



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Neal
Respondent: West Nottinghamshire College
Heard at: Nottingham
On: Wednesday, 28th March 2018
Thursday, 29th March 2018
Before: Employment Judge Brewer (sitting alone)

Representatives
Claimant: Peter Daykin, Representative
Respondent: Adam Griffiths, Counsel

JUDGMENT

1. The claim of constructive unfair dismissal fails and is dismissed.

REASONS

Introduction

1. This case was heard over two days on 28th and 29th March 2018. I had an agreed bundle running to 384 pages. I heard witness evidence from the Claimant and on her behalf: Rachel Ketteridge and Charlotte Wood. On behalf of the Respondent I heard from: Rachael Blythe; Jackie Pugh; Leigh Jarvis and Tracey Thompson. I was handed a number of other witness statements for people who were not attending, and I have given them appropriate weight. I heard and am grateful for and have considered submissions from both representatives.

Issues

2. This is a claim for constructive dismissal and the question from a statutory perspective is whether the Claimant was dismissed within the meaning of Section 95(1) (c) of The Employment Rights Act 1996.
3. The Claimant says that she resigned in response to a breach of the implied term of trust and of confidence. The Claimant says that there was either an incident which was a 'one off' repudiatory breach which caused her to resign, or, in the alternative, that there were a series of incidents and a last straw which taken cumulatively amounted to a fundamental

breach of contract, being a breach of the implied term of trust and confidence. The Respondent of course denies any such breach.

4. The issues therefore are as follows:
 - 4.1. Did the Respondent breach the Claimant's contract?
 - 4.2. If so was that breach fundamental?
 - 4.3. If so did the Claimant resign in response to that breach?
 - 4.4. Did any of the Claimant's actions affirm that the contract?
5. I note that the Respondent does not assert, but if I find that there was a dismissal in this case, it was fair for a reason.

Law

Constructive dismissal

6. When dealing with a constructive dismissal claim there are ordinarily two questions to be considered; Firstly are the circumstances in Section 95(1)(c) of the ERA met (i.e. has there been the dismissal) and if so is the dismissal fair or unfair under Section 98 of the ERA. In this case the respondent did not seek to plead in the alternative that there was a potentially fair reason for dismissal. So far as the first issue is concerned a contract of employment may be brought to an end in a number of different ways. It is only if the termination of the contract amounts to a dismissal in law that an unfair dismissal claim can be pursued. Section 95(1) of the Employment Rights Act 1996 defines the circumstances in which an employee is dismissed. The relevant part states as follows:

"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."

7. In order to establish that there has been a dismissal the leading authorities show that the claimant must prove on the balance of probabilities five matters namely:
 - 7.1. The existence of a relevant express or implied contractual term.
 - 7.2. There must be a breach of contract on the part of the respondent and this may be either an actual breach or an anticipatory breach.
 - 7.3. The breach must be sufficiently important (fundamental) to justify the Claimant resigning, or else it must be the last in a series of incidents which justify her leaving.
 - 7.4. She must leave in response to the breach and not for some other unconnected reason.
 - 7.5. She must not have acted in a way which may be deemed to have affirmed the contract.
8. The term relied on in this case is the implied term of trust and confidence. The House of Lords in **Malik v. BCCI [1997]IRLR 462** held that the term was an obligation that:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

9. The implied obligation covers a wide range of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. The burden lies on the employee to prove a breach on the balance of probabilities.
10. The case of **Woods v WM Car Services (Peterborough) Ltd [1982] ICR 639** is authority for the proposition that to constitute a breach of the implied term it is not necessary to show that the respondent intended any repudiation of the contract. The tribunal's function is to look at the respondent's conduct as a whole and determine sensibly, reasonably and objectively whether it is such that it would entitle the employee to leave. As the test is an objective one the perceptions of the employee are also not determinative. Even if the employee genuinely but mistakenly views the acts as hurtful and destructive of trust and confidence this is not enough. The act or acts must destroy trust and confidence judged objectively. Of course, whilst almost all breaches of the implied term of trust and confidence are going to amount to unreasonable behaviour, not all unreasonable behaviour amounts to a breach of the implied term. The case of **Safeway Stores v Morrell [2002] IRLR 9** is authority for the proposition that a finding that there has been a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going to the root of the contract.
11. In assessing whether an employee has resigned in response to the breach of contract the case of **Nottinghamshire County Council v Mickle [2004] EWCA Civ 859** is authority for the proposition that it is enough if the employee resigns, at least in part, in response to the fundamental breach of contract. This has been more recently re-affirmed in the case of **Wright v North Ayrshire Council [2013] UKEAT 0017 13 2706**, in which it was said, where there is more than one reason for resigning, the test is whether the breach played "a part" in the resignation — in other words where there is more than one reason for leaving the approach is to examine whether any of them is a response to the breach. It does not have to be the predominant or principal or major or main cause for leaving (paragraphs 8 and 9).
12. As this was an allegation of either a one-off event or a cumulative breach we considered the "last straw" doctrine. The claimant may cite individual events or acts none of which in themselves involve a breach of contract but which taken together and cumulatively amount to a breach of the implied term of trust and confidence. That doctrine was considered in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**. The Court of Appeal through Lord Justice Dyson said:

"Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things ...is of general application. 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. It must contribute something to that breach, although what it adds may be relatively insignificant (paragraph 19)...I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. The last straw must contribute, however slightly,

to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred" (paragraph 20)

13. In unusual cases the last straw might comprise reasonable behaviour. However its essential quality is that judged objectively it must be something which contributes to the breach of the implied term. An entirely innocuous act cannot be a final straw.
14. In a last straw case it is permissible for an employee to rely on earlier conduct of the employer even if this conduct was not relied upon by the employee as a repudiatory breach at the time; **Lewis v Motorworld Garages Ltd [1985] IRLR 465**. This principle was more recently reaffirmed in the case of **The Carphone Warehouse Ltd v Martin UKEAT/0371/12** where the EAT said this:

"In a case where a course of conduct and a last straw is relied on, the claimant will by definition have remained in employment until the last straw. That does not mean he is deemed to have waived all the earlier breaches or conduct going to make up a breach or affirmed the contract" (paragraph 29).

Affirmation

15. In some cases there may be an issue about whether the employee has affirmed the contract following the breach. The principles relating to affirmation are set out in the case of **W E Cox Toner (International) Lid v Crook [1981] IRLR 443**. I need say no more about that here.

Findings of Fact

16. The Respondent is an FE College employing around 900 staff.
17. The Claimant was employed as a tutor working in the School of Care and Education. She started with the Respondent on 3rd July 2006.
18. The Claimant encountered no significant difficulties at work until a complaint was made about her on 15th June 2016, which can be found at page 100 of the bundle. The complaint was from a student, SW, the substance of which was bullying. Jackie Pugh, Head of School: Care and Education was asked to investigate that complaint by Leigh Jarvis, the Curriculum Manager, on 16th June 2016.
19. On 21st June 2016 SW provided a detailed statement of her concerns to Ms Pugh and the Claimant was informed of the complaint on that date.
20. Ms Pugh interviewed the Claimant and some 7 witnesses between 22nd June and 23rd June 2016. She then considered the evidence, wrote and provided her report on 5th July 2016.
21. During the investigation, as well as evidence about the alleged bullying, some evidence of performance issues arose, in particular around the Claimant's marking of work.

22. Ms Pugh determined that the bullying allegation was not made out and that such capability concerns as there were should be dealt with under the Respondent's capability procedure. The capability procedure, a copy of which is in the bundle, allows at the formal stage for an action plan to be agreed and implemented prior to any warning being issued. Indeed, reading the policy it would seem that only if the action plan is not fulfilled would a warning be issued. An action plan was created and that appears at page 151 of the bundle.
23. The Claimant appealed against Ms Pugh's recommendations and that appeal was heard by Tracey Thompson, HR Director, on 2nd August 2016. Broadly the appeal was not upheld although it was accepted that Ms Pugh had not interviewed 3 students as requested by the Claimant. In evidence the Claimant said they were character witnesses. That appeal outcome letter is at page 171 of the bundle. At this time the Claimant was asked to teach level one students. She had up to that time been teaching level three students and had been doing so for some time. By way of explanation students are divided into entry level, level one, level two, and level three. Essentially these levels reflect increasing academic achievement.
24. The Claimant attended a number of capability review meetings during the period in which the action plan was active. On 9th February 2017 Leigh Jarvis wrote to the Claimant to confirm that the action plan had been achieved. She was not therefore subject to any warnings under the capability procedure.
25. On 6th April 2017 a complaint was received by the Respondent from a student, HS. That appears at page 215 of the bundle. The complaint was of misconduct by the Claimant essentially amounting to verbal abuse and potentially physical abuse. Because of the age of the student this was a safeguarding issue and in accordance with its policy the matter was escalated to the Local Authority Designated Officer, but he decided that the matter could be dealt with internally and notified the Respondent of that on or around 10th April 2017. The Respondent broke for Easter between 10th April and 21st April 2017.
26. Once again Ms Pugh was tasked with investigating this complaint. She commenced her investigation on 25th April 2017 when she met the complainant, HS.
27. On 27th April 2017 the Claimant went off sick with stress and anxiety. She remained off sick never to return to work. Whilst she was off she attended occupational health appointments and other than not attending one meeting co-operated with the Respondent in its investigation process.
28. Ms Pugh interviewed the Claimant and 9 other witnesses as part of her investigation. She also viewed CCTV footage. The Claimant declined to be interviewed a second time by Ms Pugh. It is unclear why she did so.
29. Ms Pugh concluded that certain of the complaints should be dealt with by way of a disciplinary hearing. Those conclusions appear in her report produced on 11th May 2017 and that starts at 284 of the bundle. The Claimant was advised of Ms Pugh's recommendations on 23rd May 2017 by Catherine Ingram (page 291).

30. On 26th June 2017 the Claimant was told of the arrangements for a disciplinary hearing. She was sent a copy of the report and the Respondent's disciplinary procedure. A copy of the disciplinary procedure is at page 56 of the bundle. The letter of 26th June states that Section 9 of the disciplinary policy outlines the potential outcomes of disciplinary hearings. The outcomes are what one would expect: no action, warning, or dismissal. There is potentially some contradiction in the Respondent's disciplinary procedure in that in part it says that there will be no dismissal for a first offence, but section 9 can be read as indicating that if a first offence is serious enough there can be dismissal with payment in lieu of notice. However, for the reasons set out below in my judgment, nothing turns on that.
31. The hearing date was set for 7th July 2017. According to the Claimant, and I have no reason not to accept her evidence on this point, receipt of this news caused her further anxiety in circumstances where she was already very anxious about what was happening. I accept her evidence that she had not properly engaged with the report at the time it was sent to her, and that she eventually read the report in full on 5th July 2017.
32. The Claimant says, and again I have no reason not to accept her evidence, that she decided to resign on 5th July 2017 having finally fully engaged with the report. At that time she wrote the resignation letter which appears at page 330 of the bundle. That said as follows:

“Please accept this letter as a means of terminating my employment contract with Vision West Nottinghamshire College. I feel that the relationship between myself and management has broken down and I can no longer be the victim of investigations which hold no substance. After working for the college for such a long period of time I would have hoped to leave on better terms. I would appreciate you letting me know when I can leave my employment.”
33. Notwithstanding that she had made up her mind to resign on 5th July, on advice she determined to attend the disciplinary hearing on 7th July to have her say and hopefully clear her name. The hearing concluded and prior to the panel making a decision the Claimant handed in her letter of resignation.
34. Rather than immediately accepting that, although a resignation is a unilateral act and does not require acceptance to be effective, Rachael Blythe, HR Manager, asked the Claimant to reflect on the decision over the weekend and said that they should speak again on Monday 10th July 2017.
35. The Claimant did reflect on her resignation but made it clear during her conversation with Ms Blythe on 10th July that she had not changed her mind. On 11th July 2017 Ms Blythe wrote to the Claimant confirming the position. I conclude from this that the effective date of termination was 10th July 2017. The Claimant was paid two month's pay in lieu of notice which is the notice she is required to give under her contract of employment.

Discussion

36. Essentially the Claimant complains of the following matters:
- a) The fact that she had been the subject of two investigations, and
 - b) That she feared that there would be further investigations.
37. In relation to how the Claimant initially put her case it seemed that she was relying on both investigations as straws in a last straw constructive dismissal claim or, in the alternative, she was relying on the 2017 investigation as either amounting to a series of straws or one event which found the basis of her claim. In any event the Claimant relies on breach of the implied term of mutual trust and confidence.
38. The Claimant refers to a number of specific matters as 'straws' but it was made clear in submissions from Mr Daykin that in fact the Claimant was not relying in any way on the 2016 investigation and only on that in 2017 and I have not therefore found it necessary to make any findings in respect of the Respondent's actions in 2016.
39. There is no issue between the parties that the complaints about the Claimant were received. It was not suggested that either SW or HS were, as it were, put up to making complaints by Ms Pugh or Ms Jarvis. I am required to consider whether what the Respondent did in 2017 they did in good faith and on reasonable and justifiable grounds. In considering that, I need to conclude whether that there was a breach of contract at all in this case, and if so did what the Respondent do amount to a breach of the implied term of trust and confidence.
40. In essence what the Respondent did was as follows:
- 40.1. Receive a complaint;
 - 40.2. Refer the matter to the Local Authority Designated Officer;
 - 40.3. Investigate the complaint;
 - 40.4. Report on the complaint;
 - 40.5. Convene and hold a hearing.
41. Having drilled down with the Claimant and her representative it is clear that the Claimant complains that the behaviour of Ms Jarvis and Ms Pugh made the Claimant's position as an employee of the Respondent untenable. The specific complaints are as follows:
- 41.1. Ms Pugh's investigation in particular the questions she asked and her noting of irrelevant answers;
 - 41.2. Ms Pugh selectively quoting from witness statements in her report;
 - 41.3. Ms Pugh's recommendation that certain matters be investigated separately (these are matters D and E which appear in the recommendation at page 288 of the bundle);
 - 41.4. The answers given by Ms Jarvis in her interview with Ms Pugh.

42. Turning to each of those points, I start with what the term of trust and confidence requires. It requires that the Employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
43. There being no issue between the parties that the complaint by HS was received in 2017 I turn to what the Respondent did in having received it.
44. By any measure, looking at that complaint, it was potentially very serious. It was so serious that it fell to be referred to the Local Authority Designated Officer as a potential safeguarding issue. That was a reasonable and justifiable thing for the Respondent to have done. Having been told that they could investigate the matter internally the next step was to appoint an investigating officer.
45. I have considered whether the appointment of Ms Pugh although not a specific matter raised by the Claimant, did either breach the Claimant's contract in itself or could amount to a straw, but it seems to me that although there are some criticisms of Ms Pugh as I have set out above, the Claimant does not take issue with her appointment *per se*.
46. Ms Pugh seems to have interviewed appropriate witnesses and asked appropriate questions. It is fair to say she did not always get good answers to those questions but she cannot be criticised for that. She has to work with the material she is given. On any measure, given the likely witnesses in this case, Ms Pugh carried out a reasonably sufficient investigation.
47. The Claimant appears to take no issue with any of the interviews undertaken by Ms Pugh other than that in relation to Ms Jarvis. The Claimant does not say that Ms Pugh was not acting in good faith and she does not say that, in particular, Ms Pugh's recommendations were not made in good faith. What she does say is that not all of the recommendations were based on reasonable and justifiable grounds. Specifically the first, second and fourth conclusions or recommendations in Ms Pugh's report are not criticised. The only thing the Claimant takes issue with is the third recommendation which, as I have referred to, were that a couple of matters raised in the investigation needed further investigation because they raised what by any measure for this Respondent are potentially very significant issues particularly in relation to student progression.
48. As to the question of Ms Pugh including selective quotations in her report, this is a criticism which it is difficult to understand. By definition, unless Ms Pugh was to reproduce the whole of each interview in her report, any quotation is bound to be 'selective', the question really should have focussed on whether those quotes misrepresented the evidence in the statements and in my reading of them they do not. In any event the evidence I heard was that the panel were given not just Ms Pugh's report, but all of the appendices and therefore they had sight of the entire statement of each of the witnesses and as any diligent panel should have, read them prior to the hearing. Further, since the Claimant was represented at the hearing any matters which the panel should have been taken to, they could have been, and therefore any selectivity there was,

was mitigated by those facts. In my judgment Ms Pugh was not being selective in a way which misrepresented the evidence. She was simply picking out relevant quotes, that is relevant to the allegations which the panel was to consider.

49. As to Ms Pugh noting interviewees' irrelevant answers to her questions, again it is difficult to understand why that should be a matter of criticism. Indeed, it might be said to be a matter of criticism if an investigator does not take a proper note of what was said, such that the interview note would in fact misrepresent the interview, rather than include everything that was relevant and irrelevant and be properly representative of the whole interview. Likewise, it was suggested by Mr Daykin that when a witness started to give an irrelevant answer that they should be stopped, but that would not in my judgment be a reasonable way to investigate a matter. It is incumbent upon an investigator to ask questions, listen to the answers and if questions arise from any answer, ask further questions, not to shut down the interviewee simply because they are saying something which seems on the face of it to be irrelevant.
50. The key question is this: when reaching her conclusions or her recommendations, which appear at the end of her report, did Ms Pugh do what she should have done, which was to take account of evidence which was relevant and ignore evidence which was irrelevant, and it was not suggested that during this hearing that she did anything other than properly take account of the relevant evidence and ignore that which was irrelevant. In that sense she produced recommendations which were both reasonable and justifiable.
51. That leaves the question of Ms Jarvis and her interview
52. In cross examination Mr Daykin referred to three specific responses she gave to three specific questions, and sought to suggest that either she was not answering the question asked, or she was going further than necessary in order to paint the Claimant in a particularly bad light. This is not an assertion I can accept.
53. The first question, although it contains a long introduction, is fairly simple and it appears at page 249 of the bundle. Ms Pugh asks: "Can you talk me through your discussions with Amanda?". The reference to 'Amanda' is to the Claimant. Ms Jarvis gives a fairly long answer running to almost a whole page of A4 typing, but then it was a very open question asking her simply to talk through her entire discussion with the Claimant, and she did so. Whilst the Claimant may not agree with some of the things which were said, in particular by the complainant SW, the reality was that she was not present and I have no reason to doubt the evidence of Ms Pugh and Ms Jarvis that this is the statement she, Ms Jarvis gave.
54. The second question appears at page 252. Ms Pugh asks: "H said that Mandy called her a liar through C; are you aware of this?". It is suggested by Mr Daykin that Ms Jarvis did not answer the question. Having listened to her evidence today, and I found her to be an entirely credible witness, I am satisfied that she did answer that question to the best of her ability. She said: "she just didn't want to get involved but I am aware she did say something to Davina." In other words, she is not saying that she knows that the Claimant was called a liar, but she is aware that something

untoward went on, and that is the best that she could do. That is not the only thing she says in answer to that question, but she does at least answer the question, the rest is context, but no more than that.

- 55. The final question with which Mr Daykin and the Claimant take issue is at the bottom of page 253 of the bundle. That question, put again by Ms Pugh, is again open and it just says: "Mandy is off now today?" Having considered the response, and indeed Ms Jarvis's answers in cross examination about this, I am again at a loss to understand why anything she says should be a matter of concern to the Claimant. What Ms Jarvis does is to confirm that the Claimant is off work, that the staff know about it, and what she has done to deal with the fact that the Claimant is off work and therefore not teaching. That does not in any way paint the Claimant in a bad light, and there is no suggestion that anything which Ms Jarvis said in response is untrue or misleading.

- 56. I have concluded that there was no breach of contract in this case, nor indeed anything which comes close to a breach of contract, and therefore not a breach of any fundamental term, and certainly not the term of trust and confidence. I have no doubt that the Claimant was genuinely anxious about the prospect of another investigation, but the fact that an employer determines to investigate where it has reasonable and proper grounds to do so, cannot in my judgment found a claim for breach of contract, let alone a claim of a breach of the term of trust and confidence, and for those reasons the claim of constructive dismissal fails and is dismissed.

Employment Judge Brewer
Date

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE