



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Z Habib

v

Asghar & Co Solicitors

Heard at: Watford

On: 24 November 2017

Before: Employment Judge Smail

Representation

For the Claimant: Mr B Amunwa, Counsel

For the Respondent: Ms N Malik, Counsel

RESERVED RECONSIDERATION JUDGMENT

1. The Judgment of Employment Judge Mahoney sent to the parties on 25 April 2016 is confirmed. The Claimant was unfairly constructively dismissed and did not affirm the Respondent's breaches of contract.
2. There will be a Telephone Preliminary Hearing at 9.30am on 5 February 2018 with a time estimate of 1 hour to make directions for the remedy hearing which will be heard on a date to be fixed at the Telephone Preliminary Hearing.
3. The Claimant is to file the latest version of his schedule of loss, and the parties are to file agreed draft issues of fact and law for the Remedy Hearing, with draft proposed directions, all by email for the attention of Employment Judge Smail by 4pm on 1 February 2018.

REASONS

1. By a judgment promulgated on 25 April 2016 Employment Judge Mahoney found that the Claimant had been constructively unfairly dismissed. The Claimant had been employed by the Respondent between 12 April 2002 and

7 October 2014 when he resigned. At the date of termination, the Claimant was in the position of legal accounts clerk/bookkeeper. Employment Judge Mahoney concluded that the Claimant had not affirmed the contract between the dates of the breaches of contract amounting to breaches of the implied term and trust and confidence and the date of resignation.

The remaining issue identified by the Appeal

2. Her Honour Judge Eady QC, sitting in the EAT on 15 May 2017, set aside the conclusion on affirmation finding that the Employment Judge had misdirected himself as to what was relevant. She ordered a reconsideration of the matter of affirmation only. Employment Judge Mahoney has now retired and so it falls on me to undertake the reconsideration.
3. The reconsideration has taken the form of a complete re-hearing of the issue of affirmation. I have heard evidence from Mr Mohammed Asghar, the Respondent's principal partner; the Claimant and Ms Naseem Kadri, a former partner of the Respondent's solicitors.

Findings of fact relevant to the issue

4. It is agreed that the relevant breaches of contract, found by EJ Mahoney, are the following:
 - 3.1 On Monday 21 July 2014 the Respondent disposed of the Claimant's desk at the office.
 - 3.2 On the same day Mr Asghar's daughter and an employed solicitor at the Respondent, Ms Zahra Asghar, falsely alleged that the Claimant had sexually harassed her. This was coupled with statements from Ms Asghar as to the consequences of the Claimant's lateness. Ms Asghar in effect threatened the Claimant with dismissal by saying on three occasions: "You don't know what consequences you are going to face".
 - 3.3 On 22 July 2014 Mr Mohammed Asghar stated that the Claimant had sexually harassed his daughter. This was in conversation to the Claimant's brother, Masood Ahmed. The conversation was reported back to the Claimant by his brother on the same day.
 - 3.4 On 23 July 2014 the Claimant learned that the locks had been changed so as to deprive him of the ability to enter the Respondent's office on Southall Broadway.
5. All of those matters were found by Employment Judge Mahoney to have destroyed the relationship of mutual trust and confidence between employer and employee. He expressly found that the allegation of sexual harassment was a false one. Plainly this is a serious matter.

6. The Claimant resigned on 7 October 2014 some two and a half months after these breaches. In evidence he told me he was awaiting an apology and did not get one. He did not take formal legal advice until shortly before sending in his resignation letter. The Claimant was assisted in composing the resignation letter by a colleague who had previously worked for the Respondent firm. It makes complaint of a number of matters including having been overloaded with work. He points to the change in atmosphere at work at the time the Respondent's children, Mr Farhan Asghar and Ms Zahra Asghar came to work for the firm. As to the more recent events he says the following:

“As you are aware the events which took place during the week of 21 July 2014 in respect of my employment with you has shocked me to the core. These events were the last straw in a series of other incidences occurring during my employment with you.

I remind you that following the altercation with your daughter on Monday 21 July 2014 in which she made false and malicious allegations against me accusing me of sexual harassment, that you changed the lock the same day to prevent me from returning to the office and I have not returned to the office since that day. I also remind you that you threw my desk away on 19 to 20 July which left me in some shock on Monday morning before the altercation occurred. Zahra also intimidated me and accused me of being late and she had no right to do that. She threatened me with the words: “You know what the consequences will be” three times in a menacing way suggesting that I will be dismissed. Yes I was late that day having phoned the office to explain the reasons for my lateness but I am usually in the office at 10 to 9 and this is verifiable.

The following day Tuesday 22 July 2014 you stated to Masood Ahmed that I had abused your daughter Zahra in such a bad way that you could not bring yourself to repeat the words I had allegedly uttered to her. Then, to end the week on Friday, your two sons came to the Mosque to photograph me at prayer so that they could use the photos as proof that I was well enough to go to Friday prayers but not to attend for work. You do know that we are required to do our prayers even when we are ill, thus your sons' behaviour was very menacing and made my illness worse. For me these actions are despicable and the allegation of sexual harassment is something that will leave me traumatised forever because I am a devout Muslim and I was fasting when these allegations were made. What was your daughter thinking? Changing the lock was the last straw in the series of bullying victimisation and harassment that I had been subjected to during the time that I have been working for you.

The following week you started to offer money in without prejudice offers through Dr Hussain and Masood and then later you change your mind the following week to suggest that I could come back after all and then changed your mind after that to again settle the matter through Dr Hussain and again after that to say the job is open causing me total confusion. Having told you that I was unwell and provided you with the medical confirmation to support it, you continue to harass me by email and persistent calls to me and my brothers trying to pressurise me to settle the matter when my health simply did not allow me to deal with the issue. Your suggestion that you needed me to call you so that you could deal with matters relating to work (like disbursements) is simply untrue. As you know, everything I do in my job is done in the privacy of your room and you therefore note everything that needs to be done even if I carry out the task physically at a different desk. It is not true that there are things that only I can do. Everything I do is done with your full knowledge and authority. I have never done any work in your firm without your direct instructions. This persistent harassment from you made me feel worse and my medical condition was worsened as a direct result.”

7. The Claimant submitted sick notes as follows: between 22 July 2014 and 29 July 2014; between 29 July 2014 and 12 August 2014; between 12 August 2014 and 26 August 2014; between 26 August 2014 and 9 September 2014; between 9 September 2014 and 5 October 2014. It is an agreed fact that the reasons stated on the sick note on each occasion related to neck, back and shoulder pain and stress.
8. The Claimant asked for payment during this period under the terms of his contract of employment. The Respondent had the right to choose to pay statutory sick pay instead of salary. They exercised their discretion to pay statutory sick pay.
9. I have no doubt that the Claimant was very upset about what had happened. This was his first job in the country. He was proud to be working in a firm of solicitors. Until recently he had a close relationship with Mr Asghar. This had changed when Mr Asghar's children became employed at the firm also. I accept the evidence of Ms Naseem Kadri that she went to see the Claimant in the afternoon of 31 July 2014 in order to communicate a without prejudice offer from Mr Asghar being a monetary offer for settlement. She says the Claimant was in a state of shock and was not able to discuss the matters. He was not well and his mind was all over the place. 'I have never seen him so broken', she said. He was extremely aggrieved and broken hearted that Mr Asghar after all this time had accused him of sexually harassing his daughter, thrown his desk away, changed the locks, photographed him at the mosque. All these acts of aggression demonstrated a lack of trust and confidence and he was deeply affected by this. She told the Claimant that she would let Mr Asghar know about the state he was in. I accept from Ms Kadri that she accurately described what she saw.
10. It is a feature of this period of time that there were without prejudice offers to settle from Mr Asghar made by Mr Asghar to the Claimant's brothers and made also by Ms Kadri as just described.
11. I have been shown the email communications that passed between the parties between 22 July 2014 and the resignation letter. On 22 July 2014 the Claimant sent Mr Asghar an email protesting at the way he had been treated by Zahra Asghar that day. He concluded the email by saying:

"Mr Asghar I'm not happy to be bullied and abused. Zahra, she does this all the time and I tolerated it but I'm not happy. I am not going to be able to come to work. I am ill with stress, I am worried about my accounts and taxation but I am just not well. When I feel strong I will come to the office and discuss with you."
12. Mr Asghar responded on 24 July 2014. He said he understood that an incident took place between the Claimant and Zahra on Monday 21 July 2014. He said he tried to call the Claimant but there had been no response. He said: "You have made some serious allegations about Zahra and Zahra has also made some serious allegations against you. As such this matter

needs to be investigated” therefore he was not able to comment on the incident at that time, he said. He was asked when would he next be in the office so arrangements could be made to give his side of the story.

13. However, notwithstanding that email, Mr Asghar was making without prejudice offers to settle involving the Claimant leaving employment.
14. On 29 July 2014, the Claimant emailed Mr Asghar saying he was sick with stress, back ache, shoulder and neck ache. He was very upset and hurting about what had happened. He could not deal with the problem then because he was too sick to talk about it. That is why he did not call Mr Asghar to speak about it. His doctor says he must rest. When he is feeling better he would contact Mr Asghar and they could talk about the problem. He protested at having been photographed at the Mosque by Mr Asghar's son. He said he had been faithfully with Mr Asghar for so many years working for him with so much trust but now his children were ruining everything.
15. On 4 August Mr Asghar said he could not comment until an investigation had been done. He was still waiting for the Claimant to give his version of events. The Claimant responded on 6 August saying he would respond when he was well. For the moment he asked for his wages.
16. On about 14 August the Claimant emailed Mr Asghar. He says he explained that he was ill and Mr Asghar knew that because he had been sending in sick notes. The Claimant noted that Mr Asghar was asking him repeatedly to reply and was also speaking to his family as to what was happening and if he, the Claimant, was coming back. The Claimant asked rhetorically “How could you ask me this?” He went on:

“Mr Asghar first you hear Zahra's side of the story and then you didn't hear mine but you changed the lock. Your daughter accused me of abusing her and you trusted her story and you changed the lock. I am saying to you again I deny Zahra's allegation and I am extremely hurt and shocked by her totally false claim. You changed the lock and you told Masood [his brother] that I abused his daughter using very bad words. You changed the lock – means you don't want me to come back. Then you ask my family to tell me that you can pay me money and I should not come back. Then you sent emails to say you want to investigate this matter when I am better. Mr Asghar, how come you going to investigate this matter? How can you be judge in the case involving argument between me and your daughter. You know the person have to be someone different and the place should be somewhere else. A neutral place because how can this matter be investigated in the office by you? Then you ask Naseem to ask me what I want to do? Money what I want? Then I get another email. Then yesterday Friday, you are saying to my family forget everything and come back to work and separately you will put a claim in for my health condition. With all these things how can I know what you really want? You have not paid me my wages yet. Please pay outstanding money into my account as I have asked you last week.”

17. Mr Asghar replied by email on 14 August 2014. He said that any conversations about settling the matter were done entirely without prejudice and were done simply to have an amicable outcome to the issue. He still wanted such an outcome. He was aware of his investigation responsibilities

and these would be done by independent people where appropriate. Matters had dragged on and he wanted to discuss matters over the telephone that evening. It seems that a telephone discussion, certainly a productive one, did not take place.

18. In addition to submitting sick notes on 9 September 2014 the Claimant asked for payment as he had financial commitments to clear. On 2 October 2014 the Respondent sent the Claimant two cheques representing, as I understand it, statutory sick pay albeit paid late, a cheque for £958.45 and one for £461.11.
19. On 5 October 2014 Mr Asghar emailed the Claimant saying it had been over two months since the Claimant had been to work and the Claimant had not spoken to him once. That was simply not acceptable. There were many things in relation to work that needed to be discussed and the work had suffered greatly. As he had said before, the Claimant was to give him a call so that they could talk. There followed an email from Mr Asghar on 7 October saying he still had not heard from the Claimant, the sick note had expired, there was no reason given for absence so the Claimant was absent without leave. That was at 11:58. At 19:20 the Claimant emailed his resignation letter.

The law

20. In Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 the Court of Appeal confirmed that contractual principles apply to constructive dismissals. An employee was entitled to treat himself as constructively dismissed 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. The employee in those circumstances was entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once. Delay in leaving could cause the Claimant to lose the right to leave. Delay could amount to the employee being regarded as having to elected to affirm the contract.
21. The EAT in WE Cox Toner (International) Ltd v Crook [1981] IRLR 443 applied Marriott v Oxford Co-Operative Society [1970] 1 QB 196 (CA) in an employment case to say that provided the employee made clear his objection to what was being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time even if the purpose was merely to enable him to find another job. It was against that background that Western Excavating v Sharp had to be understood. Mere delay by itself unaccompanied by any express or implied affirmation of the contract did not constitute affirmation of the contract but if the delay were prolonged it may be evidence of an implied affirmation.
22. It is a question of fact for each Tribunal as to whether the Claimant's conduct amounted to an affirmation. I have been referred to the recent decision of Chindove v Morrison Supermarkets plc, a judgment handed

down on 5 October 2017 UK EAT/007/17/JOJ. There His Honour Judge Barklem referred to an earlier decision of the EAT in the same case presided over by Langstaff J. There it was thought to be significant that a Claimant had not actually returned to work but was off sick. HHJ Barklem thought it advisable for the Tribunal of fact to set out what they considered pointed against or in favour of affirmation or was neutral.

Conclusions

23. In my judgment the Claimant did not affirm these breaches. These were serious breaches of contract. The Claimant had been falsely accused of sexually harassing a colleague employee who happened to be the daughter of the principal solicitor. The Claimant had not returned to work. He had been signed off sick throughout the entire period. Part of the sickness was down to stress which was associated with these events. The reality of the situation was that the Claimant could not return to work until there was resolution of the allegation either by way of withdrawal or apology or perhaps some independent investigation.
24. It seems to me that in practical terms the Claimant would have to have been engaged with such an event before it could be said that he had affirmed the breaches. There was no withdrawal of the allegation. There was no apology and there was no independent investigation set up to which the Claimant was invited. On the contrary, and this is an unusual feature of this case, Mr Asghar was making offers to settle, whether 'without prejudice' or not, involving the Claimant leaving.
25. Pointing against affirmation are the repeated protests by the Claimant against what had happened to him. Neutral as to affirmation is the fact that he was submitting sick notes and asking for payment of sick pay. That was neutral because his submission of sick notes and asking to be paid was during the period pending resolution one way or the other of his future employment. On no occasion did the Claimant waive his right to protest against his treatment and seek resolution thereof. Had he engaged in an independent investigation into the matter then that may have been a factor showing affirmation, but even that could have been without prejudice to the outcome. In the event, no independent investigation was offered. It was neutral as to affirmation for the Claimant to wait while sick to see if there was any positive resolution. There was not. It is very difficult for the Respondent to contend otherwise given the offers of compromise involving the Claimant leaving. In practical terms, it is very difficult to see how this relationship could have been rescued. The Respondent did nothing to rescue it. The Claimant did nothing to waive his position to claim a constructive dismissal.
26. I accept the submissions made on behalf of the Claimant that resignation was difficult for the Claimant in his circumstances. This was the Claimant's first and only job in the UK having arrived from Afghanistan with very poor English and very few skills. The Claimant had learned all of his skills in this

employment. He lacked formal training and qualifications. His prospects of obtaining alternative employment were uncertain. He was the sole breadwinner of a family with five children. At one point he did have a close relationship with Mr Asghar. Against that background, the Claimant was entitled to wait and see, particularly whilst off ill, as to whether there would be resolution. He was entitled to accept the breaches when he did.

Employment Judge Smail

Date: ...08/01/2018.....

Sent to the parties on: ...08/01/2018...

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For the Tribunal Office