



EMPLOYMENT TRIBUNALS

Claimant: Mr G Holmes-Korikis

Respondent: Lancashire County Council

Heard at: Manchester

On: 30 April 2018
1 and 2 May 2018

Before: Employment Judge Howard

REPRESENTATION:

Claimant: Mr Flood of Counsel

Respondent: Mr Jenkins of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair constructive dismissal pursuant to the provisions of Part X Employment Rights Act 1996 succeeds. The claimant was unfairly dismissed.
2. The respondent is ordered to pay to the claimant the sum of £18,000.

REASONS

1. I heard evidence in support of his claim from the claimant; from Mike Maxwell, former Assistant Manager at the Home; and a former colleague and Phil Wright, residential childcare worker. For the respondent I heard from Paul McIntyre, Senior Manager Residential Services; John Simpson, Residential Manager; and Mark Davies, Home Manager. During the hearing, I was referred to documents contained within an agreed bundle.

2. At the outset of the hearing the parties confirmed that the Anonymisation Order relating to the identification of eight children who lived in the Home had been complied with in all witness evidence.

The Issues

3. The issues were identified and agreed as follows:

Unfair Constructive Dismissal

- (1) Was there a breach of contract? The claimant asserts a breach of the implied term of trust and confidence and the duty to ensure a safe system of work.
- (2) If there was a breach, was that breach fundamental, going to the root of the contract?
- (3) Did the claimant resign in response to that breach?

4. If the claimant's employment had been terminated such as to amount to a dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996, the respondent does not advance a potentially fair reason and section 98(4) of the Employment Rights Act 1996 of fairness does not apply.

5. A timetable of evidence was agreed and Mr Holmes-Korikis presented an agreed plan of the layout of the children's Home.

Findings of Fact relevant to the Issues

6. Mr Holmes-Korikis worked for the respondent as a residential childcare worker for some ten years. It was not disputed that he was a very good worker, experienced, enthusiastic and positive, and was an asset to the respondent's residential childcare team. He moved to the Bowerham Road Children's Home in 2012. Bowerham Road is a mainstream residential care home with capacity for six young people aged between 13 and 18. It is staffed by between two and three childcare workers in any one shift.

7. It is accepted by Mr Holmes-Korikis, and is evident, that given the life circumstances and history of young people placed into care, dealing with sometimes challenging behaviour and managing that conduct to diffuse and resolve it, is an integral part of the role of a residential childcare worker. There is an inevitable risk that childcare workers will be exposed to episodes of violent or unpredictable behaviour on the part of the young people for whom they are caring, and Mr McIntyre, Senior Manager and the responsible individual for Ofsted purposes agreed, that risk is managed and mitigated by an adequate level of properly trained staff, robust processes of care planning and supervision of young people and good placement planning. It was not disputed that carrying out a thorough risk assessment to ensure that the proposed placement was suitable for the Home's dynamics was essential for effective risk management.

8. Mr McIntyre confirmed that the policy and guidance for admissions to the Home was contained in a statement of purpose, a copy of which dated July 2016 was provided. It was understood that this statement reflected policy pre-dating July 2016 also. The policy provides that all placements for young people are underpinned by robust assessments and care planning. The criteria for admission provides that:

“In all cases the planning and assessment process will incorporate an assessment of risk and the impact of making a placement on the individual child and the Home as a whole...Where there is an acceptable risk and this cannot be managed through the assessment and care planning process or would mean that the needs of other residents could not be met, a placement will not be offered.”

9. Between October and November 2015 that policy was not adhered to. As the Ofsted report which followed the monitoring visit of 23 November 2015 stated:

“Young people are at risk from poor placement planning. For example, five young people were admitted to the Home within a four-week period...Challenges made by the Assistant Manager were ignored by senior residential managers despite clear safeguarding concerns being raised...”

10. The report confirmed that because of poor admissions processes *“the Home is not acting in accordance with its statement of purpose”*. It criticised poor leadership and management which compromised safety. It reported *“high levels of disturbances with insufficient numbers of staff to cope with the influx of new young people and the levels of instability caused...”*.

11. That inspection report accurately reflected the experiences of the childcare workers at the Home including Mr Holmes-Korikis. He gave evidence corroborated by other care workers at the Home of a series of ill-judged admissions of young people which led to a toxic combination of behaviours. I accepted his and his witnesses accounts of events in the Home, the facts of which were not contested by the respondent, as honest and accurate. Mr Holmes-Korikis and colleagues were subjected to frequent and high levels of aggressive, manipulative and hostile behaviour from some of the young people. A range of assaults, threats of violence, disruptive and dangerous behaviours were carried out by the young people. During this period Mr Holmes-Korikis was required to care for a deeply disturbed girl in the Home and then in a caravan on a holiday site who was the subject of a secure order, awaiting placement, was deeply traumatised, violent and had a knife under her pillow. He was subject to events on 23 November 2015 during which all the male residents of the house engaged in violent, disruptive and antisocial behaviour, described in detail in his evidence and which required police intervention. I accepted his account, corroborated by his witnesses and supported by a de-brief account of a further episode of violent and disturbed behaviour in February 2016, and references to ongoing regular night-time disturbances in June 2016 in a later Ofsted report, that, notwithstanding the appointment of a new Home Manager, Mr Davies, in late February 2016 and an improvement in care planning and supervision processes, disturbances in the Home continued at an unusually high level.

12. Had appropriate placement planning taken place, most if not all the placements would not have been accepted as they posed a high risk to the existing

residents' wellbeing. Despite Mr McIntyre's protestations to the contrary, there was ample evidence of highly disruptive behaviour by Child 5 and Child 7 in their previous Home which would have indicated their unsuitability to be placed in the Home, together, and in such proximity with other new arrivals. Plainly, by virtue of the Secure Order alone, Child 8 should never have been placed in the Home. There were clear and legitimate concerns raised about Child 4; indeed, the respondent presented no documentary evidence of the placement planning process described by Mr McIntyre. That is because it did not take place for those young people at anything other than a most cursory level.

13. As the respondent's witnesses conceded, and was apparent from the documentary evidence including the Ofsted reports, notwithstanding all the efforts to improve processes and management, which Ofsted recognised was taking place, the reality was that behaviours at the Home did not settle and stabilise until the young people at issue were moved from the Home. As Mr McIntyre accepted, had that decision been taken earlier, or as a first step, it might well have been a faster and more effective resolution, and from all the evidence before me I am sure that it would have been.

14. Eventually Mr Holmes-Korikis sent an email of 21 February 2016, copied to a range of managers including the manager and assistant manager of the Home, in which he explicitly stated that he did not feel safe at work, "*that police have stated that they are not in control of this group of young people*", "*and it won't be long before someone gets badly hurt*". There was no direct response to Mr Holmes-Korikis. Mr Davies assumed that it would be dealt with at a higher level; Mr McIntyre, whilst being aware of the email, could not recall what, if any, steps he took to address it. The respondent's response to this email raising very serious and alarming matters was wholly inadequate.

15. As Mr Holmes-Korikis explained in evidence, it was at this point that he completely lost trust and confidence in his employer as the lack of response led him to feel that no-one cared about his health, safety and working environment.

16. As the respondent pointed out, Mr Holmes-Korikis was given a risk assessment to complete and did not do so. However, given the dysfunctional state of management of the Home at around this time, by which I am referred to Mr Davies' predecessor, and the lack of any evidence that any completed risk assessments resulted in any proactive steps, I am satisfied that it would have made no difference to Mr Holmes-Korikis' working environment had he done so.

17. Unsurprisingly, the environment in which Mr Holmes-Korikis worked caused him significant stress and he became unwell. Colleagues and his manager noticed that he was not himself and was stressed but no systematic steps were taken to address this.

18. On 9 May 2016, Mr Holmes-Korikis commenced sick leave, certificate as not fit to work because of stress at work. In breach of its own guidelines, Mr Holmes-Korikis was not contacted by Occupational Health until 22 September 2016.

19. By a letter of 3 October 2016 following by a further letter of 7 October 2016, Mr Holmes-Korikis brought his employment to an end. He gave his reasons as the

respondent's failure to provide a safe system of work, ignoring repeated warning signs of stress and anxiety and failing to follow its own Occupational Health procedures; *"After careful consideration, I feel that I cannot return to this work under current circumstances, following my sickness absence due to stress at work, and the time is right to move on. I have no confidence that there would be any improvements in working conditions, either from the attitudes of the young people we look after, nor from management negligence. I have to consider my health first and returning to work would be detrimental to my health. I had no contact from Occupational Health at LCC for the first 5 months of sickness to discuss alternative work within the organisation, despite to procedural obligations. I feel that I have been failed and I am disappointed that I will lose a well-paid job, a good pension and career prospects through no fault of my own."*

The Law

20. S95(1)(c) of the Employment Rights Act 1996 provides that:
"An employee is dismissed by his employer if ...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"

21. The principles laid out by the Court of Appeal in Western Excavating (EEC) Ltd v Sharpe 1978 IRLR 27 CA are that 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 Tribunal must be satisfied that there was a fundamental breach on the part of the employer, that the breach caused the employee to resign and that the employee did not affirm the breach by delaying too long before resigning.

22. There is no rule of law for determining whether a particular set of facts constitutes a repudiatory breach of contract by the employer, it is question of fact and degree for the Tribunal to determine. Where the term in question is that of trust and confidence, the Tribunal must consider the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

The Tribunal's Conclusions

23. Has there been a fundamental breach of contract? I found that there was. The respondent has breached the implied term to take all reasonably practical steps to provide a safe system of work and workplace. Had the respondent followed its own policy and taken reasonable steps to properly assess the suitability of those placements, including consulting with and taking into consideration the reservations of the Home's management, taking the documented pattern of behaviour of the young people into account and the fact that the Home already had a significant number of shortcomings as identified by Ofsted, Mr Holmes-Korikis would not have been exposed to such high levels of risk to his physical and mental health. Senior Managers in making those placement decisions did not have sufficient, or indeed any, regard to the welfare of the childcare workers.

24. That breach continued up to and after Mr Holmes-Korikis commenced sick leave. Mr Holme-Korikis' ill health was a direct consequence of this breach of contract.

25. Through the actions described above and compounded by the respondent's failure to address Mr Holmes-Korikis' inability to work because of stress by obtaining Occupational Health advice in a timely manner and in accordance with its procedures, the respondent was in breach of the implied term not to act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employee and employer.

26. Were those breaches fundamental? Yes. The breaches of both terms were fundamental as they go to the root of the contractual relationship between the employer and the employee.

27. Did Mr Holmes-Korikis act in response to those breaches? Yes. That was not in dispute.

28. Did Mr Holmes-Korikis affirm these breaches? I decided that he did not. Some time passed whilst Mr Holmes-Korikis was on sick leave before he resigned but he continued to raise his concerns, both in person to Mr Davies when he visited and in the risk assessment that he completed. He did not affirm either breach.

29. Accordingly, the termination of Mr Holmes-Korikis' employment was a dismissal applying section 95(1)(c) of the Employment Rights Act 1996. No potentially fair reason for dismissal was advanced and Mr Holmes-Korikis' dismissal was unfair pursuant to section 98 of the Employment Rights Act 1996 and his claim succeeds.

Remedy

30. After discussion between the parties I was invited to award remedy in the sum of £18,000, which I did.

Employment Judge Howard

Date: 16th July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 July 2018

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