



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112725/2018

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Held in Glasgow on 12 November 2018

Employment Judge: Amanda Jones

10 **Mr W Clowes**

Claimant
Represented by:
Ms L Hunter -
Solicitor

15 **Decorall Limited**

Respondent
Represented by:
Mr Archie Paterson -
Director

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not constructively dismissed and the claim is therefore dismissed.

REASONS

Introduction

- 25 1. The claimant lodged a claim of unfair dismissal and also claimed he was entitled to receive a redundancy payment. The claimant subsequently withdrew the claim for redundancy payment indicating that this claim had been made in error.
- 30 2. The claimant claimed that the conduct of the respondent over the last 2 years of his employment amounted to a course of conduct culminating in a last straw which entitled the claimant to resign and treat himself as constructively dismissed,

3. The respondent denied that the claimant had been dismissed and denied that there were circumstances which entitled the claimant to resign and claim that he had been constructively dismissed.

5 4. The Tribunal heard evidence from the claimant and one of the Directors of the respondent, Mr Paterson.

Issues to be determined

5. The Tribunal was required to determine whether the conduct of the respondent in the last 2 years of the claimant's employment taken together with the meeting which took place on 18 May 2018 between the claimant and respondent's director Mr Paterson amounted to a course of conduct which had the effect of breaching the duty of trust and confidence between the claimant and respondent, and if so, whether the claimant resigned in response to that conduct.

15 **Findings in Fact**

6. The claimant is a painter and decorator who had worked for the respondent for 15 years before his resignation.

7. For the last 3 years of his employment, the claimant was a supervisor and responsible for site management of other employees and agency workers engaged by the respondent to work on its contracts.

8. The respondent is a company which provides painting and decorating services. It has gone through various ownerships during the claimant's employment, and in around February 2018 was bought by Mr Archie Paterson and Mr Andrew Allison, both of whom had been employees of the company for some years. They are now both directors of the company.

9. The respondent employs a number of 'books in' employees who are painters and decorators on a permanent basis. It also has arrangements with various employment agencies to provide additional staff for jobs where it requires additional resources.

10. The respondent mainly carries out work in commercial buildings and operates as a sub-contractor to the main contractor which is engaged on development works, such as hospitals, student halls of residence and schools. As a result of the nature of the work it generally carries out, there are periods of the year where more agency staff are required than others.
11. All agency staff were required to have a CSCS card, which meant that they were qualified to work on a construction site. These cards would also provide details of the nature of the trade the individual carried out.
12. The card was no guarantee as to the quality of the work of the tradesperson or a guarantee that they had served an apprenticeship in their trade as some workers misrepresented their experience to the agencies.
13. In 2015/6, the claimant worked on a contract to refurbish the Gaiety Theatre in Ayr. This coincided with the time he took on a supervisory role. The claimant was responsible for the other painters and decorators on site and was unhappy with the quality and number of agency staff supplied to complete the job, which went on for some time. The contract itself was a difficult one with different trades being required to work at different times.
14. The claimant did not raise a grievance either on a formal or informal basis about any matter concerned with this contract.
15. The claimant was also unhappy with another significant contract which was around a year or so later to paint student accommodation at a property called Maclay residences. Again the claimant's concern related to the agency staff he was provided with to carry out the work.
16. The claimant did not raise a grievance either on a formal or informal basis about this contract.
17. There were no complaints from the contractor or client about the quality of work carried out on either contract.

18. In late 2017, the claimant carried out some work on a contract in Brussels on behalf of the respondent. The claimant was unhappy that he was not required for longer on the contract, that he had to drive to Brussels rather than travel by plane and that he was not paid at the hourly rate which he expected.
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19. The claimant did not raise any grievance about this matter either and in fact was paid a daily rate on the basis that he worked a 7-day week even if he didn't actually work 7 days.
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20. The claimant did not refer to any of these issues either in his claim form or raise them with the respondent in run up to his resignation.
21. The claimant had similar concerns about a contract which was being carried out at Castlebank Place student accommodation in 2018 in the lead up to his resignation.
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22. On 6 April 2018, the claimant had a meeting with Mr Paterson to discuss arrangements for labour for the coming week at Castlebank Place. The meeting planned the allocation of labour from Monday. A diagram was drawn illustrating what had been arranged. The meeting was amicable and the claimant and Mr Paterson joked about the quality of some of the agency workers they had been supplied with in the past.
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23. Mr Paterson advised the claimant that he would meet the claimant on site on the Monday morning.
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24. The claimant called Mr Paterson on the Monday when he had not arrived at the site at 7.30am. The claimant raised his voice during this call and expressed his extreme displeasure at Mr Paterson not being in attendance. His behaviour was inappropriate towards a line manager.
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25. Mr Paterson then attended the site and labour was allocated in accordance with the previous arrangements.

26. On 10 April, the claimant was asked by Mr Paterson to attend the office after work. He was not advised of the purpose of the meeting.
27. When the claimant attended the respondent's offices, Mr Paterson raised with him the call which had been made the previous day and indicated to the claimant that his conduct had not been acceptable.
28. The claimant was extremely unhappy at being criticised and raised his concerns about the agency staff who were allocated to the contract. The claimant then advised Mr Paterson that he was resigning. The meeting was not a formal meeting or part of a disciplinary procedure.
29. The claimant then called his wife who came to pick him up after the claimant had cleared his belongings out of the respondent's work van, which he used.
30. Following advice from a friend, the claimant sent a text to Mr Paterson the following day seeking to withdraw his resignation. The claimant then confirmed this intention in writing in a letter dated 11 April.
31. The respondent wrote to the claimant by letter dated 12 April, prior to receipt of the letter from the claimant, asking the claimant to meet with them to discuss the circumstances of the claimant's resignation and consider whether the retraction would be accepted.
32. The claimant responded by letter dated 15 April, indicating that he was now signed off work with work related stress and wished to communicate by letter until he felt better.
33. The respondent then wrote to the claimant by letter dated 17 April setting out its position in relation to the various matters raised by the claimant in his letter of 11 April.
34. A meeting ultimately took place on 18 May between the claimant and Mr Paterson. The claimant was accompanied by a Mr Sommerville at the meeting.

35. The claimant was paid statutory sick pay between 11 April and 18 May.

36. During the meeting on 18 May, the claimant indicated that he couldn't work with the respondent any more due to stress caused by what he referred to as 'unskilled' workforce provided to him. There was no mention during the meeting of any of the other contracts the claimant had worked on previously.

37. At the meeting, the claimant again resigned and provided a letter of resignation which he had brought with him which was dated 7 May. He did not make any mention of issues which caused him concern between 2015 and the most recent contract on which he was working.

38. The Tribunal therefore found as a matter of fact, that the claimant resigned in response to Mr Paterson's questioning his conduct in the call he made to him following Mr Paterson not attending the site when the claimant expected him to do so.

39. The claimant was paid for his outstanding holiday pay to the date of termination.

40. The claimant started work with another contractor on the next working day following his resignation.

Observations on the evidence

41. The claimant's evidence about the contracts on which he worked which caused him concern was vague. He could not remember dates or in some cases even the years of the contracts. The Tribunal formed the impression that the claimant was retrospectively seeking to find issues about contracts on which he had worked, which had not caused him particular concern at the time.

42. There were a limited number of conflicts on the evidence of the claimant and Mr Paterson. The main conflicts related to whether Mr Paterson had agreed to attend the site at 7.30am on Monday 9th April or whether he had simply

said that he would attend in the morning. The Tribunal preferred the evidence of Mr Paterson in this regard.

- 5 43. The second conflict related to the what the claimant had been told about the purpose of the meeting with him on 10th April. The claimant said that he understood the meeting to be about the ongoing work, whereas Mr Paterson indicated he was clear that the meeting was to be about the phone call the claimant had made to him the previous day. The Tribunal concluded that in fact the claimant had not been told what the purpose of the meeting was and had, probably with good reason, assumed that this was about the job itself.
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44. Neither party specifically raised the issue of whether or not the claimant's employment continued in light of the attempt by the claimant to withdraw his first resignation. In any event, the Tribunal concluded that as the respondent paid the claimant sick pay between his initial resignation and his second resignation, the withdrawal of the initial resignation by the claimant was accepted by the respondent.
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Relevant law

- 20 45. Section 95(1)(c) of the Employment Rights Act 1996 states that 'an employee is dismissed by his employer for the purposes of this Part 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.'
- 25 46. It is well accepted that the circumstances envisaged by section 95(1)(c) might not arise from a single act. An employee is entitled to resign in circumstances where he or she has been subjected to a course of conduct where any individual circumstance may not have caused the resignation, but taken together with other circumstances can amount to a fundamental breach of the employee's contract of employment.
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Submissions

47. It was submitted on behalf of the claimant that the respondent's conduct towards the claimant over a lengthy period, taken together with the conduct of Mr Paterson on 9th and 10th April entitled the claimant to resign.
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48. It was submitted that the respondent did not allocate sufficient labour to allow the claimant to do his job to the required standard over the period (which was unspecified). The Tribunal was referred to the case of *London Borough of Waltham Forest v Folu Omilaju [2004] EWCA Civ 1493*, which provided a summary of the cases which dealt with a constructive dismissal where it was alleged that there was a last straw which caused an employee to resign.
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49. In particular, it was submitted that the contracts at the Gaiety Theatre, Maclay and Castlebank Place Halls of Residence taken together with Mr Paterson's conduct in questioning the claimant and failing to provide an apology at the meeting on 18 May, amounted to a fundamental breach of mutual trust and confidence.
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50. It was also submitted that the respondent had failed to follow the ACAS Code of Practice in treating the claimant's letter of 11 April as a grievance and in not permitting the claimant to be accompanied at the meeting with him on 10 April.
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51. The respondent submitted that no grievances had ever been raised by the claimant or indeed any other employee against Mr Paterson personally or in relation to the provision of agency staff.
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52. Mr Paterson indicated that there had never been any complaints about the contracts on which the claimant worked and that they had always been completed to the standard required.
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53. Mr Paterson said that the claimant was a first-class tradesman and that they were sorry to lose him. He also indicated that the meeting on 10 April was not a disciplinary meeting.

54. It was also submitted that it was apparent from the beginning of the meeting on 18 May, that the claimant intended to resign and the respondent questioned whether in fact the claimant had obtained alternative employment before resigning.

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55. It was submitted that there was support available to the claimant 24/7 from Mr Paterson and Mr Allison, both of whom always had their mobile phones on and worked over their holidays.

Discussion and decision

10 56. The Tribunal was required to consider whether the alleged conduct of the respondent constituted a breach of the implied term of trust and confidence which is incorporated into every contract of employment. In particular, the Tribunal was required to consider the following conduct.

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- a. the nature of the work and the demands placed on the claimant when working on the contracts on which he worked prior to the Castlebank Place contract;
 - b. the nature of the work and the demands placed on the claimant during the Castlebank contract;
 - 20 c. The respondent's conduct on 9 April in not attending the site at 7.30am;
 - d. The respondent's conduct towards the claimant on 10 April; and
 - e. The respondent's conduct towards the claimant between 10 and 18th April.

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57. As was set out in *Western Excavating v Sharp* [1978] IRLR 27, it is not enough for an employee to resign just because an employer acted unreasonably, the respondent's conduct must amount to a breach of contract. It is the employer's conduct which is relevant, rather than the employee's reaction to it.

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58. The Tribunal therefore considered whether the conduct alleged, either viewed individually or collectively, amounted to a breach of the implied term of mutual

trust and confidence as set out in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, In that case the term was held to be that "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

59. In determining this matter, the Tribunal considered

- a. whether the conduct, when viewed objectively, was calculated or likely to destroy the relationship of mutual trust and confidence, and
- b. if so was there reasonable and proper cause for the conduct, and
- c. if not, did the claimant resign at least in part because of a material breach of contract by the respondent.

60. The Tribunal concluded that the conduct alleged, whether viewed individually or collectively, was not calculated or likely to destroy the relationship of mutual trust and confidence.

61. While the Tribunal accepted that the contract at the Castlebank Place Halls might have presented the claimant with challenges in relation to managing agency staff, this fell well short of a breach of mutual trust and confidence.

62. Further, the conduct of the respondent towards the claimant both on 9th and 10th April did not amount to a breach of contract.

63. In any event, the Tribunal concluded that the claimant did not resign in response to the contracts on which he worked. Rather, the Tribunal concluded that the claimant's resignation was caused principally by the criticism made of him, which did not amount to a breach of contract or unreasonable behaviour.

64. While the Tribunal acknowledges that the meeting on 18 May could have taken the form of a formal grievance hearing, the claimant was invited to set out his concerns by the respondent in a manner consistent with a grievance

procedure. He was accompanied at the meeting. The claimant indicated in evidence that he was taken aback by the invitation to set out his concerns and indicated that he could not work with the respondent any more due to stress. The failure of the respondent to deal with the claimant's concerns did not amount to a breach of contract.

65. In all of these circumstances, the Tribunal concluded that the claimant resigned voluntarily from his employment, that this did not amount to a constructive dismissal and that therefore his claim is dismissed.

Employment Judge: Amanda Jones
Date of Judgment: 13 December 2018
Entered in register: 14 December 2018
and copied to parties