



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

MS C IYIEGBU

BARTSHEALTH NHS TRUST

Heard at: London Central

On: 4 September 2018

Before: Employment Judge Oliver Segal QC

Representations

For the Claimant: In person

For the Respondent: Ms Ramadan, Solicitor

REASONS

1. The Claimant has applied for written reasons for the Judgment sent to the parties on 5 September 2018.

Evidence

2. I had an agreed bundle of 356 pages; and I had witness statements and heard live oral evidence from: on the Claimant's behalf, herself; for the Respondent, Mr Justin Creigh (a senior manager who chaired a disciplinary hearing in July 2017 which resulting in the Respondent dismissing the Claimant), and Ms Lesley Woodman (and HR Manager whose evidence covered the background and the facts relating to pay entitlements and payments made). I consider that all the witnesses were doing their best to assist the Tribunal.

Issues

3. There were issues as the Claimant's proper entitlements to certain payments, particularly as regards accrued annual leave whilst not at work.
4. There was an issue as to when and how the Claimant's employment terminated.
5. I explain those issues in so far as necessary in more detail below.

Facts

6. The Claimant worked for the Respondent from January 2013 as a Band 6 Sister. In fact, unhappily, the Claimant did not attend for work from 26 February 2014 until her employment terminated.
7. For present purposes it is necessary only to record that:
 - 7.1. The Claimant was on sick leave between February and July 2014;
 - 7.2. The Claimant was on paid suspension (whilst an investigation into her conduct was conducted) between August 2014 and June 2015;
 - 7.3. The Claimant was on sick leave between 24 August and 1 September 2015;
 - 7.4. The Claimant resumed a period of paid suspension thereafter until May 2016;
 - 7.5. The Claimant was (retrospectively in relation to the first month or so) on a period of paid authorised leave between 13 May 2016 and 7 November 2016 whilst grievances she had brought in June 2016 were investigated;
 - 7.6. The Claimant was on accrued annual leave from 8 November 2016 till 3 April 2017 (at least so far as the Respondent was concerned);
 - 7.7. The Claimant was, so far as the Respondent was concerned, absent without leave between 3 April and 27 July 2017.
8. Some of the Claimant's grievance had been concerned with her complaints that the Respondent had not paid her all sums due. Most of those complaints were, at least in part, upheld. However, the Claimant believed – at the end of 2016 and into

2017 – that, despite that outcome, the Respondent continued to leave unpaid significant sums owed to her.

9. On 9 February 2017 the Claimant wrote to the Trust complaining about this, stating that “*my [accrued] annual leave should be finished on 24th May 2017*”.
10. Shortly afterwards, unbeknown to the Respondent, the Claimant started working for another employer full-time because, she told this tribunal, she considered her employment with the Respondent at an end. She told the tribunal that she had been advised by ACAS that given the Respondent’s continuing failure to pay contractual sums due, she could “*leave without notice*”, which she understood to mean that she could treat her employment with the Respondent at an end without notifying the Respondent to that effect.
11. The Respondent – and this is not controversial – continued to believe the Claimant was employed by it. It attempted to communicate with her several times by various methods; however, the Claimant’s case is that, other than in respect of one missed call, none of those mainly written communications were received by her.
12. The Respondent eventually decided that the Claimant had a case to answer for being absent without leave and, in the end, following a hearing in July 2017 which she did not attend, dismissed her for gross misconduct, confirmed by letter of 6 October 2017.

The claims for unpaid wages

13. The background to these claims is that:-
 - 13.1. The Claimant’s entitlements to various sums in relation to annual leave, protection payments, etc., whilst she was off on extended periods of sick leave and paid suspension, were somewhat opaque – and in one respect were disputed.
 - 13.2. The Respondent’s payslips issued for the Claimant were almost impenetrable on their face and even with explanations were not at all easy to reconcile.

14. In the end, with the assistance of the parties, the tribunal was able to perform an “audit” and reconciliation exercise, to establish, hopefully with some precision, what had been paid to the Claimant at all material times in respect of the material entitlements and to compare that with what she ought to have been paid according to those contractual entitlements.
15. Once that difficult exercise had been completed, all but one of the claims were in effect agreed: either on the basis of concessions made by the Respondent as to sums still owing; or on the basis of the Claimant accepting – or at least accepting that she was not in a position to challenge – that certain sums claimed had been paid, however late and/or mis-described on the payslips. I note in passing (which is of some small relevance to the unfair dismissal claim) that one of the Respondent’s concessions, as to 9 days’ annual leave pay, was made on the basis that the Claimant’s employment had continued until 27 July 2017.
16. The one disputed issue, giving rise to the single largest claim, turned on the correct contractual construction of two contractual provisions and how they should operate during a period of absence on sick leave or paid suspension.
17. Para 11 of the Claimant’s contract dealing with ‘Annual Leave Entitlement/General Public Holidays’ provides for the Claimant to have “33 days + 8 days”.
18. Section 14 of the NHS Pay and Conditions document incorporated into the Claimant’s contract deals with ‘Sickness Absence’. At 14.9 it states “*Employees will not be entitled to an additional day off if sick on a statutory holiday*”.
19. The Respondent’s case was that those provisions mean that when the Claimant was off either sick or on paid suspension during bank holidays, her accrued annual leave entitlement should be reduced accordingly.
20. The Claimant’s case is that those provisions did not mean that, but only had the effect that an employee could not add to their annual leave entitlement any bank holiday day on which they were off sick.

21. I prefer the Claimant's interpretation of 14.9; it accords more with the natural meaning of the words (particularly "*additional day off*"). Moreover, 14.9 would surely have read differently had it been intended to mean what the Respondent contends: something like: "*Employees who are off sick on a statutory holiday will lose their entitlement to annual leave for that day*".

The unfair dismissal claim

22. The procedural history to this claim is relevant. The Claimant in the ET1 did not tick the box for unfair dismissal and stated that her employment had ended on **30/4/17**. In the details of claim the Claimant wrote that "... *I went for my accrued annual leave in April 2017 and in May 2017*". Box 7 about whether the Claimant had got another job was left blank.
23. The Claimant then sought to amend to add a claim of constructive unfair dismissal, initially on 7 September 2017. The Respondent resisted, inter alia on the basis that the Claimant had not resigned her employment but had been dismissed (as per their solicitors' email of 19/1/18. The Claimant replied to that email the same day, stating "*I resigned from the trust employment because they breached my employment contracts by not giving me annual leave pay in April and May 2017*" and she referred to the Respondent not being able to assist in resolving her outstanding pay when she "*went to the office on the 25th of May 2017*".
24. The Claimant provided a further document dated 7 February 2018 headed "Response to witness evidence", in which she wrote "*I followed ACAS advice and wrote to [the Respondent] on 9th February 2017 to re confirm it. ... The trust breached my contract of employment in April and May 2017 by not paying me and I was duly advised by ACAS that I do not have to give them notice of termination of employment as a result of that*".
25. The case came before the tribunal on 8 February 2018 and was adjourned to a telephone hearing on 23 February, at which the Respondent conceded the Claimant could amend to add the unfair dismissal claim; but unfortunately the date on which the Claimant alleged her employment had terminated was not identified.

26. The Claimant's witness statement for the full tribunal hearing put her case in materially identical terms to those in her document of 7 February 2018 (see above).
27. In the Claimant's oral evidence to the tribunal she stated that her employment had ended in **February 2017** following her letter to the Respondent of 9 February referred to above. This was somewhat inconsistent with the way she had put matters in the ET1 and when arguing for the amendment, as well as in her witness statement (see above); though it was consistent with her having taken up alternative full-time employment shortly after that date.
28. The Claimant confirmed in her evidence that she had not communicated that she was resigning in February 2017, unless that could be inferred from her letter of 9 February. That letter sets out in detail what the Claimant understands her outstanding entitlements to be, and (as noted above) comments "*So my annual leave should be finished on 24th May 2017*". There is nothing in that letter which hints at the fact that the Claimant considers her employment to be at an end. It is uncontroversial that the Respondent did not read the letter (or understand from any other source) that the Claimant considered her employment with it had ended, in February or at any time prior to July 2017.
29. It is well established law that in order for a resignation and for a claim for constructive dismissal to be effective, even where the employer is in repudiatory breach of contract, the employee must communicate to her employer that she is treating that breach as bringing the contract to an end – she must resign.
30. In this case the Claimant did not do so and moreover did nothing to suggest to the Respondent that she was treating herself as having resigned.
31. In the circumstances, the Claimant's employment continued until she was dismissed by the Respondent some months later.
32. The Claimant did not seek to rely on that later dismissal as unfair in front of the full merits tribunal. Indeed it would have been difficult for her to have done so given that she had been working full-time for another employer for 5 months without informing the Respondent by that time and had had almost no communication with

the Respondent during that period and had not replied to the many letters sent to her by the Respondent (which she says that for various reasons she did not receive).

33. Finally, I note that even had the Claimant been able to establish that she was unfairly constructive dismissed in February 2017, she would have sustained no loss of earnings and moreover would have to give credit for the 9 days' holiday pay referred to at para 15 above, which (on that hypothesis) would be paid in error.

Employment Judge Segal

Date 21 September 2018

JUDGMENT SENT TO THE PARTIES ON

24 September 2018

FOR THE TRIBUNAL OFFICE