EMPLOYMENT TRIBUNALS

Claimant: **Mr A Davies**

Respondent: **The Dean Close Foundation**

Heard at: **Worle** **On: 17, 18 and 19 October 2017**

Before: **Employment Judge C H O'Rourke**
Members Ms S M Pendle
Mr H Patel

Representation
Claimant: **Mr A Small, Counsel**
Respondent: **Mr J Bromige, Counsel**

JUDGMENT having been sent to the parties on 24 October 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:

JUDGMENT

1. The Claimant's claim of age discrimination is dismissed upon withdrawal.

2. The Claimant's claim of constructive unfair dismissal fails and is dismissed.

3. Following the UK Supreme Court Judgment in Unison v Ministry of Justice, the Claimant will be reimbursed the Tribunal fees he has paid in respect of this claim, by separate arrangements made directly with him or his representatives by the Ministry.

REASONS

Background and Issues

1. The Claimant was employed as a swimming coach at the Respondent school for sixteen years, until his resignation with effect 31 May 2017.

2. As a consequence, he brings a claim of constructive unfair dismissal.

3. While initially he also brought claims of protected disclosure and age discrimination, the former was dismissed by way of withdrawal at a pre hearing review on 31 May 2017 and the latter dismissed by way of withdrawal on the second day of this hearing.

4. The issues therefore in respect of the claim of constructive unfair dismissal are as follows:

    4.1 Did the Claimant resign because of an act or omission of the Respondent?

    4.2 Did that act or omission by the Respondent amount to a fundamental breach of contract?

    4.3 Has the Claimant affirmed the breach?

    4.4 If not, then the claimant has been constructively unfairly dismissed.

    4.5 If constructively unfairly dismissed, the Tribunal will then consider whether based on the reason for dismissal, that that reason was potentially fair and that the respondent had acted otherwise reasonably.

5. Various preliminary issues were discussed at the outset of the hearing, but as these related to the age discrimination claim, these fall away. Similarly, the Tribunal dismissed some aspects of the Claimant's claim of age discrimination on the first day of the hearing as being vexatious, but as the entire claim was withdrawn the next day that decision is not elaborated upon here.

The Law

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

    95. Circumstances in which an employee is dismissed

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

        (a) The contract under …,

        (b) he is …, or

(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 case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 EWCA** sets out the well known test for determining constructive unfair dismissal. We remind ourselves that in such cases the burden of proof rests upon the Claimant.

8. The case of **Malik v BCCI [1997] ICR 606 UKHL** which confirmed the existence of the implied term of trust and confidence in employment contracts and that the employer should not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

9. Finally, the case of **Omilaju v Waltham Forest London Borough Council [2005] ICR 481 EWCA** which explained that the act constituting a "last straw" not need to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. The test is objective and while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case for conduct which is perfectly reasonable and justifiable, to satisfy the last straw test.

The Facts

10. We heard evidence from the Claimant and on his behalf from his wife Mary Davies.

11. For the Respondent we heard evidence from Mr Andrew Hall, Deputy Head Master, Mr Adrian Boucher, the Bursar and Ms Jacqueline Brophy, Human Resources Manager.

12. The Respondent is a medium to large-scale organisation, with approximately seven hundred employees and has appropriate management and administrative resources commensurate with that scale of organisation.

13. Assessment of Claimant's Credibility. As stated, the burden of proof rests with the Claimant and the quality of his evidence is therefore particularly important. His Counsel, Mr Small, freely and fairly acknowledged that the Claimant had, in his words, been "*pretty rubbish*" as a witness. He was easily confused and struggled to understand questions and answer them directly and to the point. He also frequently contradicted both the details of his own pleadings and his statement, which themselves he was obliged to correct on several fundamental issues and even, on occasion, his own oral evidence given only moments before.

14. The Respondent Counsel, Mr Bromige, asserted that this behaviour indicated that in his words, the Claimant was being "*dishonest*". We do not go that far. Our view of the Claimant is that he is an 'innocent abroad' and severely out of his depth in these proceedings. As a consequence, we don't consider that he was being deliberately dishonest, but sought on some occasions to "duck and dive" when he found himself under pressure. His evidence, as a consequence, was not consistent or entirely reliable and we view our assessment of the facts hereafter through that prism.

15. Questions to the Claimant as to his Future. The Claimant said that the first indication as to the potential vulnerability of his position was when two members of the School's management, separately, but within a week of each other, asked him "*where he saw himself in three years' time?"*. At that point he was 57 years of age and viewed the queries as directed at his age and potential retirement. His evidence as to who put these questions and when was confused. In pleadings, he said September 2016 and that the persons involved were Mr Boucher and a Mr Moss. At this hearing, he corrected the date to the "*summer term*" i.e. April – June 2016 and replaced Mr Moss with Mr Salisbury, the Senior School's Headmaster.

16. We obviously heard no evidence from Mr Salisbury, as, until the Claimant's oral evidence, he had not been named. Mr Boucher, in his oral evidence, denied any such query. He was challenged as to why he had not mentioned it in his statement and said he was focussing on later events and stated that it was clearly an omission on his part.

17. We note, however that the ET3 contained such a firm denial repeated in the response to the Scott Schedule and are satisfied that Mr Boucher simply omitted to deal with the matter in his statement and that he was focussing on the later issues, in which he was more heavily involved.

18. We find therefore, on balance that the events as described by the Claimant did not take place.

19. The Diving Board Incident. Mr Hall took up his new post as Deputy Headmaster on 1 September 2016. Part of his role was to oversee sports generally and as relevant to this case, the swimming pool in particular.

20. On 13 September, Mr Hall visited the pool and introduced himself to the Claimant. It is common evidence that the diving boards were out of bounds, having been condemned as such by the Claimant himself several years earlier.

21. Later on that day, a pupil cut his foot while using a diving board and on the school nurse's advice was taken to A&E to have the cut "*glued*" (hereafter referred to as the 'diving board incident'). It was common evidence and admitted as such by the Claimant that the pupil and others were under his supervision and he had permitted them to use the diving board.

22. In his action report the next day, on 14 September [92], he appears to dissemble somewhat in referring to "*putting equipment away that pupil cut his toe on*". He was unable in cross examination to explain the relevance of

that reference and our view is that he was attempting, at least at that point, to 'cover his tracks'.

23. He attended an investigatory meeting on 17 September [95], at which, to his credit, he accepted full responsibility and apologised.

24. A Mr Slade (we were unsure as to his position) wrote to the Deputy Headmaster on 2 October [98], raising concerns about behaviour in the pool generally, an incident resulting in a pupil being taken to hospital on 30 September, having hurt his neck. Mr Slade said:

> *"Anthony, lovely though he is, is a highly trained life-saver, but doesn't seem to have full control over behaviour that could lead to the use of his skills. I wonder if the boys have any idea of how easy it is to drown as well – do they get any training?"*

25. It is agreed evidence that the Claimant was not informed of this concern until 24 November and that that was either in a meeting that morning, or certainly later that day, by email from Ms Brophy [169].

26. The Claimant attended a disciplinary meeting on 13 October, chaired by Mr Boucher, to deal with the diving board incident. There are two sets of minutes [116 and 117] and then further amendments [123]. It seemed generally accepted that the minutes at page 117 was the working document. The Claimant did not deny his previously-admitted responsibility and Mr Boucher is recorded as saying that the offence did warrant some form of warning and did subsequently give the Claimant a written warning sometime later.

27. Discussions as to Possible Settlement. It was agreed evidence that Mrs Davies, who had accompanied her husband, raised issues concerning potential retirement of the Claimant. While the Claimant's evidence was that this was an off-the-cuff remark, the Respondent's witnesses denied that stating that Mrs Davies initiated discussions about the Claimant's pension. The Claimant's own evidence on this point was contradictory and on balance we prefer the Respondent's evidence. It is not the case, we find therefore that the Respondent initiated any conversation about the termination of the Claimant's employment, but merely responded to overtures made by the Claimant and/or his wife.

28. All present agreed that the Claimant and his wife were quite emotional at this point and Mr Boucher, with the Claimant's agreement, proposed a further meeting in a few days. The minutes state that the "*discipline process is paused until the resolution of that pre-termination discussion*".

29. Subsequent discussions took place about the Claimant's pension rights and the disciplinary proceedings remained paused until 22 December.

30. Gap in Claimant's Certification. Mr Hall's oral evidence was that as part of an overall concern about supervision of sports he called for copies of all instructors' qualifications. On 8 November, he emailed Ms Brophy to specifically ask for the Claimant's certificates [125]. This is because for

some reason the Claimant had not been included in the initial trawl. Ms Brophy confirmed Mr Hall's evidence that the trawl had been a general one and not targeted at the Claimant. In the absence of any evidence to the contrary, we accept that account and find therefore that the Claimant was not being singled out in this respect.

31. Eventually, on 17 November, the Claimant himself provided an RLS certificate, on which it was apparent that he was not qualified to conduct life-saving to a depth beyond 2.4 metres [138], when the pool was 3.5 metres deep. This was pointed out to the Claimant by email on Saturday 19 November by his line manager [147], who said that he would "*organise a time for you to top up the qualification to support the pool depth*". The Claimant himself, without discussion, privately organised the appropriate test the next day, Sunday 20 November and informed his line manager on 22 November to that effect [165].

32. Prior to these events, an inspector from the appropriate association (ASA) visited the pool on Thursday 17 November, on a visit organised by Mr Hall. He said that they gave him "*verbal feedback*" that there "*was some way to go to resolve some of our compliance issues*" [139]. It was agreed evidence that the Claimant was not invited to participate in this meeting. Mr Hall said that his role was to "*meet and greet*" and that the main participant from the School was the estates department, indicating to us that the main thrust of the visit was infrastructure and equipment, rather than supervision. Therefore, while there was nothing sinister in the Claimant not attending, it clearly would have been courteous to invite him. We did not, however, consider that this indicated that the Claimant was being 'sidelined'.

33. Incident of Claimant not being 'Pool-Side'. On 18 November, Mr Hall visited the pool. It was common evidence that pupils were in the pool and that the Claimant was not pool-side. The Claimant said he had momentarily left, to close an outer door, to prevent a cold draught falling on the pupils. He accepted in evidence that he should not have done so, either getting the pupils out of the pool, or getting one of them to close the door. He attempted to mitigate this error by relying on the age and experience of the pupils. Mr Hall referred to some of the pupils carrying out water-based rugby training, by practicing line-outs, resulting in some doing "*back flips*", which was disputed by the Claimant, but we don't consider that issue particularly relevant: the important point being the Claimant's absence, for no matter how short a time, from pool-side.

34. The Claimant's line manager raised his concern with him as to this incident by email on 19 November [147] and a meeting was proposed.

35. Mr Hall Conducting Dive Test. On Sunday 20 November, Mr Hall had an exchange of emails with an ASA advisor who had verbally told him that he himself (Mr Hall) could conduct the appropriate diving test and that was subsequently confirmed in an email the next day Monday 21 November [226].

36. Over that weekend, it had been arranged that cover would be provided from suitably-qualified lifeguards, to fill in the gap in the Claimant's qualifications.

37. On 3 December, Mr Hall attended at the pool and carried out a dive test to certify a 17-year-old pupil, who was already a qualified lifeguard, to conduct rescues to 3.5 metres. The Claimant only knew about this because the student informed him and although he was present, it was agreed evidence that Mr Hall did not speak to him, apart from perhaps saying hello. The Claimant considers these actions of Mr Hall to be a fundamental breach of the implied term of trust and confidence. He said in his pleading that he felt humiliated, but in cross-examination was unable to explain why this was.

38. It was clear to us that Mr Hall's behaviour was rude and insensitive and it would have been better management to have spoken to the Claimant beforehand or have considered asking the Claimant to conduct the test himself. We consider on balance that a single act of rudeness or insensitivity on Mr Hall's part does not in these circumstances amount to a fundamental breach. We don't believe that he was acting in any calculating manner to undermine the Claimant but simply, as a busy man, conducting the matter in as expeditious manner as he could. As far as the Claimant was concerned, this was the first time that Mr Hall had intervened in any way in his role and the Claimant was unaware that he could have conducted the test himself, or even, from his subjective point of view that Mr Hall was doing something that he could not. While perhaps embarrassing, we do not consider that this one-off incident could constitute behaviour likely to destroy the relationship between employer and employee.

39. Offer, Rejection and Re-Commencement of Disciplinary Process. On 9 December, the Respondent wrote an offer letter [176] (although expressed to be 'without prejudice', subsequently found by an earlier Tribunal to be open correspondence), which offered him continued employment to the end of the academic year, a positive reference and a tax free lump sum of £3,500, in return for him completing a compromise agreement.

40. The Claimant's response was to have his solicitors write to the Respondent on 16 December [179] alleging age discrimination, in respect of the incident of 3 December and referring to the offer as "*derisory*".

41. The Respondent considered therefore that the pause in the disciplinary proceedings was at an end and Mr Boucher issued a written warning on 22 December [182].

42. The offer letter [177] referred to the other two incidents which "*need to be investigated further and may lead to further disciplinary process*".

43. The Claimant criticised the Respondent for its inaction in progressing or investigating these incidents, with the implication that these were being held over him as a form of threat. However, in cross-examination the Claimant was asked what his reaction would have been if the Respondent had promptly dealt with these issues and he said that he would have felt pressurised and '*got at'*. Therefore, we find that the Respondent was 'between a rock and a hard place' in this scenario, criticised for holding back on the allegations, but would inevitably have also been criticised had it progressed the matter. Our view is that the Respondent considered itself

engaged in 'without prejudice' settlement discussions with the Claimant and there was nothing to be gained on either side by raising these disciplinary additional issues, while those discussions were ongoing. Indeed, we find that they would inevitably have prejudiced any possibility of a successful outcome to those discussions. As a consequence therefore, that decision cannot meet the definition contained in **Malik**.

44. Claimant's Sick Leave and Grievance. The Claimant went on sick leave on 5 January 2017 and remained so until his resignation on 12 May [206]. In that letter he effectively gave three weeks' notice, with his effective date of termination as 31 May 2017. Throughout this sick-leave period he was in receipt of contractual sick pay, of either full or half-pay, with that latter entitlement expiring on 23 May, a week before his termination date.

45. The Claimant's solicitors again wrote on 10 January 2017 [188]: this time specifically raising a grievance and making a subject access request for the Claimant's personnel file. Ms Brophy asked for both written authority from the Claimant to release such documents and also confirmation that his solicitors acted for him. She was challenged as to why she sought the latter authority, when she had already been in correspondence with the solicitors and accepted that it was probably unnecessary. We do not accept however, that she was doing so to be obstructive, but merely being over-cautious and applying 'belt and braces'.

46. She also specifically asked whether the Claimant "*would like us to proceed with his grievance while he is on sick leave*". She and Mr Boucher both said that while not formal policy, it was the school's custom not to approach staff on sick leave, without their agreement, which we consider an entirely reasonable approach.

47. The next letter from the solicitors on 14 February [203A], provides no response whatsoever to that query and indeed refers to the possibility of the Claimant being disabled and to his pacemaker surgery. The clear inference we draw from that response, as did the Respondent, was that the Claimant did not, at least at that time, wish to proceed with his grievance. We are quite sure that had that not been the case his solicitors would have been 'up in arms' on the subject. The impression we have is that the Claimant was not really driving this grievance process, but that his solicitors were, perhaps for tactical reasons. Any failure to process his grievance cannot therefore be a fundamental breach of contract.

48. Final Straw. The Claimant entered into early conciliation on 28 February and subsequently filed his ET1 on 20 March, with the Respondent filing their ET3 on 19 April 2017. The Claimant said that for him, the final straw was seeing the Respondent's denial of his allegations as to their behaviour, as set out in their Response.

49. Putting aside applying **Omilaju**, as to whether the mere filing of a defence to a claim can be a last straw, when it would have been negligent on the Respondent's part not to have done so, we do not consider that this event was the prompt for the claimant's resignation. Rather, we consider it was the timing of the cessation of his entitlement to contractual sick pay, which

as we have found, did not elapse until almost two weeks after his resignation. We are confident that the Claimant had been planning his resignation for some time and timed it accordingly.

50. Conclusion. For these reasons therefore, we find that the Claimant's claim of constructive unfair dismissal fails and is dismissed.

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Employment Judge CH O'Rourke

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Date 13 November 2017

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE