



EMPLOYMENT TRIBUNALS

Claimant: Mr S Ferry

Respondent: The Colleges Partnership Limited

HELD AT: Hull

ON: 7 and 8 November 2018

BEFORE: Employment Judge Cox

Representation:

Claimant: In person

Respondent: Miss Gardiner, counsel

REASONS

1. Mr Ferry brought a claim to the Tribunal alleging that he had been unfairly dismissed by the Colleges Partnership Limited (“the Company”).

The relevant law

1. Mr Ferry had resigned on 6 March 2018, giving the Company notice that he was terminating his contract with effect from 3 April 2018. The success of his claim depended upon him being able to establish that his resignation fell within the definition of dismissal in section 95(1)(c) of the Employment Rights Act 1996 (the ERA). That section says that an employee is dismissed if he terminates his contract, with or without notice, in circumstances in which he is entitled to terminate it without notice because of his employer’s conduct. This is known as a constructive dismissal. The Company did not say that the reason for its conduct fell within the potentially fair reasons for dismissal in section 98(1)(b) and section 98(2) ERA. So if Mr Ferry could establish that his resignation amounted to a dismissal, his claim would succeed.
2. An employee is entitled to terminate his contract without notice if his employer has conducted itself in a way that amounts to a very serious breach of its obligations under the contract of employment (which is described in legal terminology as a repudiatory breach) and the employee has resigned in response to that conduct. This is known as a constructive dismissal.

3. Even if an employer has seriously breached an employee's contract of employment, if the employee continues to work on under that contract, he may, depending on the circumstances, be viewed as having affirmed the contract, that is, as having agreed to the contract continuing. In those circumstances, he loses the right to resign and claim constructive dismissal.

Background

4. At the Hearing, the Tribunal heard oral evidence from Mr Ferry and from a former colleague of his, Mr D'Rozario. For the Company, the Tribunal heard oral evidence from Mr Williams, Team Leader and Mr Ferry's line manager, and Mrs Burton, Executive Director of the Company, who heard Mr Ferry's appeal against the outcome of a grievance he presented after he gave notice of his resignation. The following findings are based on that evidence and the documents to which the Tribunal was referred.
5. The Company's business includes the provision of vocational training and management of apprenticeships. One of its clients is the Army. Mr Ferry's job involved the delivery of electrical engineering qualifications on a contract the Company had with the Royal Signals. His duties included recruiting learners, delivering, assessing and monitoring National Vocational Qualifications and delivering key skills training and assessment. His job title was originally Electrical Engineering Assessor, later changed to Apprenticeship Co-ordinator.

New tasks

6. The first issue that the Tribunal had to decide was whether the Company had been guilty of a repudiatory breach of Mr Ferry's contract.
7. Mr Ferry made two complaints. One was about new tasks that he had been asked to take on. He said he had agreed to take on these tasks on a trial basis only but was then given them permanently. The other complaint was that he was being unfairly treated in comparison with the telecommunications assessors in the same team as him, who had not been asked to take on these extra tasks.
8. At the Hearing, Mr Ferry clarified what the new tasks were. They arose from the Company's introduction in around 2012 of a computer system called OneFile, which was a computer-based record of apprenticeships. This enables learners to access and add to their learning portfolios online and enables assessors to access learners' work from any location and provide feedback on it. This system replaced the paper-based learning portfolios that had previously been used.
9. Mr Ferry agreed to take part in a trial of the OneFile system and as a result he had some additional tasks. He needed to scan documents and complete administrative referencing of evidence from the Learner Admin Folder to the apprentice's OneFile e-Portfolio account. He then completed a template, which had been provided by Mr Williams, to create an assessment plans for the learner, by filling in the relevant details. The learner then agreed the plan and attached evidence of the training on functional skills, technical certificates and personal learning and thinking skills that they had completed at Blandford. The

learner signed off the plan and sent it back to Mr Ferry to be assessed. Mr Ferry then forwarded it to Mr Williams, who was the internal quality assurer for the electrical engineering qualification, to sign off.

10. Mr Ferry's terms and conditions of employment stated: "Also attached is a Job Description setting out the main duties and responsibilities of your position. The nature of the business means that the actual duties you perform may alter from time to time to reflect the changing nature of the business. We will keep you fully involved in discussions about changes as they arise." The Job Description included the following amongst the responsibilities of the post: "to ensure all relevant paper work is completed and passed to the Line Manager in accordance with [the Company's] policies and procedures".
11. The Tribunal found that the Job Description was incorporated by reference into Mr Ferry's terms and conditions of employment. The Tribunal was also satisfied that, although the new tasks connected to the OneFile system were computer-based rather than paper-based, they fell within Mr Ferry's job description. During the course of his evidence, Mr Ferry accepted that they did.
12. Mr Ferry's evidence was that another new task he was given was to give presentations, lasting between an hour and an hour-and-a-half, on the electrical engineering apprenticeship to learners when they arrived at their field unit. This presentation, which had previously been done by Mr Williams, explained to the learner what they needed to do to complete their apprenticeship successfully. In his evidence to the Tribunal, Mr Ferry accepted that this task fell within the main job objective in his job description, which included assisting learners in the successful completion of their apprenticeships. The Tribunal also accepted that this task was covered by Mr Ferry's job description, which included in the job holder's tasks "any additional tasks as laid down by the Line Manager".
13. In summary, the Tribunal accepted that the tasks that Mr Ferry was asked to carry out all fell within the contractual duties of his post. In asking Mr Ferry to carry out them out, the Company was not breaching his contract.
14. Mr Ferry said he agreed to do the new tasks only on condition that most of them (including the uploading of administrative referencing tasks on to the OneFile portfolio and the creation of assessment plans for training completed at Blandford) would be transferred to staff based at Blandford when the OneFile system was rolled out more widely across the Company. Mr D'Rozario, who was the other electrician assessor in Mr Williams's team at the relevant time, also confirmed that that was the basis on which he had agreed to take on this work. The Tribunal accepted that Mr Williams indicated to Mr Ferry and Mr D'Rozario when discussing these tasks with them that the Company intended that the new tasks would be handed on to Blandford staff when the new system was rolled out more generally. The Tribunal also, however, accepted Mr Williams's evidence that he had never expressly agreed with Mr Ferry that he would be doing these tasks for the trial period only. The Tribunal accepts his evidence: it is not plausible that Mr Williams would reach such an agreement when he was entitled to require Mr Ferry to take on these tasks without any limitation or condition.

15. Mr Ferry pointed out to the Tribunal that his terms and conditions said, under a heading "Changes": "We reserve the right to make reasonable changes to your terms and conditions. Minor changes will be notified to you in writing and will take effect from the date quoted. For more significant changes we will consult with you and give you 4 weeks notice of our intentions. We will tell you individually of the proposed changes and consider all comments made before making any final decision." Mr Ferry complained that there was no consultation about, or notice of, the new tasks being allocated to him permanently. That did not, however, mean the Company was breaching his contract. The new tasks he was being asked to carry out did not involve a change in his terms and conditions: they fell within the existing terms of his contract.
16. The Tribunal considered whether requiring Mr Ferry to continue to do the new tasks after the roll-out of OneFile began, contrary to the understanding that they would be handed on to others at the end of the trial period, amounted to a breach of the implied term of trust and confidence in his contract. That term required that the Company would not, without reasonable and proper cause, conduct itself in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and Mr Ferry.
17. The Tribunal could identify no breach of the implied term. It was clearly within the Company's management discretion to decide that the tasks at issue needed to continue to be done by Mr Ferry and his colleague, in the light of the changed staffing situation at Blandford. By the time the new system was rolled out in 2015, staffing levels at Blandford had been reduced and the remaining staff had heavy workloads, making it impracticable for this work to be done there. The Company had reasonable and proper cause for not reallocating the tasks, which Mr Ferry had been given initially on a lawful basis and within the express terms of his contract of employment.

Unfair treatment in comparison with other assessors

18. The other aspect of Mr Ferry's complaint was an alleged unfairness in the way in which the Company treated him in comparison with the way in which it treated telecoms assessors.
19. Mr Williams accepted that he had not asked the telecoms assessors in his team to do the tasks arising from the OneFile system that he had asked of Mr Ferry. That was because their work related to qualifications that were the responsibility of a different internal quality assurer, Mr Evans. Mr Evans had decided, in consultation with the relevant qualifications body, that the telecoms assessors need not do these tasks. Electrical engineering was covered by a different qualifications body. Mr Williams took the view that it would enhance the transparency and clarity of how the electrical engineering qualifications for which he was responsible were achieved if they were recorded in the way he asked Mr Ferry and Mr D'Rozario to record them.
20. The Tribunal acknowledged that Mr Ferry disagreed with Mr Williams's approach and considered that the resultant different treatment of assessors within the same team to be unfair. Nevertheless, the Tribunal accepted that it was clearly within the legitimate scope of Mr Williams's management discretion

for him to take the view that he did. Objectively assessed, Mr Williams's decision was neither calculated nor likely to destroy the relationship of trust and confidence between the Company and Mr Ferry, and Mr Williams had reasonable and proper cause for adopting the approach that he did.

21. In summary, the Tribunal concluded that the Company had not breached Mr Ferry's contract of employment by requiring electrician assessors but not telecoms assessors to carry out the tasks associated with OneFile.

Affirming the contract

22. Although this was not necessary for its decision, the Tribunal went on to consider whether, even if the Company had been guilty of a repudiatory breach of Mr Ferry's contract, he had lost his right to resign and claim constructive dismissal because he had continued to work in circumstances where he could be viewed as agreeing to the continuation of his contract.

23. There was no documentary evidence of Mr Ferry having complained about the new tasks in his annual appraisal meetings or in his 1-2-1 meetings with Mr Williams. The Company did not disclose the e-mails that Mr Ferry said he had sent over the course of several years to Mr Williams complaining about these matters. The Tribunal was therefore prepared to accept in Mr Ferry's favour that he had repeatedly complained in emails to Mr Williams about the unfairness of these new tasks being permanently allocated to him and about the fact that the other assessors were not expected to do them.

24. The circumstances that gave rise to Mr Ferry's complaints had first arisen in 2015, when the new tasks were not reallocated at the end of the trial period for OneFile, and had continued since then. Mr Ferry resigned in response to these issues in 2016, but then decided not to follow through on his resignation and continued to work for the Company. The Tribunal considered that this amounted to clear evidence that he was agreeing to the continued existence of his contract. Mr Ferry then continued to work for the Company for a further two years before he finally resigned in 2018. So, even if Mr Ferry was sending e-mails to Mr Williams complaining about the situation, the way in which he conducted himself was clear evidence that he nevertheless agreed to the continued existence of his contract of employment.

25. For that reason also, the Tribunal did not accept that Mr Ferry was entitled to resign and claim he had been constructively dismissed.

Reason for resignation

26. Although this was not necessary for its decision, the Tribunal considered whether the additional tasks and inconsistency of treatment in comparison with the electrical assessors were the reason for Mr Ferry's resignation.

27. The Tribunal was not satisfied that they were. In his letter of resignation, Mr Ferry clearly stated that his reason for leaving was the unfairness in pay, both between the different types of assessors and between assessors and functional skills tutors and learner mentors. This was consistent with one of the outcomes

that Mr Ferry sought in his later grievance, which was to be given extra pay for doing the new tasks. In an e-mail to Mrs Burton on 5 February 2018, he complained that the Royal Signals assessors were doing more work than the other assessors, learner mentors and functional skills tutors and yet these other individuals were being paid the same as him. He went on to say that he was happy with what he was paid because he could supplement his salary with an army pension, but added: "When I see others being paid the same as me yet not covering all the different aspects to the role it does not seem fair." In similar vein, in an e-mail Mr Ferry sent to Mr Williams on 27 February, 10 days before he resigned, he said: "I am being asked to do more work than others for the same wage."

28. From this evidence, the Tribunal was satisfied that the reason why Mr Ferry resigned was that he felt strongly that it was unfair that he was doing more work than his colleagues but was being paid the same as them. In other words, he resigned because he was not being paid fairly for the additional tasks.
29. Mr Ferry did not, however, base his claim on the unfairness of the Company's pay policy. If he had, the Tribunal might have needed to consider whether the policy breached the implied term of trust and confidence. That would have involved an examination of all the jobs involved, what their content was, in theory and in practice, and why the Company had decided to pay individuals as they did. None of that evidence was before the Tribunal, because that was not the basis of Mr Ferry's claim.

Conclusion

30. In summary, the Tribunal did not accept that Mr Ferry had established that he resigned in circumstances where he was entitled to do so without notice because of the Company's conduct. The Tribunal did not, therefore, accept that he was dismissed within the meaning of that term in section 95(1)(c) ERA, meaning that his unfair dismissal claim failed.

Employment Judge Cox

Date: 12 December 2018