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term' of trust and confidence. Glidewell LJ said at p.469:**
>
> > **'(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W M Car Services (Peterborough) Ltd* [1982] IRLR 413.) This is the "last straw" situation'.**
>
> **16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimis non curat lex') is of general application**
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> **…**
>
> **20. 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.

21. 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.

22. 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)."

19. The repudiatory breach relied on need not be the sole cause of the employee's resignation. Provided the employee accepts the repudiatory breach as bringing the employment to an end, it does not matter if the employee also objects to other actions or omissions by the employer not amounting to a breach of contract (see Nottinghamshire County Council v Meikle [2004] IRLR 703).

20. In relation to ground one, the Claimant's central submission is that the Employment Tribunal adopted an impermissibly narrow approach to the conduct potentially relevant to constructive dismissal, focussing on reasonable adjustments that did not bother the Claimant and omitting to address matters that did. To apply the law correctly Mr Catherwood contends that the Employment Tribunal had to consider all potential acts relied on by the Claimant that could (individually or cumulatively) amount to a repudiation by the Respondent. A major and obvious candidate was the office reorganisation and its surrounding circumstances.

21. For her part, Ms Smeaton relies heavily on paragraph 71 of the Employment Tribunal's judgment where, she submits, its conclusion could not be clearer. The Employment Tribunal did not limit its consideration of whether there was a fundamental breach to its findings in respect of reasonable adjustments but dealt with the question on a broader basis that encompassed potential breaches of the implied term of trust and confidence. The reasoning may be short, but the conclusion is clear.

22. Ms Smeaton submits that the constructive dismissal claim as presented to the Employment Tribunal, relied heavily on the allegation that there was some form of conspiracy against the Claimant involving almost every work colleague she named in the case, rather than on a persistent failure to make reasonable adjustments. The conspiracy allegation was firmly rejected by the Employment Tribunal and the Claimant is now seeking to refocus her claim. Moreover, what bothered the Claimant (as the Employment Tribunal found) was not the Respondent's failure to make reasonable adjustments in respect of the office rearrangement; what 'bothered' her were the attempts by the Respondent to fulfil the duty, i.e. the changes to the office ultimately made in an attempt to fulfil the obligation under s.20 Equality Act 2010 (EqA) (see paragraph 20 of the Respondent's Skeleton Argument). As to these, Ms Smeaton submits that the Employment Tribunal found she was not worried about the chair or the lack of a dedicated phone line.

23. I do not accept Ms Smeaton's submissions and prefer the arguments advanced by Mr Catherwood. The Employment Tribunal's analysis of the constructive dismissal claim (in light of its earlier findings) is at paragraphs 56-71 (set out above). Only two aspects of her case are expressly addressed in the context of constructive dismissal:

(i) the reasonable adjustment failures; and

(ii) the conspiracy claim.

24. The reasonable adjustment failures are discounted because the Employment Tribunal concluded that these did not bother the Claimant and so they did not amount to breaches of contract – see paragraph 71. That appears to confuse breach with causation, but more significantly, the Employment Tribunal failed altogether to consider the conduct of the Respondent in rearranging the Claimant's office and its impact on the Claimant in light of the Employment Tribunal's own findings that showed the extent to which these events were a very real issue for the Claimant and continued to be a source of distress for her right up to her resignation (see for example the findings relating to her discussion with the office manager and a nurse at paragraphs 30.79 and 51). It is apparent from the Employment Tribunal's express conclusions that it regarded the two reasonable adjustment allegations (relating to the chair and the dedicated phone line) as the only aspect of the office reorganisation that was relevant to constructive dismissal. There is nothing in the Employment Tribunal's analysis at paragraphs 56-71 that addresses as potentially relevant acts (or omissions) the other sources of distress concerning the reorganisation summarised above, and found by the Employment Tribunal to have occurred.

25. It is no answer to the Employment Tribunal's failure to address these points to dismiss them on the basis that they arose from attempts by the Respondent to fulfil the statutory duty to make reasonable adjustments. That may have been the context, but the result of this mismanaged effort was to create an office environment for the Claimant (who is disabled) that was worse than before and presented tripping hazards and other obstacles (to her as a disabled person) and meant that on the Employment Tribunal's own findings she was left without a fit and proper working environment. The same is true in relation to the Respondent's reliance on

A the finding that the reorganisation was not an act of unlawful direct discrimination. That is so but does not entail that the mismanaged implementation of changes to the office that put the Claimant in a worse position than previously did not amount to potential breaches of the implied term of trust and confidence, or at least acts that could be relied on as part of a series of acts or incidents that cumulatively amount to a repudiation of the contract by the Respondent.

26. The conclusion reached by the Employment Tribunal at paragraph 71 addresses the reasonable adjustment failures in terms. The broader conclusion reached by the Employment Tribunal and relied on by Ms Smeaton, that aside from the reasonable adjustment failures there were "no potential breaches of the term of the Claimant's contract" and on the facts "no breach of either an express or implied term…" is itself wholly explained by the Employment Tribunal's analysis and rejection of the conspiracy claim at paragraphs 58 – 67 and the finding that the Claimant was not bullied by anyone in the Respondent's organisation (paragraph 69). There is no challenge to those conclusions, but that is not an answer to this appeal. What is clear is that, the Employment Tribunal's conclusions on constructive dismissal are devoid of any analysis of the events of the office reorganisation because the Employment Tribunal did not engage with that aspect of the Claimant's case. The Employment Tribunal's failure is not a failure to provide reasons but is properly characterised as a failure to address an important part of the Claimant's case. The decision is not saved by the broad conclusion expressed at paragraph 71 that relies on unrelated matters without any reference whatever to the office reorganisation events.

27. Ms Smeaton submits that even if the Employment Tribunal erred in this way, it is immaterial in light of the Claimant's case that she resigned on the basis of the "last straw" meeting with Dr Basheer on 14 May 2015 and not because of concerns about the office

rearrangement. She relies on the fact that the Employment Tribunal made its own findings as to the real reason for the Claimant's resignation at paragraph 68 as follows:

> **"68. Mrs Conry's statement reflected what we have found to be the true position. After leaving Dr Basheer the claimant was desperate not to return to work, indicating that they were 'going to suspend her'. We do not find that to be the case, but do judge that to be the reason why she resigned, as almost immediately a letter of resignation followed."**

She submits that conclusion is not directly challenged and was a conclusion open to the Employment Tribunal on the evidence and its findings. In other words, the reason found by the Employment Tribunal for the Claimant's resignation was a non-repudiatory one, so that the appeal must fail in any event.

28. I do not accept this submission. The Tribunal recognised that the meeting with Dr Basheer could constitute the last straw. It was not necessary for the last straw to be characterised as unreasonable or as disclosing blameworthy conduct on the part of the Respondent: see Omilaju v Waltham Forest London Borough Council at paragraph 20. 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.

29. Whilst it is correct that "an entirely innocuous act" cannot be a final straw (Omilaju at paragraph 22) in light of the Employment Tribunal's findings I do not consider the meeting with Dr Basheer could be said to fall within that category (as Ms Smeaton ultimately accepted). In particular, the Employment Tribunal found that the meeting was "not an effective appointment". Dr Basheer was running late, and had not read the details of the Claimant's previous referrals. In the course of the meeting, he revealed to the Claimant a meeting between Dr Elekima and Mrs Steadman that she had not been told about, which caused her further

suspicion and distress. Dr Basheer also mentioned that he would be considering mental health issues (again, not something previously raised with her) and the possibility of medical suspension.

30. I agree with Mr Catherwood that in the context of the mismanaged and detrimental office reorganisation, this was quite capable of amounting to a last straw. The Employment Tribunal considered at paragraph 71, "whether this was a series of breaches, with the meeting with Dr Basheer being the 'last straw' " and concluded that there were no potential breaches. This was an incorrect approach: the Employment Tribunal did not need to identify a series of "breaches"; it was sufficient for there to be a series of acts capable, cumulatively, of amounting to a repudiation. More significantly, the Employment Tribunal failed altogether to consider whether the circumstances of the office reorganisation were sufficient to amount cumulatively (and in conjunction with the last straw meeting with Dr Basheer) to a repudiation of the contract. Had it done so, there was ample evidence that could have entitled it to conclude that they did.

31. Further, the Employment Tribunal's analysis of the "real" reason for the resignation focuses on the Claimant's increasing sense of suspicion, culminating in her meeting with Dr Basheer, and her belief that she was to be suspended, which the Tribunal found to be unjustified. However, that analysis fails to engage at all with the other serious concerns the Claimant had relating to 13 April 2015 which, as the Employment Tribunal found, she continued to raise, including three days before her meeting with Dr Basheer. It is striking that these ongoing complaints, and their timings, are not addressed by the Tribunal anywhere in its conclusions on constructive dismissal. Moreover, paragraph 68 fails to recognise that the Claimant's increasing anxiety about potential suspension, even if unjustified, had its roots in the

events of the office reorganisation of 13 April 2015. It was the Claimant's reaction to the mishandled reorganisation that led to the focus by the Respondent on the Claimant's conduct, which in turn led to her belief that she was being "set up" and her resignation. The fact that her resignation may in part have been as a result of concerns that were unfounded, does not mean that it was not also a response to concerns that were justified. Meikle at [33] makes clear it is enough that she "resigned in response, at least in part, to fundamental breaches of contract by the employer" (emphasis added).

32. If the Employment Tribunal had addressed this aspect of the Claimant's case, which in my judgment it did not, and asked itself whether, had the office reorganisation been properly handled, or even not undertaken at all, the Claimant would have ended up resigning, it may well have concluded that she would not have done so. To reach a safe conclusion on why the Claimant resigned, it was first necessary for the Employment Tribunal to recognise and address the serious concerns she had and expressed right up to three days before her resignation, about the mishandled reorganisation and whether the final meeting with Dr Basheer was the last straw in a series of acts or omissions by the Respondent which cumulatively amounted to a repudiation of her contract by the Respondent. Having failed to address those matters, the finding made by the Employment Tribunal as to the real reason for resignation cannot be regarded as safe and cannot stand.

33. To the extent that the Respondent contends that the Claimant did not allege before the Tribunal that she resigned in response to the office reorganisation and that the appeal amounts to a reformulation of her case, I do not accept this argument. The Claimant's claim form and particulars consists of a narrative setting out her numerous concerns leading up to her resignation. Within these, the events of 13 April 2015 are given prominence and their impact is

clearly articulated. She refers to being stunned and feeling badly let down. She says she was extremely upset. These events were clearly identified as part of the sequence of events that led to her "final straw" resignation. Furthermore, the letter of resignation is in general terms and certainly does not exclude reliance on these events. Nor is it possible to construe the letter written subsequently as disavowing reliance on the events of 13 April 2015. That letter was a response to the main points of disagreement with Mrs Steadman's letter to her. The fact that the Claimant did not raise a grievance is also irrelevant: see Tolson v Governing Body of MES 2003 IRLR 842 at [8].

34. For all these reasons ground one succeeds and the decision that the Claimant was not constructively dismissed cannot stand.

Ground two: harassment

35. The second ground of appeal challenges the Employment Tribunal's approach to the same events of 13 April 2015 in addressing the allegation of unlawful harassment. The Employment Tribunal dealt with this issue at paragraph 46, which is set out above.

36. Ms Smeaton makes a preliminary objection to this ground of appeal on the basis that the allegation of harassment relied on by the Claimant (and identified as the issue to be addressed at the hearing) was an allegation of: 'Failing to advise the Claimant adequately in advance of the rearrangement of her office'. She submits there was no wider allegation of harassment as now advanced on appeal and the Employment Tribunal was entitled to proceed on that limited basis.

37. I entirely accept that the Employment Tribunal's jurisdiction is limited to complaints made to it (see Chapman v Simon 1994 IRLR 124 at [53]). However, although read literally

A the allegation appears to be limited in the way Ms Smeaton suggests, it is clear that neither the Respondent nor the Employment Tribunal proceeded on that literal basis. In particular the Employment Tribunal considered the changes that were made in the reorganisation (as complained of in the ET1) together with the failure to consult. In light of the way in which the Claimant's case was pleaded in relation to these events, it would have been artificial to proceed on the basis that this allegation was concerned only with consultation and did not embrace the circumstances of the reorganisation itself. As Mr Catherwood submits, the complaint of lack of consultation necessarily carried within it a complaint about what the lack of consultation led to, namely an office reorganisation that left the Claimant in a worse position as a disabled person than before and upset her considerably. Had the reorganisation been undertaken with proper care by the Respondent, the lack of consultation would in all likelihood, not have mattered. Accordingly, I do not accept that this is an attempt to reformulate or widen a case not advanced below as the Respondent submits. In any event, even looking at the allegation of harassment narrowly as a failure to consult the Claimant, I agree with Mr Catherwood that unwanted conduct can include inaction so this is really another way of complaining about going ahead with an unwanted (and ultimately detrimental) reorganisation of her office space.

38. Turning to the substance of this ground, there is no doubt that the Employment Tribunal directed itself correctly as to the relevant statutory test under s.26 EqA . This provides:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account –**

(a) the perception of B;

(b) the other circumstances of the case

(c) whether it is reasonable for the conduct to have that effect."

39. It is self evident that s.26 provides that harassment can arise in two ways: through conduct that is intentional on the one hand, and through conduct that is not intentional but has the relevant effect. In applying the statutory test at paragraph 46, the Tribunal found that "[the reorganisation] did upset the Claimant however we do not consider it was done with the intention to create an intimidating environment, but in an attempt to meet the requirements of the Occupational Report". The only legal question expressly addressed by the Employment Tribunal here is whether the creation of the relevant environment was intentional. Having reached that conclusion the Tribunal should have considered whether, nevertheless, and notwithstanding the Respondent's good intentions, the reorganisation had the relevant effect, having regard to the questions under s.26(4). The Tribunal did not on the face of its reasoning, work through the steps required under s.26 EqA.

40. The question is whether it can be inferred that the Tribunal, having correctly directed itself in law, applied the correct test to reach a conclusion that there was no requisite intention and implicitly, no relevant effect as Ms Smeaton contends. I do not consider that it can. There were many allegations of harassment pursued by the Claimant and it appears from the Employment Tribunal's reasoning in relation to each, that is was overwhelmingly focused on what it found to be the good (if sometimes misguided) intentions of the Respondent. The only paragraph (as Ms Smeaton concedes) where the Employment Tribunal dealt with the effect of the conduct relied on is at paragraph 45(b) where the Employment Tribunal concluded the "Claimant was [not] harassed because of her disability as the allegations cannot have had the

relevant effect if the Claimant was ignorant of them." In the remaining paragraphs there is no reference at all to the effect created by the challenged conduct.

41. I have concluded that I cannot safely assume that the Employment Tribunal implicitly conducted the required analysis of the effect of unwanted conduct when reaching its conclusions in relation to the allegation of harassment arising out of the office reorganisation. Had the Employment Tribunal done so it would have addressed the Claimant's perception, the other circumstances and the objective effect of the conduct. Had it taken the correct approach, there was ample evidence to support the conclusion that the Claimant perceived the circumstances of the reorganisation as creating a hostile environment for her as a disabled person, with trip hazards and obstacles to a fit and proper workspace. She was extremely upset by it as the Employment Tribunal's own findings make clear. Furthermore, there was ample evidence to conclude that it was reasonable for the conduct to have that effect given in particular the delays, the lack of consultation and the inadequacy of what was done.

42. This is not to adopt a pernickety or hyper-critical approach to the Employment Tribunal's conclusion. When it comes to dealing with an important allegation and the words used by the Tribunal indicate that it applied only part of the statutory test, there is no basis for assuming that the Tribunal in fact worked through the rest of the test when it made no reference to having done so, and where its own findings of facts clearly required careful legal analysis to address the allegation.

43. I agree with Mr Catherwood that the Tribunal's statement that it may have been good management practice to advise and consult all the staff beforehand simply compounds the problem. The Claimant was not in the same position as all the other staff: she was disabled and

the changes were to be made primarily for her benefit. It was therefore all the more important to consult with her than with other staff. The Tribunal appears to have treated consultation as simply a matter of general workplace practice and to have lost sight of the fact that there was a disability element to the analysis.

44. For all these reasons I have concluded that there was a failure to consider the effect of the same unwanted conduct on the Claimant in relation to the allegation of unlawful harassment. The Employment Tribunal's decision cannot stand. The appeal on ground two must accordingly be allowed.

Burns/Barke procedure and disposal

45. The Respondent submits that if the appeal succeeds, the Burns/Barke procedure is appropriate. The Claimant opposes that approach. I do not consider that further reasons should be sought from the Employment Tribunal. The errors I have found involve a misapplication of the law and not simply a lack of reasons: they are not remediable through further reasons.

46. The more difficult question is whether, given the need for the matter to be remitted, it should return to the same or to a fresh Employment Tribunal. I have found this to be a difficult and finely balanced question on which both sides have strong points to be made. Having borne in mind the factors identified in Sinclair Roche & Temperley v Heard and another [2004] IRLR 763 EAT, on balance I have concluded that the case should properly be remitted to the same Employment Tribunal. This Employment Tribunal has made extensive findings of fact. There is no suggestion of bias on its part and its judgment is not fatally flawed – the essential matter of concern being its failure to address the Claimant's case on the events of 13 April. I understand the concern identified on behalf of the Claimant that this might be seen as giving the

Employment Tribunal a second bite of the cherry on the two issues that are remitted and the danger that the Employment Tribunal will seek to justify its earlier decision. However I have no reason to doubt the professionalism of the experienced Employment Tribunal in this case. It has already made findings about the mishandled reorganisation and recognised how distressed the Claimant was by what happened. I am confident that it will look at those findings in light of this judgment and adopt a properly open-minded approach. It will be for the Employment Tribunal to consider whether fresh evidence is necessary, but I will permit the parties to make representations about the scope of the order for remission, and its consequences.

47. In conclusion, both grounds of appeal succeed and the questions of constructive dismissal and unlawful harassment (relating to the events of 13 April 2015 and their consequences) are remitted to the same Employment Tribunal.

Postscript

48. Having received competing written submissions from the parties on the scope of remission I have concluded that a wider scope of remission along the lines sought on behalf of the Claimant is appropriate to avoid potential difficulty, confusion and unfairness; and reject Ms Smeaton's submission that all findings of fact made in the existing judgment should remain undisturbed on appeal.

49. For the purposes of the constructive dismissal claim, the Employment Tribunal will have to focus on the events of 13 April 2015, and their impact on the Claimant. However, it will also need to look at the events between the office reorganisation and the Claimant's resignation (including the meeting with Dr Basheer), having particular regard to questions of causation and/or the 'last straw' principle. As my judgment records:

(a) the Tribunal's findings as to the real reason for resignation cannot stand (paragraph 32);

(b) the events of 13 April 2015 can be relied on as part of a series of acts or incidents that cumulatively amount to a repudiation of the contract by the Respondent (paragraph 25);

(c) The Claimant's increasing anxiety about potential suspension, even if unjustified, can be seen as having its roots in the events of the office reorganisation (paragraph 31);

(d) The meeting with Dr Basheer cannot be regarded as an entirely innocuous act (paragraph 29).

It will be for the Tribunal to consider each of these fact-sensitive issues unfettered by its previous findings of fact and in light of any fresh evidence that it considers it necessary to admit. I have little doubt that it will wish to hear further evidence from the Claimant, but that is a matter for the Employment Tribunal.

50. The remitted harassment claim is more limited in factual scope, but again, fair consideration of this claim means that the Employment Tribunal should be able to revisit all of the factual circumstances of the office reorganisation and make fresh and/or different findings as necessary.

51. The Employment Tribunal need only consider matters that are potentially relevant to the two remitted claims (relating to the events of 13 April 2015 and their consequences) and can be trusted to manage the remitted claims appropriately to ensure that the focus remains on those claims.

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