



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hopper

Respondent: Outwood Grange Academies Trust

Heard at: Teesside

On: 22, 23 and 24 July 2019

Before: Employment Judge Shepherd

Appearances

For the claimant: Mr Robinson-Young

For the respondent: Ms Kight

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal is not well founded and is dismissed.
2. The claimant is not entitled to a redundancy payment.

REASONS

Note: The written reasons provided below were provided orally in summary in an extempore Judgment delivered on 24 July 2019. A request for written reasons was received from the claimant at the hearing. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues

1. The claimant was represented by Mr Robinson-Young and the respondent was represented by Ms Kight.

2. I heard evidence from:

Dale Hopper, The claimant;
Stuart Jones, Director of Technology;
Alison Lister, Director of Business Services.

3. I had sight of an agreed bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 242. I considered those documents to which I was referred by parties.

4. The issues to be determined by the Tribunal were discussed at the commencement of this hearing. They were agreed by the parties' representatives as follows:-

4.1. Was there a dismissal (s.95(1)(c) or s.136(1)(c) Employment Rights Act 1996)?

a. Did the respondent commit to repudiatory breach of the claimant's contract of employment? Or was there an anticipatory breach of contract?

i. What was the repudiatory/anticipatory breach?

ii. When was it committed?

iii. by whom?

b. Did the claimant resign in response to that breach?

c. Did the claimant delay in resigning such that he affirmed the breach?

4.2. If there was a dismissal, was it for the potentially fair reason of redundancy?

4.3. If dismissal is on the grounds of redundancy, was the claimant entitled to a statutory redundancy payment?

4.4. Was it fair and reasonable to dismiss the claimant for that reason, having regard to equity and the substantial merits of the case?

4.5. If the reason for the claimant's dismissal was not redundancy and the claimant was unfairly dismissed, is the claimant entitled to a basic award?

4.6. If a fair procedure was not followed, would following a fair procedure have made any difference (s. 123 (1) Employment Rights Act 1996)?

4.7. In relation to 4.5/6 – did the claimant's conduct contribute to his dismissal?

5. Having considered all the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a

summary of the principal findings that I made from which I drew my conclusions:

- 5.1. The claimant was employed as an IT Network and SIMS Manager at Outwood Academy Redcar. His employment commenced in June 2001 and was transferred to the respondent pursuant to the Transfer of Undertakings Regulations 2006 (TUPE) on 1 October 2017.
- 5.2. Prior to the transfer the respondent had identified a need to restructure the staff at Outwood Academy.
- 5.3. On 12 December 2017 Stuart Jones, Director of Technology, the claimant's line manager and Alison Lister, Director of Business Services met with the claimant. The claimant was informed that there was to be a restructure and that his role would be removed. It was indicated that the restructure was likely to happen before Easter. The claimant was informed that there would be a position of ICT Technician at Redcar Academy which would be at a lower grade. The claimant was also informed that there was a vacant post of Assistant Network Manager. This would be a role working across three academies. The role was at a lower grade but was said to have had good career progression prospects and there would be pay protection for one year. The claimant confirmed that he was interested in the role of Assistant Network Manager.
- 5.4. On 8 February 2018 the claimant had a meeting with Stuart Jones. They talked about the new role. The claimant indicated that he was looking forward to it. There was discussion about the travel required. The role was based at Outwood Academy Bishopsgarth and that he could claim expenses for travel to the other two sites in Ripon and Easingwold. Stuart Jones said that the claimant accepted the role but asked if he could delay the start until after Easter as he wished to take part in a project that was taking place at Redcar Academy.
- 5.5. On 6 March 2018 Alison Lister sent a letter giving formal notice to the staff that the decision to review the staffing structure at Outwood Academy Redcar may result in a redundancy situation and a consultation meeting was held with all staff on 13 March 2018. The claimant attended that meeting.
- 5.6. The claimant applied for the post of Network Support Engineer with Redcar and Cleveland Borough Council. On 26 April 2018 the claimant was informed that he had been shortlisted and invited for an interview with Redcar and Cleveland Borough Council on 3 May 2018.
- 5.7. Consultation with staff was to conclude on 30 April 2018. At that stage the opportunity to take voluntary redundancy came to an end.
- 5.8. On 8 May 2018 the claimant informed the respondent that he had been offered another job.

- 5.9. On 8 May 2018 the claimant sent an email to Claire Lawless, HR, he said that he had been offered another job but hadn't yet accepted it. He referred to the dates that had been provided in respect of the redundancy process and stated that he had not appealed and assume that his last day of employment would be 1 June 2018. The claimant had a telephone conversation with Claire Lawless and was informed that a redundancy payment was not an option as the time for applications for voluntary redundancy had passed.
- 5.10. The claimant sent a further email to Claire Lawless on 8 May 2018 in which he stated:

“Just to follow up from my phone conversation, at present my three redundancy options with OGAT were (these were given to me on notification of redundancy on 12 December 17)

1. Take redundancy and leave.
2. Drop down to ICT Technician here at Redcar as a slot in position.
3. Offer of another position elsewhere within the trust with the new role/pay scale of Assistant Network Manager.

Initially I spoke to Stuart and confirmed my interest in the new post (but have yet to sign anything to that effect). I am now seeking my redundancy. Following my last email the booklet showed the redundancy timescales which show that the appeal hearing (which I have not been involved in) is as of w/c 21 May 2018....”

- 5.11. The claimant had a telephone conversation with Stuart Jones. The claimant informed Stuart Jones that the new employment he had obtained was with the Local Authority. He indicated that his new employer was willing to wait a period of time to enable the claimant to secure his redundancy payment from the respondent. Stuart Jones said that he expressed surprise at this news given that the claimant had given nothing but positive indications about the role of Assistant Network Manager since his verbal acceptance and they had left the post empty for five months at his request.
- 5.12. On 17 May 2018 the claimant rang Alison Lister. She informed him that he was not eligible for redundancy. He had secured a new role. He had not yet been given notice of his current role being deleted. The respondent had a new role which the claimant had accepted. Voluntary redundancy was not appropriate as there was an alternative role for the claimant. Alison Lister said that she told the claimant that the respondent wanted him to stay. There was another role for him. She said that if he didn't want to stay and wanted to accept the role at Redcar and Cleveland Borough Council he would need to resign and accept that role.

5.13. On 11 June 2018 the claimant wrote to Andrew Wappat, Associate Executive Principal, resigning with immediate effect. He indicated that he considered that Outwood Academy had destroyed trust and confidence and behaved very unprofessionally towards him. He said that he had never received a formal job offer or draft contract for the position of Assistant Network Manager. He had decided to take voluntary redundancy but had been informed that this was not an option. He did not consider the alternative post was suitable or reasonable alternative employment. He stated:

“Having unsettled me by telling me before Christmas that my job was redundant, my employer withheld any actual offer of employment in another role. Instead I have been kept in the dark my employer has been happy to play a waiting game to see if I would resign....

My role as been deleted, I have been told this several times by HR. Given that my contract as IT Network and SIMS Manager no longer exists, I am entitled to redundancy payment because a redundancy situation exists and I have not been offered any other employment and certainly not suitable and reasonable alternative employment.”

5.14. On 20 June 2018 Andrew Wappat replied to the claimant accepting his immediate resignation. In that letter it was said that the claimant had not indicated that he was anything but happy to move to the role of Assistant Network Manager. He had not asked the respondent to consider an application for voluntary redundancy during or after the consultation process and only asked about redundancy after being offered another role.

5.15. Following a period of ACAS early conciliation, the claimant presented a claim to the Employment Tribunal of unfair dismissal, redundancy and sex discrimination. The claim of sex discrimination was dismissed upon withdrawal.

The Law

Constructive dismissal

6. Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer’s conduct”. The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence. That is expanded upon in a well known passage

from the judgment of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347:-**

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it”.

7. Next, there is the significance of what is colloquially called a final straw. This was considered in the Court of Appeal judgment in **London Borough of Waltham Forest v Omilaju [2005] IRLR page 35:-**

“In order to result in a breach of the implied term of trust and confidence, a final straw, not itself a breach of contract but must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. 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 of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. However, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee’s trust and confidence has been undermined is objective”.

8. Further clarification of the objective nature of the test is provided in the Court of Appeal judgment in **Bournemouth University Higher Education Corporation v Buckland [2010] IRLR page 45:-**

“The conduct of an employer who is said to have committed a repudiatory breach of the contract of employment is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one of the tools in the employment tribunal’s factual analysis in deciding whether there has been a fundamental breach but it cannot be a legal requirement”.

9. There is also an issue surrounding the circumstances of the treatment of the claimant’s grievance by the respondent. As the EAT put it in **WA Goold (Pearmak) Limited v McConnell & Another [1995] IRLR page 516:-**

“There is a fundamental implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have”.

10. A further helpful passage concerning treatment of grievances to be found in the judgment of Judge Richardson in the EAT in **Blackburn v LD Stores Limited [2013] IRLR page 846 paragraph 25:-**

“In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to a contributory breach of the implied term of trust and confidence. Where such an allegation is made, the tribunal’s task is to assess what occurred against the **Malik** test”.

11. In **Meikle v Nottinghamshire County Council [2005] ICR page 1**, Keane LJ said:-

“The Appeal Tribunal there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It is suggested that the test to be applied was whether the breach or breaches were the ‘effective cause’ of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far in questions about the employee’s motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by repudiation by one party which is accepted by the other ... The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation. It follows that, in the present, it was enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer”.

12. The test was put in slightly different terms in a more recent EAT case, **Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013)**, in which Langstaff P endorsed a test first propounded by Elias P in **Abbey Cars West Horndon Limited v Ford UKEAT 0472/07:-**

“The crucial question is whether the repudiatory breach played a part in the dismissal ... it follows that once a repudiatory breach is established, if the

employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon”.

13. I have considered the Employment Appeal Tribunal case of **Lees v Imperial College of Science Technology and Medicine UKEAT/0288/15/RN** this was a case in which the claimant had been told that her secondment to a post was to end and an alternative post was to start before her secondment came to an end. The claimant declined to accept you will. It was held that the Employment Tribunal was in error to analyse the question whether this was a constructive dismissal by considering the implied term of trust and confidence rather than by asking whether the respondent proposed any longer to fulfil its obligations under the contract. Had it done the latter, it would have concluded that the respondent was proposing a breach of contract, which the claimant was entitled to accept as terminating her own obligations under it.
14. In the case of **David Webster Ltd v Mr C Filmer EAT/167/98** the claimant's contract was coming to an end. The claimant's colleagues were given notice of dismissal by reason of redundancy but the claimant was not. Upon the claimant's return to work following a holiday he was made an offer of what, on the face of it, was suitable alternative employment. He refused that offer and brought the contract to an end. It was found that this was not a case of unfair dismissal but was a case in which there was a dismissal by reason of redundancy.
15. I had the benefit of written and oral submissions from Ms Kight on behalf of the respondent and written and oral submissions from Mr Robinson-Young on behalf of the claimant. These submissions were helpful. They are not set out in detail but both parties can be assured that I have considered all the points made even where no specific reference is made to them.

Conclusions

16. There are two remaining claims, unfair dismissal and a claim for a redundancy payment. Both these claims are dependent upon there having been a dismissal.
17. The claimant's case is that there was a constructive dismissal. In order to show a constructive dismissal the claimant has to establish that he resigned following a repudiatory breach of contract and that he resigned in response to that breach.
18. In the Employment Appeals Tribunal case of *Wright v North Ayrshire Council* it was held that if a repudiatory breach of contract is established an employee may leave for a whole host of reasons and he can claim he has been constructively dismissed if the repudiatory breach is one of the factors relied upon.
19. The respondent identified the claimant's post as one to be deleted in the restructuring exercise. This was clearly a potential redundancy situation. Consultation was commenced with the claimant. He was offered another post at a lower grade but that was subject to pay protection for one year and there would be

payment of travel expenses to the new location.

20. It was said that this alternative post had good promotion prospects. The claimant did not reject or indicate that he would reject the proposed new post or give any indication that it was not suitable employment. His evidence to the Tribunal in his witness statement and oral evidence was that he had indicated that he was interested in knowing more details about the job and he requested more details from Stuart Jones and Alison Lister.
21. Stuart Jones and Alison Lister were clear in their evidence that the claimant had indicated that he was interested in the role of Assistant Network Manager. The details had been discussed with the claimant and he had not requested a job description or person specification.
22. The claimant's evidence was, at times, hesitant and not in accordance with the documentary evidence. For instance, in his witness statement and oral evidence he said that he had indicated that he would be interested in receiving more details whereas in the email he had sent he referred to having confirmed that he was interested in the job but had yet to signed anything to that effect. Also, with regard to looking for alternative employment. He said that he asked for the job description and person specification for the Assistant Network Manager's post but there is no mention in any of the correspondence until his letter of resignation. I am not satisfied that the claimant had merely indicated that he was interested in receiving more details. He had expressed an interest in the post.
23. It was submitted by Mr Robinson Young that Stuart Jones was an unreliable witness and, where there is conflict between his evidence and the evidence of the claimant, the claimant's evidence should be preferred. I do not accept the submission. The evidence of Mr Jones was not unreliable. He had indicated in his written witness statement that the claimant had accepted the Assistant Network Manager role. However, during cross-examination he was not certain about this and stated he felt that the claimant had implied acceptance of the role. This did not make the totality of his evidence unreliable and I do not prefer the claimant's evidence where there is a conflict. I have considered the totality of the evidence on the balance of probabilities and in respect of specific findings of fact.
24. The claimant did not reject the new post or give any indication that he was of the view that it was not suitable alternative employment.
25. The respondent was of the view that the claimant had indicated that he would accept the proposed role. He had not been provided with any provisional offer in writing. It was indicated that the reason for this was that the claimant was no longer at risk of redundancy as there was a new role proposed for him. He had not taken part in the individual consultation and had not been given notice of dismissal. It was indicated that the respondent would not send a written offer of suitable alternative employment before the completion of the consultation and the process of any appeal.
26. The respondent did not provide the claimant with written details of the proposed alternative role. It is provided within the Redcar Academy policy on

managing staff changes that posts must be offered provisionally in a revised structure and the applicant would be asked to confirm their acceptance of the offer in writing. This was not done at the time of the claimant's resignation. However, I do not consider this to be a repudiatory breach of contract by the respondent.

27. I was referred to the cases of *Lees v Imperial College of Science Technology and Medicine* UKEAT/0288/15/RN and *David Webster Ltd v Mr C Filmer* EAT/167/98. I am not satisfied that the respondent in this case was seeking to impose a change of role because the claimant's existing role was no longer required. There was no indication that the respondent was to impose the Assistant Manager's role upon the claimant.
28. I am not satisfied that there was an anticipatory breach of contract. The claimant has not shown that the respondent had indicated that it did not intend to honour an essential term of the contract.
29. The respondent wished to continue to employ the claimant. There was a proposal of suitable alternative employment. The claimant had not rejected that proposal. I am not satisfied that the claimant's email of 8 May 2018 was an indication that the claimant rejected the proposed role as not being suitable alternative employment. The indication was that he had confirmed his interest in the post but had not yet signed anything. He had then been offered what he considered to be a more attractive role with another employer but that does not provide an express or implied indication that the proposed role with the respondent was considered to be unsuitable.
30. He resigned in order to take up another job with Redcar and Cleveland Council. I am not satisfied that there was a repudiatory breach of contract and I am not satisfied that the claimant resigned as a result of any breach of contract..
31. I have some sympathy with the claimant. Obviously, he was in a difficult situation as the restructure meant that his role was to be deleted. However, he was offered a suitable alternative role in which he indicated that he was interested. It may not have been ideal but he did not indicate that it was unsuitable and it was not established that there was any breach of contract or anticipatory breach of contract on the part of the respondent. It was fortunate that the claimant was able to obtain a role that was more attractive to him before the restructure was completed. However, that meant that he was not dismissed and was not entitled to a redundancy payment.
32. It was unfortunate that the respondent chose to make allegations of possible gross misconduct and serious safeguarding concerns in its grounds of resistance. There no foundation shown to these allegations and they were unnecessary.
33. The claimant has not established that he was constructively dismissed. There was no actual dismissal and, in those circumstances these claims are not well-founded and are dismissed.

Employment Judge Shepherd

29 July 2019