EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr A Adom **v** **Axis Security Services Ltd**

Heard at: London Central
On: 17 – 18 April 2019

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr R Leong, solicitor
For the Respondent: Mr P Paget, solicitor

JUDGMENT

The claimant's remaining claim, being that he was constructively unfairly dismissed is dismissed pursuant to rule 37 Employment Tribunal Rules of Procedure 2013.

RESERVED REASONS

Introduction

1. By a claim presented on 28 March 2018, the claimant brought a number of claims. Those claims included constructive unfair dismissal, disability discrimination, direct sex discrimination, failure to pay wages, and breach of contract. The claim was supported by a lengthy narrative, albeit there was a lack of clarity. The response was accepted on 10 July 2018.

2. By letter of 20 July 2018, Regional Employment Judge Potter ordered the parties to agree a list of issues. At a preliminary hearing on 23 July 2018, the claimant was ordered, by Employment Judge Tayler, to provide "further particulars and/or apply to amend the claim to fully particularise the claim (including setting out in chronological order what was said or done, by whom, the date and what claim it is said to give rise to) and answering the request for additional information in the response form."

3. The matter was listed for a further preliminary hearing on 22 August 2018. On 30 July 2018, the respondent made various applications, including an application for wasted costs. On 2 August 2018, the claimant's solicitor objected. On the same day, 2 August 2018, the claimant's solicitors wrote to the tribunal applying for the hearing of 22 August 2018 to be vacated. The letter contained the following paragraph: "The claimant has reduced his claim to only one – unfair constructive dismissal."

4. On 2 August 2018, the claimant also filed further and better particulars relating to unfair constructive dismissal.

5. On 13 August 2018, the respondent invited the tribunal to strike out all claims, other than the constructive unfair dismissal claim. This led to a judgment by Employment Judge Tayler of 20 August 2018 specifically dismissing the complaints of unauthorised deduction from wages, discrimination on the ground of sex, discrimination on the ground of disability and breach of contract. It states, "The claimant's remaining claim of unfair dismissal will proceed on the date of which has already been notified." The hearing was reduced to two days and was to proceed on 4 December 2018. There was no further case management discussion. The case did not proceed on that date and was rescheduled for 17 and 18 April 2018, which is when the matter came before me.

6. On day one of the hearing, unfortunately, the claimant's representative had been involved in a road traffic accident. I adjourned the matter, so the claimant could clarify whether he was able to obtain representation from either that representative or the solicitor who had been acting previously, Mr Leong. I noted that the constructive unfair dismissal claim was unclear, and the claimant should be prepared to clarify the nature of the claim. In particular he should be able to identify the breach and the reason for his resignation.

7. The claimant indicated that he believed that there were continuing claims of discrimination which he could pursue. Consideration of that matter was reserved for day two.

8. On day two, Mr Leong attended, as the original advocate, whilst discharged from hospital, was not well enough to attend.

9. Mr Leong agreed that the claimant had withdrawn all claims, other than the constructive unfair dismissal claim. Therefore, the only live claim before the tribunal was the unfair dismissal claim.

10. Mr Leong indicated that he wished the tribunal to exercise its discretion to allow the claimant to proceed with the claims that had been withdrawn.

11. Mr Leong made a number of submissions. He relied on the claimant's mental health, to the extent that the claimant could not give instructions. He indicated that the solicitors were on "a frolic" of their own in withdrawing the claim. I noted that proceeding with such a submission may lead to his client waiving privilege, and he confirmed we would take instructions. Finally, he suggested that there was no prejudice to the respondent, as they were able to prepare adequately for the case.

12. Following an adjournment, I noted the case of **Khan v Heywood Middleton Primary Care Trust** [2006] IRLR 793, CA, which confirms that withdrawal is a final act. I confirmed that in my view there was no discretion for me to allow the claimant to proceed with the withdrawn claims. The claims had been dismissed. There was no power for me to revisit that judgment. It was open to the claimant to seek to appeal the judgment and/or seek a reconsideration from Employment Judge Tayler.

13. I allowed an adjournment because Mr Leong indicated he was not able to adequately identify the breach of contract relied on in the constructive unfair dismissal claim, and he needed to take instructions. We consider this carefully when he returned.

14. The claimant alleges that the respondent breached the terms of mutual trust and confidence. It was specifically conceded that the claimant alleges no other contractual term was breached.

15. It is accepted that he resigned by email of 12 January 2018. Mr Leong confirmed that the claimant relies on the events of 10 January 1998. The claimant had been on sick leave from March 2017. He was due to attend a sickness absence meeting, but had not attended. He was contacted by Ms Julie Blackmore, HR manager, by telephone. He alleges that he then handed the telephone to his volunteer carer. The claimant alleges that the breach of contract occurred when Ms Blackmore discussed with the carer, Ms Tachie private and confidential issues relating to the claimant's absence and work. It is said that that single action was, in itself, a breach of the term of mutual trust and confidence and that it justified, and caused, his resignation.

16. The claimant puts an alternative case, where it is said that the discussion with Ms Tachie was a last straw. I therefore explored what further conduct was relied on as the course of conduct for which the discussion on 10 January 2019 was the last straw. We discussed this at length. The detail of the claimant's position is not set out in the claim form, or anywhere else. However, a number of points have become clear. The previous conduct

relates entirely to the actions of his manager, Ms McCall. There are a number of incidents referred to in his claim form. There are a number of incidents referred to from 2014. There is reference to his contacting Ms McCall as he felt unwell. He alleges he requested permission to call an ambulance and was told "It is up to you - you cannot leave the site unsupervised." He says he called an ambulance and left work. It is alleged in 2014 that Ms McCall came to the site where the claimant was working and accused the claimant of disliking her and upon his denial, stated "That is non-my business, but we will soon see who is in charge." There is a further reference to October 2014 when the claimant requested time to go to Ghana to visit his sick father. This triggered a policy which replaces staff who were absent for more than six weeks. He alleges Ms McCall stated, "Who do you think you are?" and went on to say, "I want to make it clear to you today, that you are a nobody, just a security officer and if you feel your you are intelligent enough, go and find another job." There is reference to 20 February 2017, when it is alleged Ms McCall called the claimant on a regular basis "with an unknown number" when he took the call, she replied, "Are you stupid, and how dare you talk to me in this way?" It is alleged she threatened the claimant saying, "We will see how long you have got left in this company, nonsense."

17. I have considered the claimant's further and better particulars. There appeared to be a number of new allegations which do not appear in the claim form. There is reference to Ms McCall alleging the claimant left site without permission in August 2015 and hence "got him suspended". It is alleged that he was replaced at Inter Park House. This appears to relate to the time he went Ghana. There is general reference to Ms McCall's negative attitude. There is also reference to him being ill at work and feeling dizzy in 2014. It is unclear whether this relates to the ambulance incident.

18. The further particulars also state, "The allegation that investigations were being conducted against the claimant prior to his sickness are untrue and strongly denied." I specifically explored this. It is respondent's case that there were allegations of misconduct against the claimant, in particular relating to unauthorised absence, which he was required to answer. This occurred before he started his sickness absence in March 2017. Whilst further and better particulars clearly deny that such an investigation had started, it was admitted before me that the investigation had started. It follows that the further and better particulars were misleading in this respect.

19. It follows that the breach of contract is said to be by Ms Blackmore discussing with the claimant's carer, Ms Hitachi, confidential matters concerning the claimant's work on sickness absence on 10 January 2018. That is in itself said to be a breach the term of mutual trust and confidence. To the extent it is put, in the alternative, as a last straw incident, the course of conduct relates entirely to the way the claimant was treated by Ms McCall in relation to the matters stated above.

20. Following clarification of the alleged breach of contract, the respondent applied to strike the claim out on the basis that there was no reasonable prospect of success; I heard submissions.

21. Mr Paget submitted that Ms Blackmore's contact with the claimant, and the subsequent conversation with the carer, occurred because of a legitimate, and reasonable, continuing sickness absence procedure. He says contacting the claimant, and thereafter discussing briefly the position with the carer when she intervened, cannot be seen as a breach of contract, whether in itself, or as a blameworthy last straw. In any event, he submits that the action of Ms Blackmore must be seen entirely independently from the action of Ms McCall. The general management of the claimant was not relevant to the sickness absence procedure. In any event, he says that even in Ms McCall's conduct was blameworthy, in any sense, there could be no possible contact with Ms McCall since the claimant went on sick leave in March 2017 any breach in relation to that must therefore have been waived.

22. It was the claimant's position that there was a major incident which caused the dismissal, being the breach of confidentiality on 10 January 2018. It is alleged that the incident was serious, and the tribunal cannot conclude there was no reasonable prospect of showing that that was a fundamental breach of contract. He says that the claimant's letter of resignation clearly relies on the breach and that a two-day delay cannot be taken to be sufficient to waive the breach. Further, he stated it is clear that the alleged breach of confidence could be a last straw incident.

23. The respondent's position was that there should be deposit order if the claim was not struck out. The claimant objected.

<u>The law</u>

24. Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer’s conduct.

25. The leading authority is **<u>Western Excavating ECC Ltd -v- Sharp</u> [1978] ICR 221**. The employer’s conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **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 then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer’s conduct. He is constructively dismissed.**

26. In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer’s breach caused

the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

27. In last straw dismissals there can be a situation where individual actions by the employer, which may not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

28. The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

29. **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

30. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.

31. In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **…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.**

32. I would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

33. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response. The power to strike out a claim is set out in rule 37 Employment Tribunal Rules of Procedure 2013.

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

34. Before making a strike out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

35. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute (see, e.g., **North Glamorgan NHS Trust v Ezsias** [2007] EWCA Civ 330). Whilst this case dealt with the strike out in the context of discrimination cases, it emphasises the importance of exercising caution when relevant facts are in dispute.

36. The Court of Appeal in **Ahir v British Airways Ltd** [2017] EWCA Civ 1392 made it clear there is no general proposition that where there is a potential disputed facts a claim must proceed. It is necessary to look carefully at the facts and to consider the nature of the dispute. Underhill LJ put it as follows:

> **16 … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success.'**

At paragraph 19 he went on to say:

> **… in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not**

> **what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.**

And at paragraph 24

> **… As I already said, in a case of this kind, where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so...**

37. It can be seen from **Ahir** that it is not enough for a claimant to assert there is a dispute of facts, and that, therefore, the tribunal is compelled to find there is a prospect of success. First, the claim must be clear. Second, the facts alleged and relied on should be clear. Third, resolution of those facts should be capable of demonstrating the relevant claim whether directly or by way of inference. Fourth, the respondent's explanation should be considered. Fifth, if the explanation is disputed, there should be some plausible explanation for this from the claimant.

38. There is nothing **Ahir** which conflicts with the general proposition that the claimant's case should be taken at its highest on the pleadings see e.g. **Ukegheson v London Borough of Haringey** 2015 ICR 1285.

Discussion

39. In order for the claimant to succeed, it is necessary for there to be a breach of contract, the breach must, at least in part, cause the resignation, and the contract must not be affirmed.

40. The respondent does not seek to strike out on the basis that there is no causational link between the alleged breach of contract and the resignation. It is not alleged that the claimant lost the opportunity to resign because he affirmed the contract, save to the extent that there may be a affirmation of any breach of contract by Ms McCall.

41. The respondent's submissions are based on the assertion that there is no reasonable prospect of the claimant persuading a tribunal that the action of Ms Blackmore on 10 January 2018 amounted to a breach of contract, whether in itself, or as a final straw.

42. The claimant relies on the breach of the implied term of mutual trust and confidence. In order to succeed, a tribunal must find that the employer has without reasonable and proper cause conducted itself in a manner calculated to or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

43. In considering a strike out, it is appropriate that I should take the claimant's case at its height. I have done so. I have considered carefully

the claim form. Even though the claimant does not apply to amend, and even though he has introduced new matters in the further and better particulars, I have then taken them fully into account, as if they were part of the claim. He has not sought to rely on his statement specifically, but I did invite him to refer to it, to the extent that it would support his claim. He has relied on the statement filed by Ms Tachie. I have treated that statement as if it were entirely true. I considered carefully the letter of resignation. To the extent there has been any dispute before me by the respondent as to the relevant facts, I have taken into account only those facts which have been specifically agreed by the claimant.

44. As regards the statement of Ms Tachie, she confirmed she was with the claimant on 10 January 2017 when he received a phone call from the respondent. She says, "I was not allowed to discuss my client information… So I apologise to her that I could not engage in such discussions and ended the call." She described him as "screaming over the phone" saying "can you leave me alone to sleep because I am on antidepressant and not feeling well to speak." She states she rushed to his assistance to find out what the problem was, at which point he handed the phone to her "without saying a word." She says she tried to find out who was on the phone when Ms Blackmore introduced herself. Ms Tachie volunteered that the claimant was sick and not in a position to talk or move from the house. She says Ms Blackmore "insisted that it was a meeting they had been trying to get him to attend for a while which is relating his long-term sickness and investigation." It is said she wanted to know the state of the claimant and whether Ms Tachie could escort him to the meeting as, she was a trained carer. She states that she is a trained carer and knew she was "not allowed to discuss my client information," therefore, she ended the conversation.

45. It follows that on the claimant's own evidence, he knew that Ms Blackmore was on the phone, he handed the phone to the carer, the carer enquired who was on the phone, and there was a brief conversation which referred to the fact the claimant was due to attend at a meeting with the respondent. Ms Blackmore enquired as to how the claimant was and sought confirmation as to whether he could attend with the carer. On the carer's own case, she did not discuss any private and confidential information.

46. It is this conversation the claimant says was, in itself, a breach of the implied term of mutual trust and confidence.

47. It is accepted that the claimant went on sickness absence in March 2017 and never returned to work. Initially he had problems with arthritis. In September, the absence continued because of depression and anxiety. During that time, the respondent was unable to progress the potential disciplinary proceedings against the claimant. The claimant filed various grievances which were dealt with. The claimant makes no specific complaints about those grievances, or the way in which they were handled. It is also apparent that the respondent engaged its sickness

absence procedures, on occasions and the respondent sought to hold meetings. One of those meetings was scheduled for 10 January 2018. There is no suggestion at all that the respondent was wrong to invoke its sickness absence procedure or that in any manner at all, other than the alleged infringement on 10 January 2018, that there was any improper conduct at all.

48. Respondents are often put in a difficult, and sometimes invidious, position when an employee is absent, particularly when there are issues of stress, anxiety and depression. If no contact is made, the employer may face criticism for not offering support and assistance. If contact is made, the employer may face criticism for offering support and assistance, should the employee deem it unwelcome or intrusive.

49. It follows, that when considering whether there is a breach of contract, whilst the employee's perception is a factor which must always be considered, the test is objective. In order for the claimant to succeed in his primary case, it would be necessary for the tribunal to conclude that Ms Blackmore's action on 10 January 1998 was a fundamental breach of contract. This means that her conduct was either calculated to, or likely to, fundamentally damage the relationship of trust and confidence.

50. There is no suggestion that it was wrong for a meeting to be arranged. When the claimant did not attend, it is not suggested that it was improper for her to contact the claimant. It is apparent that the claimant was distressed. His own witness describes him as screaming. He gave the phone to the carer. It is difficult to see how Ms Blackmore could have interpreted that as anything other than an invitation to discuss, at least briefly, the situation with the carer. It would be reasonable to assume that the carer understood the importance confidentiality, and there is at least an implied consent to a discussion. Even on the carer's own evidence, that discussion did not go beyond what could reasonably be seen as a legitimate and proper enquiry. The conversation was concerned only with the claimant's current state, whether he could proceed with a meeting, and whether there was a practical way of holding that meeting. On the carer's evidence, it became clear, after a short time, that no progress could be made that day, and she hung up.

51. I have concluded that there is no reasonable prospect, taking the claimant's case at its height, of a tribunal finding that the action of Ms Blackmore was a fundamental breach of the claimant's contract. It follows that there is no reasonable prospect of success on the claimant's primary case. He cannot establish the breach. It follows there was no right to resign and treat himself as constructively dismissed. It follows that the unfair dismissal claim must fail.

52. I have considered carefully the alternative argument. This is based on the discussion of 10 January 2018 being a final straw.

53. I have regard to **Omilaju**. The last straw does not have to be of the same character as the earlier acts, nor must it in itself constitute unreasonable or blameworthy conduct. But the last straw must contribute to the breach of the implied term of mutual trust and confidence. An entirely innocuous act cannot be a final straw. I have reached the conclusion that there is no reasonable prospect of a tribunal finding that the events of 10 January 2018 were a last straw contributing to the breach of the implied term trust and confidence based on the actions of Ms McCall. There is no connection at all. Whilst the last straw act does not have to be the same character, there must be some contribution, however slight, to the breach. This is a case where the alleged final straw was action which in itself was reasonable and justified and is, essentially, innocuous. Whilst the claimant may have been unhappy, it is clear Ms Blackmore talked with the carer because the claimant invited it. There is no prospect of the claimant succeeding on his alternative argument.

54. I do accept that there is no reasonable prospect of the claimant establishing that he had not, at least, initially, waived any breach by Ms McCall. Contact with had stopped in March 2017. It is apparent that the claimant had multiple issues with her dating back to 2014, but he chose not to resign. It can be argued that a final incident may be sufficient to revive any previous incidents. This would depend upon the nature of any waiver. I have not had any specific arguments on this. It is not argued by the claimant that he was entitled to rely independently on any breach by Ms McCall, or that in some manner the original alleged breaches were revived following his waiver. The action of Ms McCall is relied on only as part of an alleged course of conduct with the last straw being the actions on 10 January 2018 by Ms Blackmore. For the reasons I have already given, I cannot accept there is any reasonable prospect of finding Ms Blackmores actions were a last straw.

55. It follows there is no reasonable prospect of the claimant establishing his arguments that the respondent was in fundamental breach of contract as a result of the actions Ms Blackmore on 10 January 2018. It follows that the claim of unfair dismissal cannot succeed and is therefore dismissed.

____

Employment Judge Hodgson

Dated: 9 July 2019

Sent to the parties on:

10 July 2019

For the Tribunal Office