



EMPLOYMENT TRIBUNALS

Claimant: Mr S Kilroy

Respondent: The Phoenix Academy Trust

Heard at: Nottingham **On:** Wednesday 24 April 2019

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: Mr Hamilton, Solicitor

Respondent: Mr Hoyle, Representative

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal pursuant to Section 95(1)(c) of the Employment Rights Act 1996 succeeds.

RESERVED REASONS

1. Mr Hamilton represented the Claimant whom he called to give evidence on his own behalf. He also called Ms Stacy Smith, Mr Kilroy's partner. Mr Hoyle represented the Respondents and he called Mr J D M Rose the Chairman of the Governors of Phoenix Academy Trust. He also called Ms J Harvey a Parent Governor for Phoenix Academy Trust. There was an agreed bundle of documents and references are to page numbers in that.

Issues and the relevant law

2. I held a case management discussion with the parties respective advisers which led to the following case management summary:-

"1. Mr Kilroy's principle claim is that of constructive unfair dismissal. It was not clear to me from the pleadings how the contract of employment was brought to an end and by whom. The matter was clarified and it is common ground:-

1.1 That by a telephone call on 23rd July 2018 from the Chairman of the Governors to Mr Kilroy the outcome of a disciplinary hearing was communicated to the effect that Mr Kilroy was summarily dismissed.

1.2 Mr Kilroy's solicitor posted to the Respondents on that day a letter of resignation. It is common ground that that letter has no effect **to bring an end to the contract of employment** (added for clarity).

1.3 Mr Kilroy appealed his dismissal and as a result of that appeal Mr Kilroy was reinstated and that was communicated to him on 16 October 2018.

1.4 By letter of 22 October 2018 Mr Kilroy resigned and it was that letter of resignation that brought the employment contract to an end.

2. Thus the issues in relation to constructive unfair dismissal are:-

2.1 Was the employer 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 (in this case the implied term of trust and confidence) then the employee is entitled to treat himself as discharged from any further performance?

2.2 If so did Mr Kilroy resign as a consequence of that breach?

2.3 Did he do so promptly ie without affirming the contract?

3. There was a discussion whether there was sufficient time given that the case is listed for one day on 7 March. The parties are of the view that there is a reasonable prospect of concluding the evidence at least on that day. It is therefore preferable that the matter proceeds rather than postponed which neither party wants."

Relevant Law

3. The relevant law is Section 95(1)(c) of the Employment Rights Act 1996:-
“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2):-

(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.”

4. As to case law given that Mr Kilroy relies upon a breach of the implied term of trust and confidence. It is for the Claimant to show that the Respondent (The Trust) did not without reasonable or proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

5. A breach of the implied term of trust and confidence will always be a significant breach ie a repudiatory breach if proven.

Findings of fact

6. Mr Kilroy had been a Teacher for 28 years and since 1998 he taught first at Stubton Hall Boarding School which was replaced by the Phoenix School in 2003 and became the Phoenix Academy Trust in 2013. He became Assistant Head at the Trust in 2006 and Deputy Head in 2011 and from September 2014 he became Vice Principal, eventually becoming Acting Principal in March 2018. The Trust is a mixed BESD (Behaviour, Emotional and Social Difficulties) Secondary School.

7. In early 2018 discussions began between the Trust and a body known as Community Inclusive Trust which led to the acquisition of the Trust by CIT. It is not clear to me when that transfer actually took place. What is clear is that the disciplinary process which led to Mr Kilroy's dismissal which was communicated to him orally on 23 July was conducted by persons representing CIT.

8. I found Mr Kilroy to be a straightforward and truthful witness. Very little of his evidence was contradicted by the Trust's 2 witnesses who seemed to have done precisely what they were advised to do.

9. Mr Kilroy's evidence which I accept is that on 22 January 2018 he made a phone call to an acquaintance, Chris Armond who was employed by CIT. He rang Mr Armond to ask what the process of transfer to CIT would be and Mr Armond asked him "do you want a pay-out". Mr Kilroy responded in the negative and said that he wanted to be considered for the permanent role of Head Teacher.

10. On 11 May 2018 he met Mr Armond and Ms Louise Perkins at the Trust and was questioned about discrepancies between the inventory of pictures and artworks and a different inventory sent by Mr Kilroy to Mr Armond.

11. On the same day Mr Armond met with Mr Kilroy and Mr Kilroy was again questioned about the differences between the two inventories. Mr Armond said "if you resign this matter will go away". Mr Kilroy's response was "why would I need to resign. What's the issue?".

12. On 14 May 2018 at short notice Mr Kilroy met with Mrs White, the HR lead of CIT. The notes of that meeting are at pages 105 to 108. Mrs White said as follows:

"AW explained that a concern had come to light regarding the School's artwork/painting. AW further explained that she had been asked by the Chair of the Governing Body to carry out an investigation. As Investigation Officer it was her responsibility to fact find in respect of the investigation. AW would be asking questions and giving SK the opportunity to provide answers." That process carried on and AW concluded that because the investigation could be of a serious nature the Chair of Governors has confirmed in an e-mail that you are to be suspended on full pay."

A letter to that effect was handed over, see page 109/110.

13. Mrs White at her instigation met with Mr Kilroy for an off the record meeting. The meeting took place on 16 May at Mr Kilroy's home. Mrs White handed over the minutes of the meeting of 14 May which led to Mr Kilroy's suspension and there was a discussion about the returning of paintings that belonged to the school which were currently stored at Mr Kilroy's house. Mr Kilroy expressed his concern about the fact that he was the exam officer and that there was work that required to be done and offered to help.

14. Mr Kilroy's evidence is that Mrs White stated that he could resign. Mr Kilroy's response was "why do people keep telling me to resign. Why would I need to do that?". Mrs White's response was that if you resigned all of this would go away. I note at this stage that Mrs White was present during the hearing but did not give evidence.

15. Mr Kilroy records in his evidence in chief that about that time ie mid-May he formed the belief that trust and confidence between employer and employee had broken down.

16. On 5 June 2018 Mr Kilroy was by letter invited to attend an investigatory meeting "to investigate concerns that have been raised in relation to your responsibilities towards the pupils concerning exams and assessments". Mr Kilroy responded asking for further and better particulars including any documentation that was to be used. Mrs White's response is at page 116 effectively saying that any material would be supplied on 20 June.

17. The meeting did take place on 20 June and the lengthy notes are at page 116A to 116F. There was a further discussion of art work and additional concerns in respect of examinations were also put forward. They included alleged failure to enter pupils into exams, alleged failures to provide access, concerns regarding BTEC subjects and other subjects.

18. On 22 June Mrs White rang Mr Kilroy and I accept that his paragraph 48 of his proof of evidence accurately sets out that telephone conversation. As part of that conversation Mrs White invites Mr Kilroy to consider a compromise agreement. Mr Kilroy indicates that he would need to get legal advice.

19. I accept that a subsequent telephone conversation instigated by Mrs White on 26 June took place and again Mrs White invites Mr Kilroy to consider a compromise agreement as an option. On 27 June Mr Kilroy met with Mrs White at the Trust's premises in order to further clarify the position about the ownership of paintings at the Trust's premises. Again Mrs White invited Mr Kilroy to consider a compromise agreement and suggested "that £20,000 sounded like a good figure". When Mr Kilroy did not respond she said "£30-40,000". Mr Kilroy indicated that it should be a figure in excess of £50,000 which Mrs White wrote down and said she would take it back to CIT.

20. On 5 July Mr Kilroy is invited to a disciplinary hearing, see 138 and 139. The allegations to be addressed were as follows:

"(1) Between September 2017 to July 2018 you grossly negligent (sic) in your duties as an exams officer when you failed to enter students into exams and/or provide access as evidenced by the attached.

(2) During your employment you had unauthorised possession of school property when you took paintings from the school as evidenced by the attached.

(3) During your employment you may have sold school property without authorisation and/or lost several paintings belonging to the school which has caused unacceptable loss as evidenced by the attached.”

Mr Kilroy was warned that summary dismissal might be a consequence.

21. Attached to the letter was Mrs White’s investigation report which we see at 143 to 149.

22. The disciplinary hearing was held on 12 July chaired by Mrs B Herbert of Lloyds Employment Law, Mr Rose the Chair of Governors, Mr Christopher Lawrence another Governor and Ms Selby the Clerk to the Governors. Mrs White was also present. The minutes of the disciplinary hearing begin at page 151A and conclude on 151W. There is a thorough discussion of the allegations against Mr Kilroy. Mr Lawrence is recorded as making 3 comments and Mr Rose only one. It is clear that Ms Herbert not only chaired but directed the meeting. Ms Herbert concludes at page 151V:

“Has anyone else got something else that they would like to say? No. The plan then is to do some investigation into what you said today and a decision will be made to you. I can’t give you a time frame as I don’t know how long the investigation will take and obviously it’s not something to be rushed, you will remain suspended for the time being and I would say if anything pops into your head in the next day or so and you want to e-mail Ann or Denise which is the best person to go through.”

23. There is no evidence before me that any further investigation was carried out. Ms Herbert did not give evidence.

24. On 23 July Mr Kilroy instructed his solicitor to write to Mrs Herbert in the form of the letter that we see at 153 and 154. Although there is some confusion as to when the letter was actually sent it is common ground that before it was received by either Mrs Herbert or the Trust itself Mr Rose the Chairman of Governors had telephoned Mr Kilroy on 23 July to inform him that he had been dismissed with immediate effect.

25. It is important to note what the letter at 153 said. The final two paragraphs read as follows:

“He now finds himself driven to the conclusion that there is no way in which he will be able to return. He feels that he is the victim of the current situation in which Phoenix Academy is being absorbed into CIT Academies, that he is not wanted, that the spurious allegations against him are a ruse to get rid of him and that if he were to return he would find himself under constant unwelcome pressure over his last 3 years.

We are in no doubt that the circumstances as set out above amount to a constructive dismissal and it is our client's intention to regard himself as dismissed. This will inevitably give rise to a claim for unfair dismissal. We would welcome any proposals that Phoenix Academy may have by way of response."

26. The dismissal was eventually confirmed in a letter of 1 August 2018 at pages 156 to 158. The allegation in relation to gross negligence as an exam officer was upheld. The other two allegations concerning art work were not upheld because the Trust had been unable to speak to the former Chair of Governors Mr Bush. The letter concluded that the allegation which was upheld was gross misconduct and Mr Kilroy was summarily dismissed with effect from 23 July.

27. The letter pointed out that Mr Kilroy had the right of appeal. By letter of 6 August Mr Kilroy did appeal by way of letter to the Clerk of the Trust. There were delays in arranging the appeal. During that period of delay Mr Kilroy complained that he had not been paid his holiday pay, that the matter of collection of his own property from the school had not been resolved and that he had heard nothing about the appeal.

28. At 192 is a letter of 30 August inviting Mr Kilroy to an appeal hearing. It is from Mr Rose. Mr Kilroy was to attend an appeal to be "heard by Mr Stuart Farrah, a consultant from Lloyds Employment Law Consultancy on Tuesday 4 September at Lloyds Employment Law offices etc. Mr Kilroy says that he acknowledged that letter by way of a telephone call to Mr Rose informing him that he would attend. Mr Kilroy did attend on Mr Farrah on 4 September to be told that Mr Farrah had been informed that the meeting had been cancelled because the academy had informed Lloyds that Mr Kilroy would not be attending. I accept Mr Kilroy's evidence that he had done no such thing. The meeting was rearranged for 12 September and it did go ahead and the lengthy and thorough notes begin at page 197 and conclude at 219. There are only two people present namely Mr Farrah and Mr Kilroy. Having read those minutes which are in fact a transcript it seems to me that a reasonable observer would have come to the conclusion that having regard to the explanations put forward by Mr Kilroy there was little or no foundation for the conclusion that he had been guilty of gross negligence in his role as exam officer.

29. On 19 September there is a further significant letter from Mr Kilroy's solicitors to Mr Farrah. The letter complains about the failure to make arrangement for the collection of Mr Kilroy's personal possessions and goes on:

"It seems that those with whom our client is communicating are unaware that irrespective of the result of the current appeal there is no question of our client returning to his former employment and, as he is (sic) points out to us as well as them, his personal possessions are quite separate from the outstanding issues. He is then told that the Governors are being advised by Lloyds Employment Law Consultancy."

30. The letter goes on to say that the further delay in transmitting the result of the appeal was unacceptable.

31. There is a document at page 222 from Mr Farrah dated 13 September ie before he met with Mr Kilroy yet setting out a fair summary of the meeting he did hold with Mr Kilroy.

32. The letter then goes on to give advice as to the approach a Tribunal would take should Mr Kilroy bring a claim of unfair dismissal. The e-mail was sent to Ms Selby and Ms White. Neither of them have given evidence as to what happened to it.

33. On 8 October 2018 Mr Kilroy brought the proceedings which are the subject of this decision and I note that that was before the conclusion of the appeal was communicated to him. I note also that there is recorded as part of the narrative to the claim form the following:

“If I was successful in my appeal my intention was to pursue my claim based on constructive dismissal.”

34. Unbeknown to Mr Kilroy or his advisers a further hearing took place to which Mr Kilroy was not invited at all. A letter from Mr Rose at page 229 of 2 October indicating “that the two Governors who sit on the Appeals Committee have requested further documentation before being able to reach a satisfactory conclusion” was sent to Mr Kilroy. In fact the Appeal Committee which consisted of Ms Harvey and Mr Price met on 11 October. Ms Harvey’s recollections of the hearing were almost none existent. In her evidence she says that they concluded that on the basis of the evidence that the issue was one of capability and not one of gross negligence. The one matter that she was able to confirm was that the Appeals Committee were informed that Mr Kilroy had declined to attend. I accept Mr Kilroy’s evidence that he did not so decline because he was never invited.

35. The outcome was that Mr Kilroy was reinstated with effect from 23 July but was issued with a final written warning.

36. I have to say that the outcome letter at pages 230 to 232 is to put it charitably bizarre. At page 231 it opens with the following:

“Your job description was reviewed and it was evident that this is a capability issue as opposed to gross negligence. It was also noted that there had been a financial loss to the Academy with regard to the late entry of exams. You were negligent in the following areas.”

It then lists 11 matters of alleged negligence which all appear to relate to his role as Acting Vice Principal but none of which appear to relate to the original charge for which he was dismissed. Nor could any of them be properly described as negligent. However notwithstanding its manifest defects it seems to have been accepted by both Mr Kilroy and his solicitor.

37. On 22 October Mr Kilroy’s solicitor wrote to the Trust and informs them in unequivocal terms that Mr Kilroy would not be returning to work. As already agreed at the Preliminary Hearing it is that letter that brought an end to the contract of employment.

Conclusions

38. Having regard to those findings of fact, has Mr Kilroy proved that there has been a breach of the implied term of trust and confidence. I remind myself that that is to be judged objectively. Firstly there are the conversations with Mr Armond which took place respectively in January and May. There are also the conversations with Mrs White that took place in May and June 2018. Those with Mr Armond took place before even an investigation into allegations of misconduct had begun and those with Mrs White during the investigation and subsequent disciplinary procedure. On no less than 5 separate occasions Mrs White in effect invited Mr Kilroy to resign. At that point Mr Kilroy had clearly formed the view that his employer wished to be rid of him. Objectively judged in my view he was correct to form that view.

39. As to the disciplinary process I accept Mr Hoyle's submissions that there were reasonable grounds upon which to investigate the 3 allegations for which Mr Kilroy was held to account.

40. As to the allegations concerning the art work the Trust were right to conclude, in the absence of evidence from Mr Bush that they could not be substantiated and it was correct to find them not proven. As to the allegation of neglect in his duties of exams officer again it was reasonable to investigate and to bring Mr Kilroy to account by way of a disciplinary hearing. However it is not clear to what extent the Trust (in the person of Mrs Herbert) took Mr Kilroy's explanations seriously. It appears to me that it was not until Mr Kilroy's meeting with Mr Farrah that Mr Kilroy's explanations were taken seriously. As noted above (see paragraph 23) Mrs Herbert indicated that there would be further investigations after the disciplinary meeting but there is no evidence that any were carried out. It is hard to derive any sense from the letter setting out the outcome of the appeal hearing given its contradictory and illogical conclusion save that there must have been doubts as to the finding of gross misconduct.

41. It is clear beyond doubt that on or about 23 July Mr Kilroy formed the view that he could not return to the Trust and in accordance with his instructions the letter at page 150 and 153 was sent in those terms. Had this letter not been rendered a nullity by Mr Rose's telephone call informing Mr Kilroy that he had been summarily dismissed and had Mr Kilroy then brought proceedings swiftly, in my view a claim of constructive unfair dismissal would have succeeded.

42. Thus Mr Kilroy and his advisers were placed in a quandary. Since he had been dismissed, any claim then open to him would have been one of unfair dismissal. Plainly not pursuing a contractual appeal procedure would have been a factor in any such litigation.

43. Therefore the question is whether Mr Kilroy affirmed the contract by pursuing the appeal process given that he was no longer able to resign because the employer had brought an end to the contract of employment. It is clear from his evidence and the contemporaneous documents that Mr Kilroy wished to counter the allegations being made against him, clear his name and thereby support his family financially.

44. Can affirmation be implied from Mr Kilroy's adoption of the contractual appeal process? Is that an unequivocal act from which it may be inferred that he intends to go on with the contract regardless of the breach of the implied term of trust and confidence.

45. In my judgment it cannot. On a number of occasions following the dismissal on 23 July Mr Kilroy made it plain that he did not intend to return to his employment irrespective of the outcome of the appeal. He did so in his meeting with Mr Farrah. His solicitor did so in their letter of 19 September, see page 220 and further his claim form to the Tribunal makes it clear that if his appeal was unsuccessful he was pursuing a claim of unfair dismissal but if it were successful and led to his reinstatement then he would then resign and pursue a claim of constructive unfair dismissal.

46. Finally there is no doubt that Mr Kilroy resigned primarily because of the delays in the disciplinary process and primarily the impression that was objectively justified that one way or another the Trust wished to be rid of him.

47. The claim of constructive unfair dismissal therefore succeeds.

Remedy

48. That therefore leaves the question of remedy to be determined. Given that both parties are represented I would hope that the parties can come to terms. I would mention that the Claimant's statement in his schedule of loss to the effect that he has found himself unable to contemplate alternative employment is unlikely to satisfy me that he has taken reasonable steps to mitigate his loss. If the parties cannot come to terms then there will need to be a remedy hearing and I have made a direction accordingly.

Employment Judge Blackwell

Date: 25 April 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE