



EMPLOYMENT TRIBUNALS

Claimant: Ms S Flatman

Respondent: Essex County Council

Heard at: East London Hearing Centre **On:** 9-11 October 2019

Before: Employment Judge C Lewis

Members: Miss J Hartland and Mrs BK Saund

Representation

Claimant: Mr A Ohringer, Counsel

Respondent: Mrs J Smeaton, Counsel

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claim for constructive dismissal has not been made out in the claim is therefore dismissed

REASONS

Judgment having been given orally at the hearing, written reason are provided at the request of the Claimant

1. This final hearing took place over three days during which the Tribunal heard evidence from the Claimant and from Mrs J Hearn, Ms O'Reilly and Miss J Hunt for the Respondent. The Tribunal was also provided with a witness statement from Ms Markwick who did not attend to give evidence but whose statement the Tribunal read.
2. An agreed list of issues was in the Tribunal's bundle [pages 46 to 47], the constructive unfair dismissal claim was identified in the following way:
 1. Did the Respondent commit a fundamental breach of the Claimant's contract? The Claimant maintains the Respondent breached its obligations under manual handling operations regulations 1992 and/ or the implied obligation to provide a safe place of work by:
 - 1.1 failing to conduct a risk assessment of the Claimant's role to establish exactly what training is required and to identify possible areas of concern in her existing work practices and
 - 1.2 failing, despite requests, to provide manual handling training during

the course of the Claimant's employment in respect of her duties to assist people who required lifting into and out of a wheelchair.

2. If so, did the Claimant resign in response to the breach?

3. Did the Claimant delay, so as to waive any breach/affirm the contract.

3. At the end of the evidence both counsel presented very helpful oral submissions in addition to their written submissions. Mr Ohringer provided the Tribunal with a bundle of authorities, containing seven authorities and a copy of the manual handling operations regulations 1992. Mrs Smeaton also handed up a copy of *Assamoi v Spirit Pub Company (Services) Ltd UKEAT/0050/11/LA*.

Findings of fact

4. The Tribunal made the following findings of facts as far as their relevant to the issues that the Tribunal had to decide, some additional matters were dealt with in evidence however the Tribunal doesn't address each and every one of those matters where it was not something that we consider to be relevant to the decision we had to make.
5. Having heard the witnesses give evidence the Tribunal were impressed by the Claimant and her evidence and accepted the veracity of what she was saying about what she was required to do in respect of transfers and moving of AB; and that it involved weight-bearing and at times lifting and supporting AB in various transfers and manoeuvres, particularly when AB was being raised from the floor to a standing position, to a sitting position and in transfers in and out of specialist equipment.
6. The start date for the Claimant was disputed but we have not found it necessary to make a finding on that and to reach a conclusion on the issue before us and it was agreed by the parties we should put that one-side it only relevant to any basic award, but the dispute was essentially whether the Claimant's continuous employment started on 31 October 2005 or 1 September 2006.
7. We find that the Claimant was employed as a Learning Support Assistant (LSA) from 1 September 2006 at the infant school having been employed previously as temporary cover and we make no finding as to whether that previous period was continuous with the employment as an LSA. We have seen the Claimant's contract in respect of her LSA role and that was the role about which she gave evidence to the Tribunal. The Claimant's job description [page 54] confirms what the Claimant told us in paragraph 3 of her witness statement, namely that she was expected to support all aspects of the pupils' physical and learning needs under the direction of the class teacher. We find that she was required to physically support those pupils under her care who had a physical disability, if deemed appropriate, and to attend to pupils' personal needs, including help with social welfare and health matters. Whilst the Claimant was not assigned to a particular pupil, the school adopted a team approach to the care of individual pupils so that everybody shared that responsibility. In the academic year starting September 2017 the Claimant was specifically

assigned to the class in Year 1 which contained a pupil with special educational needs and additional needs (who will be referred to as AB) in light of the fact that AB used a wheelchair and other specialist equipment and the Claimant had experience of supporting a pupil in the past who also used a wheelchair. The class teacher was Kate Mansfield and we find that she was the Claimant's direct line manager for the purposes the schools' management structure.

8. AB had joined the school in the Reception class the previous year. She had a number of pieces of specialist equipment, including a standing frame, walker and a wombat chair which was a wheelchair. The Claimant and others were required to assist her to move between the three pieces of equipment at regular intervals during the day and depending on the task or activity that AB was engaged in. The Respondent disputed that the Claimant was required to lift AB but accepts that she was required to assist AB to move and transfer and that this would involve some aspects of weight-bearing. We accept the Claimant's evidence as to what she was required to do and how she had to manoeuvre AB. We find that did involve an element of lifting and the Claimant's use of the term lifting we find not to be inaccurate or inapposite. The Claimant demonstrated how she transferred AB into her wheelchair and how this required her to support AB's weight whilst she was kneeling. The Claimant also demonstrated how she was required to assist AB to get to her feet from sitting on the floor or from a kneeling position. The Claimant explained that she had been shown by the previous year's LSA, Isatu Chadbourne, how to support AB in doing this.
9. The Respondent stated that there was also another LSA and the teacher in the classroom. We except the Claimant's evidence that the teacher Ms Mansfield had a shoulder problem which meant she was unable to assist with supporting the pupil and in any event she was busy teaching the class and that the majority of the task of assisting AB fell to her.
10. We find that the Claimant was aware that the Respondent should have carried out risk assessments, and there is reference to this in text messages between her and the class teacher from May 2018, in the period before the Claimant resigned. We also accept that the Claimant had asked for and continued to ask for manual handling training from September 2017 onwards. We accept that she made repeated requests to Jane Hearn (the SENCO) for that training to be provided. We were taken to the record of visits by the occupational therapists and physiotherapists to the school which was produced by them at the request of the headteacher for the purposes of these proceedings [pages 196 and 197 of the bundle], this records numerous visits to the school in respect of AB and her equipment.
11. The Claimant accepts that transfers were demonstrated during those visits but specifically states that when she raised her concern at the lack of manual handling training she was informed by those therapists that they were not able to give training themselves and they advised that separate manual handling training should be arranged for any LSA's and other staff. We accept without hesitation that this reflects the position that the Claimant was told and we also find that Ms Hearn was present on at least two occasions including 17 October 2017 when the Claimant raised

concerns as to the lack of manual handling training and the difficulties she was having in supporting AB with transfers from the wheelchair.

12. Ms Hearn's told us that she did not hear what the Claimant said or the response from the therapists that there should be separate manual handling training. We found her evidence to be deeply unsatisfactory. Ms Hearn seemed to have no recollection, or very little recollection, of any of the requests made by the Claimant throughout this period; she did accept that she could remember one or two occasions where the Claimant had raised manual handling training with her, but even then she took no steps whatsoever to action the training, either by making enquiries herself as to who could provide it, or asking someone else to do so; nor did she at any point tell the Claimant that it was not her remit to arrange the training and that she should approach someone else, for instance Ms O'Reilly, who is the health and safety coordinator, or indeed the headteacher.
13. We are also satisfied that the reference in the OTPT's notes of the visit on 23 November 2017 [page 197], at which Ms Hearn was again present, to the provision of a small wheeled stool which would "possibly assist with transfers", is an acknowledgement of the fact that the Claimant had again raised the difficulty that she was having and accept that she explained that she was finding she was bending when trying to assist AB with transfers. We also accept that the suggestion of a small wheeled stool was not going to address the concern that the Claimant had raised and would possibly make it harder for her to support AB in that transfer. We find that suggestion to be consistent with what the Claimant told us about the role of the OT and PT team; that their role was to address the needs of the pupil AB and was not focused on the needs or indeed training of the LSA's supporting AB.
14. Returning to the evidence of Ms Hearn, she told the Tribunal that she did nothing between October 2017 and March 2018 to either arrange or to seek to engage other people to arrange training but she accepted that she told the Claimant she was looking into it. We accept the Claimant's evidence as to what she said she was told by Ms Hearn throughout this period, including that she was looking into the training and then later that she told the Claimant that she was "at the top of my list", which led the Claimant to believe it was being dealt with, and not that she had to go to someone else to make that request to arrange it. We are satisfied that explains why the Claimant did not feel the need to escalate her request at that point in time, she accepted at that time the assurances that she had been given. She had however directly raised it with her line manager and she understood that Ms Mansfield was also making similar requests of Ms Hearn. We find that the Claimant raised her concerns with Ms Hearn again in February when she returned from a period of leave. In reply Ms Hearn mentioned that she had not been aware of the skills gap that was present in the classroom until the Claimant was absent, meaning that there had not been anyone with the skills needed to assist AB with her equipment. We are satisfied that was a conversation that the Claimant had with Ms Hearn, not just one Ms Hearn had with the class teacher, although she may have said something to the same effect to that teacher.
15. In paragraph 18 of its response to the claim (ET3) the Respondent accepted that the Claimant made requests for manual handling training in

February and March and did at that point raise a concern about some back pain. It was accepted that Ms Hearn made a note to speak to Jo Lambert, the specialist teacher employed by the Respondent, at the PNI session arranged for 13 March 2018. Ms Hearn told us that she approached Ms Lambert after that training in March, however she was aware from January that repeated requests were being made and that the Claimant had said that her back was being injured or at least that she was complaining of back pain. Ms Hearn told the Tribunal that Ms Lambert said that she would email her with a contact of someone who could provide specific manual handling training. Ms Hearn did nothing to follow up her enquiry and simply waited for Miss Lambert to send the contact details. We find that the Claimant was not present during the conversation between Ms Lambert and Ms Hearn and did not know that Ms Hearn had made that request at that point.

16. We are satisfied that the Claimant chased Ms Hearn about manual handling training again on 26 March 2018. In April she went to her GP about her back which had become very painful. We accept the Claimant's evidence that she had been suffering severe pain before Christmas and that she mentioned her back pain to Ms Hearn in January and again in March and April, and that by 20 April when the Claimant spoke to Ms Hearn again about her back pain and her request for manual handling training she was fed up with having been asking about training so many times with nothing having been provided to her.
17. On 25 April the Claimant phoned Jo Lambert and raised her concern about the lack of manual handling training which prompted Ms Lambert to immediately contact the school. Ms Lambert emailed the headteacher, Ms Hunt, and Ms Hearn. In that email she notes that it is advisable for staff to receive manual handling training. The headteacher Ms Hunt responded and requested details for the trainer Natasha (Ransome). Ms Lambert provided Natasha's details the following day. In her email Ms Hunt informs Ms Lambert that she was "aware of the issue". She explained that comment to the Tribunal by saying that she had been made aware of it by Ms Hearn when she had spoken to her immediately on receipt of the email and before replying to it.
18. The Claimant also emailed the headteacher on 26 April to let her know she had contacted Jo Lambert and although she did not describe that email as a grievance she set out specifically the matters about which she is concerned and her complaints. The response from the headteacher on 26 April was that she was fully aware of the situation and stated "we are looking to have training from an independent physio and to arrange it quickly".
19. On 1 May the Claimant went off sick with back pain. She was signed off until 21 May. She spoke to the headteacher on 21 May by phone and there was also a text message. She informed Ms Hunt that she was speaking to her doctor about returning to work on restricted duties and the doctor wanted to confirm whether that would be possible, it would mean no lifting. Ms Hunt's response to the text was that would be "okay in the short term". The text is found at page 182 a of the bundle, the text continues,
"we probably need to have a discussion about moving you to another

class group so to avoid situations where you may be required to move and assist and to protect other members of staff to difficulties with the remaining members of staff by narrowing down the number of staff who are able to assist”.

20. The Claimant returned to work on 22 May and went to see the headteacher in her office. We find that Ms Hunt repeated in substantially similar terms what she said in the text, including in respect of looking at moving the Claimant, and needing to address the needs of other members of staff or the need for there to be other staff in the classroom so there were enough staff who could support AB. The Claimant left that meeting feeling angry and upset that the headteacher had not done anything about supporting her and was now talking about the needs of other staff and she felt that her concerns were being minimised or dismissed. She also informed the headteacher she did not want to move class as she had a relationship with that class. During that conversation Ms Hunt told the Claimant that she wished that she had raised the issue with her earlier. The Claimant saw this as a criticism and felt that she was now being blamed for not having raised it with Ms Hunt.
21. Ms Hunt told the Claimant that training was being organised in the following few weeks, that other staff who would be dealing with the child in future would also be attending, and that she had decided by that point that the child would move to a different class teacher the following year with a new team LSA's.
22. The Claimant's case was that she did not have reasonable cause to believe what she was being told about training being arranged; she had been told by Ms Hearn for months that something was being done but nothing had happened and the headteacher had not been particularly proactive or helpful. She had been told that something would be done quickly in April yet still on the 22nd May nothing had been arranged and at the time of her resignation letter on 5 June still nothing had been arranged. This was five weeks since she had gone on sick leave due to back pain and she had still not been told the date for any manual handling training.
23. The Claimant set out in her resignation letter [p.185] firstly, that it was with great sadness that she offered her resignation, then she went on to state that she had requested suitable training multiple times “as per requirements to safeguard my health and well-being in regards to manual handling”. She referred to having continuing back issues which had failed to resolve after three weeks rest and then referred to previous dangerous situations she had been placed in where she also sustained injuries and stress within her working environment.
24. We heard evidence about those previous incidents but those were not matters that were relied on as contributing to the breach of contract. The breaches relied upon are clearly identified in the list of issues.
25. We note there was no response to the Claimant's resignation letter from them the school or the headteacher, although Miss Hunt did state in evidence that she was sorry that the Claimant resigned and she was sorry to lose her as she had been a valuable member of staff and her skills were also valued.

Relevant law

26. The Claimant's claim is of constructive unfair dismissal. The issues set out above identify the legal issues for the Tribunal in respect of that claim. The Claimant specifically relied on the following as a fundamental breach of her employment contract.

The Claimant maintains the Respondent breached its obligations under manual handling operations regulations 1992 and/ or the implied obligation to provide a safe place of work by:

1.1 failing to conduct a risk assessment of the Claimant's role to establish exactly what training is required and to identify possible areas of concern in her existing work practices and

1.2 failing, despite requests, to provide manual handling training during the course of the Claimant's employment in respect of her duties to assist people who required lifting into and out of a wheelchair

27. We were provided with written submissions by both Counsel which were amplified in oral submissions. We took into account the parties' respective submissions and the authorities provided to us. There was no real dispute between the parties as to the law and the legal principles were helpfully set out at paragraph 26 of Mr Ohringer's written submissions. The dispute was as to where the legal principles should lead us on the facts before us.

Conclusions

The reason for the Claimant's resignation

28. We find that the Claimant was aware of a legal obligation on the Respondent to carry out a risk assessment (that is referred to in a text between her and Ms Mansfield) and she specifically refers in her resignation letter to training as per requirements to safeguard health and well-being.

29. We are satisfied that a failure to meet legal requirements was in her mind and she identified the training as the central issue. We also find that a risk assessment should have identified the need for training had one been carried out. However we find that it was not the failure to provide the risk assessment itself that was in the Claimant's mind when she resigned. We find that the issue identified at 1.2 in the list of issues was centrally in her mind and we find that was the reason for her resignation.

30. By this time the Claimant had suffered continuous back pain, she had requested training in regards to manual handling to safeguard her health and well-being. She also refers in her resignation letter to having followed all the protocols, taken this up with her line manager since the beginning of the school year, but had no resolution, she felt she was unable to continue in the current situation.

31. We accept that there was a breach of the obligation to provide manual handling training and that was ongoing. We also find the Claimant had not

waived that breach. There had not been manual handling training provided specific to the task the Claimant was required to do, although she did accept she had prior manual handling training in 2008 in respect of another pupil who required hoisting. At the date she resigned she still hadn't been provided with the manual handling training or a date for that training. She had objected to the failure to provide that training and repeated her request for it throughout the period up to her resignation

32. The more difficult question for the Tribunal was whether that breach was a fundamental breach. It is not every breach of contract which will justify an employee resigning and claiming they have been dismissed. We also had to look at the response from the Respondent, before the Claimant resigned, what they did in the circumstances, and the effect of the breach that we have found on the employment contract as a whole, that is whether the breach we found went to the root of the contract or indicated that the Respondent was no longer indicating a willingness to be bound by a fundamental term.
33. The Respondent relies on the fact that they had provided training, although it was not specific manual handling training, in the form of the sessions with the occupational and physiotherapists. They were of the view that that input was specific to the needs of AB and that the OT and PT demonstrated the transfers and the equipment that AB used. The Respondent's evidence was that the OTPT sessions was better than the manual handling training that had been provided the previous year.
34. Having found that the failure to provide manual handling training was a breach we considered what the Respondent had done by the time the Claimant came to resign or reached the decision to resign, whether that is 22 May or 5 June.
35. On 21 May the Respondent had agreed to restricted duties for the Claimant to protect her from lifting in the short term and had suggested the move to a different classroom as a longer-term solution. We accept that the headteacher had said that she needed to have a discussion about that with the Claimant, but we find that was what she foresaw doing. We are satisfied that this was to protect the health and welfare of the Claimant.
36. Mrs Smeaton in her submissions identified three steps which she said mitigated the effect of the breach in respect of manual handling training, including making arrangements for the training to take place at the future date. We accept that two of those steps, the restriction on lifting, i.e restricted duties, and the decision to move the Claimant to a new class had taken place, and the Claimant had been told about them, before the point at which she resigned. We find that those were in place before the resignation - rather than being attempts to remedy a fundamental breach after it had taken place.
37. We accept Ms Smeaton's submissions. We are satisfied that the Respondent, by those actions, demonstrated that it did have concern for the Claimant's safety; it had taken steps to address the Claimant's concerns and to ensure that she would not be exposed to the danger of lifting and to damage to her back and that they were taking her concerns seriously.

38. At the point that the Claimant resigned those measures have been put in place to protect her. We are satisfied that in the context of the employment contract over all that despite the ongoing failure to provide manual handling training therefore was not a fundamental breach and did not go to the root of the contract.
39. The Claimant's claim for constructive dismissal therefore fails and is dismissed.

Employment Judge C Lewis

18 November 2019