



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms E Butcher

and

Respondent

Surrey County Council

Heard at:

Reading

On: 29 June 2018

Before:

Employment Judge Vowles (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr G Self, counsel

RESERVED JUDGMENT

Evidence

- 1 The Tribunal heard evidence on oath and read documents in a bundle provided by the parties.

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

- 2 The Claimant resigned from her employment as Surrey Safeguarding Adults Board Manager on 18 April 2017. The effective date of termination was 18 July 2017. She was not constructively dismissed. This complaint fails and is dismissed.

Wrongful Dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

- 3 The Claimant resigned from her employment as Surrey Safeguarding Adults Board Manager on 18 April 2017. She gave the required contractual notice. No further notice was required. She was not wrongfully dismissed. This complaint fails and is dismissed.

Reasons

- 4 This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

Claimant

1. On 1 November 2017, the Claimant presented complaints of unfair constructive dismissal and wrongful dismissal to the Tribunal.

Respondent

2. On 5 December 2017, the Respondent presented a response and resisted both claims.

EVIDENCE

3. The Tribunal heard evidence on oath from the Claimant, Ms Elizabeth Butcher (Manager of Surrey Safeguarding Adults Board).
4. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Clement Guerin (Head of Adult Safeguarding) and Ms Gurbax Kaur (HR and OD Manager). The Tribunal also read the witness statement of Ms Louise Lamb (former Head of Adult Safeguarding). Ms Lamb was unable to attend the hearing due to illness. Initially the Respondent requested a postponement of the hearing because of her absence and because it was said there was a direct contradiction on an important issue between the Claimant's evidence and Ms Lamb's evidence as follows:

Claimant's evidence

5. *"36. After I handed in my notice, there were some discussions between Simon Turpitt (Independent Chair of the Board), myself and Louise Lamb. I made it clear in the discussions that the reason I was going was because I could not take the abuse from [Employee A] anymore. Both Simon and Louise asked me to reconsider saying they would like to keep me if possible, however, it was my decision. I agreed to stay so long as the abuse was dealt with.*

37. All of this was dealt with in discussions and not put in writing. It was a time when there was a lot of talking and I was still feeling fragile from what I had been through. There was nothing put in writing from the above parties about the withdrawal, however, if the resignation had not been withdrawn there would have to be other activities taking place. This would include Louise identifying my leaving date which would have to be with 3 months notice minus any annual leave. No such activities took place and I believed the respondent's were wanting me to stay. Nothing was said or done to the contrary."

Ms Lamb's evidence

6. *"10. I am very clear however that subsequent to either of these conversations, I never discussed or agreed with Liz that she would withdraw her notice, nor did I have any agreement with her that her resignation would be held in abeyance until the grievance was resolved."*
7. The Claimant objected to the application for a postponement and confirmed that although she continued to assert that she did discuss withdrawal of her resignation with Ms Lamb, there was never an actual withdrawal of it by her or any agreement between them that it would be held in abeyance. However, she was clear that there was a discussion about it.
8. Upon hearing this clarification, that the only issue between them was whether there was a discussion about withdrawal and the Claimant accepted there was no actual withdrawal agreement or any agreement to hold the resignation in abeyance, the Respondent withdrew the application for a postponement and agreed to proceed with the hearing in the absence of Ms Lamb on the basis that the Tribunal would accept the evidence in Ms Lamb's statement apart from the dispute regarding "discussion" by the Claimant.

WRITTEN SUBMISSIONS

9. At the conclusion of the evidence, the parties agreed to provide written closing submissions sequentially. The Respondent agreed to provide submissions no later than 6 July 2018 and the Claimant no later than 20 July 2018. These submissions were provided and the Tribunal has taken them into account.

FINDINGS OF FACT

10. The Claimant was employed as the Surrey Safeguarding Adults Board Manager from 13 September 2011. Her line manager was Ms Lamb until 15 May 2017. The Claimant herself was a line manager for other staff including Employee A.
11. The relationship between the Claimant and Employee A deteriorated with each accusing the other of inappropriate behaviour towards them. Eventually, the Human Resources department and Ms Kaur became involved to try to resolve the dispute between them and Ms Kaur appointed Mr Nick Sponder as the case officer. Employee A was agreeable to mediation but the Claimant was not. Mr Sponder therefore suggested a facilitated meeting which was said to be a "restorative approach under the Respondent's "Resolving Differences at Work" procedure".
12. A facilitated meeting took place on 10 April 2017. In attendance were the Claimant, Employee A and the facilitator was Ms Lamb. Employee A was

accompanied by her union representative and the meeting was held away from the usual work location.

13. On 11 April 2017 the Claimant sent an email to Ms Lamb saying that she was taking sick leave for the next three days and that she felt that the meeting had not helped. Her email included the following:

“I didn’t get any feeling at yesterday’s meeting that [Employee A] sees any reason to change her behaviour. If anything, the only thing achieved was a demonstration that I can’t do anything about it and I felt both she and her representative attending the meeting intending to up the ante rather than to reach an agreed way of working together. As a manager and a team member, this leaves me with few options. I’ll consider these over the next few days and hope to be back in work next week with some solution.”

14. On 12 April 2017 Employee A submitted a formal grievance against the Claimant, although, as the Claimant was absent on sick leave, she was not aware that the grievance had been presented.

15. There followed the Easter weekend of 14-17 April 2017 and the Claimant returned to work on 18 April 2017. On that day, she submitted her resignation to Ms Lamb as follows:

*“Resignation of: Elizabeth Mary Butcher
Personnel number: 164823*

Please accept this letter as notice of my resignation from the position of Surrey Safeguarding Adults Board Manager at Surry County Council.

I am required to give 3 months notice and have some leave left outstanding which I would like to take at the end of my notice period ie. I would like to leave the leave included as part of my notice period.

I have enjoyed being a part of the safeguarding team and am thankful for the help and support you and others have given me. Wishing you all the best in the future.”

16. At the point of resigning, the Claimant was still unaware that Employee A had submitted a formal grievance and it could not therefore have influenced her decision to resign. The three months’ notice period would expire on 18 July 2017.

17. An internal investigator, Theresa Hawkins, was appointed to investigate Employee A’s grievance and she interviewed both the Claimant and Employee A.

18. On 2 May 2017 Ms Lamb and the Claimant had a one to one meeting and the record shows that the Claimant’s potential last day at work would be 1 July 2017 because she wanted to take accrued leave up to the end of her employment.

19. The Claimant was interviewed by Theresa Hawkins as part of the investigation on 17 May 2017. The minutes of the meeting recorded: *“EB [Claimant] reported that she has formally submitted her notice period and will be leaving mid-July.”* On 24 May 2017 the Claimant sent some amendments to the minutes of the meeting to Theresa Hawkins but she did not correct the extract quoted above.
20. In the meantime, Ms Lamb resigned at short notice and was replaced by Mr Guerin. He was new to the Council and its processes and only had a brief handover takeover meeting with Ms Lamb on 15 May 2017. She told Mr Guerin about the dispute between the Claimant and Employee A and said that the Claimant had resigned. Mr Guerin assumed that any necessary paperwork in respect of the resignation had been completed and that no action was required by him.
21. Because Mr Guerin was new to the Council, it was agreed that the Claimant’s appraisal would be undertaken by his colleague, Brian Mayers. Mr Mayers typed appraisal notes dated 22 May 2017 which record: *“Unfortunately Liz [Claimant] has made the decision to leave the County Council.”*
22. On 22 June 2017 Daryle Lowden (Senior Human Resources Advisor) sent an email to Mr Guerin as follows:

*“From: Daryle Lowden BUS
Sent: 22 June 2017 14:29
To: Clement Guerin ASC
Subject: Confirmation of Resignation*

Dear Clement

I’ve been assigned to provide HR support to the grievance submitted by [A] which has been investigated. It has been brought to my attention that Liz Butcher had tendered her resignation earlier this year in April? Please could you confirm if this is the case as the SAP is not indicating that a Leavers form has been completed.

*Kind regards
Daryle.”*

Mr Guerin replied as follows:

“Dear Daryle

Thanks for your email. I’ve only recently come in to post and I’m a little unclear on some of this as it seems not to be a straightforward situation. I think Liz may have withdrawn her resignation – is there anything on her HR file to show this? I can follow up with her to clarify, but that might not be until sometime next week.

Regards,
Clement.”

23. On 28 June 2017 Mr Guerin met with the Claimant and he sent a further email on that day to Mr Lowden as follows:

“Re: Confirmation of Registration

Dear Daryle

I spoke with Liz today. She told me:

- *She notified Louise Lamb (my predecessor) of her resignation on either 18th March or 18th April – she couldn’t remember which but thought it was more likely to be April*
- *She had a subsequent discussion with Louise Lamb and with Simon Turpitt (Chair of Surrey Safeguarding Adults Board) at which she says it was decided that her resignation would not be effected until after the outcome of the grievance against her was known. She can’t recall the date of this meeting and does not have a record of it.*

I have asked Liz to check if she has copies of any relevant correspondence.

It would be useful to get some clarity on where we are at in the process and what I should be saying to Liz and to Tracy about this matter, or what conversations other people are having with them. Anything you can share at this point would be appreciated.

Please let me know if there is anything else you need from me at this point.

Thanks,
Clement.”

24. Also on 28 June 2017 the Claimant wrote to Mr Guerin as follows:

“Hi Clement

We discussed my resignation letter today and you asked me to send you a copy of it. Please find this attached. I handed this to Louise Lamb at a meeting on 18 April. Later that day I was in contact with Simon (Turpitt) and we discussed why I wanted to leave, which relates to a specific circumstance. At the end of that discussion he said he would speak with Louise and see if the issue could be resolved as he was reluctant to have to go through a recruitment process if they were able to avoid it. I confirmed that if a resolution could be achieved then I would be willing to stay.

I haven't heard anything further from anyone and I assumed it had been 'paused' whilst other conversations were happening. As Louise moved on unexpectedly quickly it was not possible for me to discuss it with her more recently.

Best wishes,

Liz."

25. In fact, the Claimant did not leave at the end of her notice on 18 July 2017 and continued to attend work.
26. In the meantime, Mr Guerin was making enquiries and taking advice from the Human Resources department. He took the view that as the Claimant had resigned and there had been no mutually agreed retraction of her resignation there was a need to agree a leaving date. He therefore met with the Claimant on 11 August 2017 to tell her that they needed to decide when her last day of service would be. The Claimant proposed 4 September 2017.
27. On 14 August 2017 the Claimant wrote to Mr Guerin:

"I have been informed that I have resigned and I must leave asap. I do not agree that I have resigned because the resignation I submitted 4 months ago was put in due to harassment by a member of staff, It was withdrawn a few days later at the suggestion of ASC and the notice period (3 months) had elapsed without it ever being discussed.

However, both HR and Clement are insistent that I have resigned therefore we have agreed a last date of 4 September. I am now on leave and was only going to be in the office for 3 days at the end of that before my final date of employment with SCC.

I have now taken legal advice and have contacted ACAS to discuss resolution. I will not be asking for reinstatement but will be asking for appropriate compensation because I do not believe the dismissal to be lawful. It is clearly dismissal and not resignation. In any event, a resignation that is put in due to harassment is constructive dismissal. No proper procedures have been followed and to give me 3 weeks notice is unpardonable."

28. On 16 August 2017 the Claimant again wrote to Mr Guerin with a chronology which included the following:

"Meanwhile Louise spoke to me about the resignation and invited me to reconsider. She believed that with robust support from HR and the grievance process being followed through than the situation could be expected to improve. She had conversations with Simon Turpitt, SSAB independent chair, and it was agreed the desired outcome would be to keep all SSAB staff if at all possible and we would all work towards that aim. I therefore agreed to withdraw my resignation."

29. Mr Guerin replied on 16 August 2017 with the following:

“Dear Liz

Thank you for your email of 14 August 2017 and your email today and the letter attached to that. We do not agree with your account of events and the view of Surrey County Council is that you resigned on notice. In your letter received today you say I said you were an “over-stayer”. I did not use those words, so I am sorry that there has clearly been a misunderstanding.

Since we spoke last week I have now had an opportunity to review the position regarding your annual leave. When we met on 11 August 2017 you proposed a last day of employment on 03 September 2017, and that as you had accumulated work hours you would take 01 September 2017 as a day in lieu.”

30. Mr Guerin’s letter offered the Claimant an extension of employment to 8 September 2017 after calculating outstanding leave and the Claimant’s employment was treated as ending on 8 September 2017. This was also the date the Claimant put on her ET1 claim form.

DECISION

Unfair Constructive Dismissal

31. Section 95 Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. Constructive dismissal is defined as follows:

(1) *For the purposes of this part an employee is dismissed by his employer if –*

(c) *The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.*

32. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 - An employee is 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 is 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. ... He must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

33. Hilton v Shiner Limited [2001] IRLR 727 - The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts. For example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence, yet it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.
34. London Borough of Waltham Forest v Omilaju [2005] IRLR 35 - In order to result in a breach of the implied term of trust and confidence, a “final straw”, not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus, if 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 and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test. 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 the employer. The test of whether the employee’s trust and confidence has been undermined is objective.
35. Kaur v Leeds Teaching Hospital NHS Trust [2018] CA – The point being made in Omilaju was that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. Such a situation would be both unfair and unworkable. Underhill LJ disagreed with the view expressed by HHJ Hand QC in Vairea: provided the last straw forms part of the series (as

explained in Omilaju) it does not 'land in an empty scale'. He recommended that tribunals put Vairea to one side and continue to draw from the pure well of the Omilaju judgment, which contains all that they are likely to need.

Effective date of termination of employment

36. Section 97(1)(a) Employment Rights Act 1996 reads as follows:
- “ ... the effective date of termination (a) in relation to an employee whose contract is terminated by notice whether given by the employer or by the employee means the date on which the notice expires.”*
37. In this case, the Claimant did not leave on the expiry of her notice, 18 July 2017, but her service overran due to errors by the Respondent. There was a failure to complete the necessary paperwork upon the Claimant's resignation because Ms Lamb left abruptly. The handover with Mr Guerin was brief and inadequate and he failed to make necessary and timely enquiries about the Claimant's resignation and her due leaving date.
38. In TB Turbos v Davies [2004] UKEAT/0231/0, it was said:
- “Payment of wages and the accumulation of other benefits up to the mistaken date cannot change the legally effective date of termination which is determined pursuant to the legislation.”*
39. It is not possible, therefore, for the effective date of termination to be changed by accident or by mistake or error.
40. The Tribunal was satisfied that it was by mistake and error that the Claimant did not leave on 18 July 2017.
41. The Tribunal found as a fact that the Claimant unequivocally resigned on notice by letter on 18 April 2017. The notice period given was three months and therefore the effective date of termination was 18 July 2017. The Claimant accepted that there was no agreement to withdraw or pause the notice, although she continued to assert that there was discussion about it. Her acceptance of that position was consistent with her comments to Theresa Hawkins on 17 May 2017 and her comments to Brian Mayers on 22 May 2017.
42. In Wallace v Ladbrokes Betting and Gaming Limited [2015] UKEAT 0168/15, it was said:
- “29. Assuming that the resignation is indeed unequivocal, the rule remains that a notice of termination once given cannot be withdrawn except by consent; the employer cannot unilaterally prevent an employee's resignation taking effect, although it can agree with the employee that she might withdraw that resignation (Willoughby). If there is no agreement that the employee's notice of resignation is withdrawn, the effective date of termination will be the date on which the notice expires (s97(1)(a) ERA),*

and it has been held (see the majority view of the Court of Appeal, Ackner LJ dissenting, in TBA Industrial Products Ltd v Morland [1982] ICR 686) that it will not be open to the parties to agree to change that date: the EDT has been fixed by the date of expiry given in the notice (and see, to similar effect, the decision of the majority in Lees v Arthur Greaves (Lees) Ltd [1974] 2 All ER 393 CA).

33. ... HHJ Peter Clark considered that, although notice once given by an employer could not be unilaterally withdrawn, it could – during the operational period of that notice – be extended by agreement between the parties. What could not be done, however, was for the parties to agree a retrospective EDT, so, to purport to agree a different date of termination after the expiration of notice (see also Horwood v Lincolnshire County Council UKEAT/0462/11).

43. As found above, there was no withdrawal of resignation in this case, much less agreement by the employer to withdraw. The Tribunal therefore found, as a matter of fact and law, that the effective date of termination was 18 July 2017. The retrospective agreement between Mr Guerin and the Claimant on 11 August 2017 regarding a termination date in September 2017 was of no effect. The employment had already terminated. Nor could there be any express dismissal after 18 July 2017 because the employment had already terminated.
44. The effect of this finding is that the claims were presented to the Tribunal out of time by one day. This is based upon a termination date of 18 July 2017, referral to ACAS on 12 September 2017, early conciliation certificate issued on 25 September 2017 and the claim being presented on 1 November 2017. The time limit therefore expired on 30 October 2017.
45. Although, as the Respondent pointed out in closing submissions, neither party had the opportunity to make representations on the time/jurisdiction issue, I am satisfied that it was not reasonably practicable for the Claimant to present her claim within the time limit because both she and the Respondent mistakenly believed the effective date of termination to be 8 September 2017 and that was the date stated in both the ET1 claim form and the ET3 response form. And the claim was presented the day following the expiry of the time limit and that was a reasonable period thereafter. The Tribunal therefore had jurisdiction to consider the claims.

Constructive dismissal

46. The claim was set out in the ET1 claim form as follows:

“This claim involves several issues relating to my former employment, namely:

- *Breach of the employer’s duty of care in relation to not responding to abuse I experienced from a member of staff.*

- *Constructive dismissal for the termination of my contract. My resignation was submitted in April 2017 as a result of the abuse, however the respondents asked me to withdraw the resignation because they were going to deal with the abuse. They then activated the resignation at very short notice outside of the notice period and outside of any policy.*
 - *Breach of the employer's duty of care in relation to supporting me when the member of staff put in a grievance.*
 - *Breach of the employer's duty of care in relation to supporting me when my employment was subsequently terminated outside of the notice period.*
 - *Repeated failings to follow any proper procedures in relation to all and any part of the above.*
47. It follows from the Tribunal's findings above that the 2nd, 3rd and 4th points were events that occurred after the Claimant resigned and could not therefore be considered as breaches of contract in response to which the Claimant resigned.
48. So far as the 1st and 5th points were concerned, the Tribunal did not find those proved. It was clear that the employer did respond to the Claimant's complaint about abuse from Employee A and did follow proper procedures. Employee A was moved temporarily elsewhere to ease tensions and the Respondent's policy "Resolving Differences at Work" was implemented. The Claimant was offered mediation and support and a facilitative meeting was arranged between the Claimant, Employee A and facilitated by Ms Lamb.
49. Although the Claimant was clearly dissatisfied with the conduct and outcome of the meeting of 10 April 2017, as set out in her email of 11 April 2017, she gave the Respondent no opportunity to take further action or provide further support to her because she was then absent on sick leave and resigned immediately on her return to work on 18 April. 2017.
50. The Tribunal found nothing which could amount to a fundamental breach of contract in the conduct of the Respondent. On the contrary, the Respondent acted positively, supportively and promptly when it was clear that the breakdown in the relationship between the Claimant and Employee A was becoming serious. Viewed objectively, the Respondent's conduct was reasonable and justifiable.
51. There was no express dismissal. The employment was terminated by the Claimant's resignation.
52. There was no fundamental breach of contract found proved by the Tribunal and there was no constructive dismissal.
53. The claim for unfair constructive dismissal must fail.

Wrongful dismissal

- 54. The Claimant resigned giving 3 months' notice, which she worked. No further notice was required to be given by the Respondent under the contract of employment.
- 55. The dismissal was not wrongful.

Employment Judge Vowles

Date: 23 August 2018

Sent to the parties on:

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For the Tribunals Office