



EMPLOYMENT TRIBUNALS

Claimant:

Mrs J Kayongo

v

Respondent:

Regency Cleaning Services Ltd

Heard at:

Reading

On: 15 October 2019

Before:

Employment Judge Milner-Moore (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr R Chaudhry (Solicitor)

JUDGMENT

1. The unfair dismissal claim fails and is dismissed.

REASONS

THE ISSUES

1. This matter was listed before me for a full merits hearing to consider whether or not the claimant had been unfairly dismissed. The following issues arose for determination:-
 - 1.1 Was the claimant dismissed by the respondent or did she resign?
 - 1.1.1 The claimant asserts that she was told on 4 September 2018 that she “did not work for the respondent” and that this was a dismissal.
 - 1.1.2 The respondent asserts that the claimant resigned.
 - 1.2 If the claimant resigned, did she do so in circumstances in which she was constructively dismissed by the respondent?
 - 1.2.1 The claimant relies on the following matters as constituting a breach of the implied term of trust and confidence:-
 - 1.2.1.1 The respondent saying that he would not pay the claimant and that she did not work for him anymore;

- 1.2.1.2 A failure to confirm the position as to terms and conditions of employment following transfer.
- 1.2.2 Were such matters in breach of the implied term of trust and confidence?
- 1.2.3 Did the respondent have reasonable and proper cause for the conduct; and
- 1.2.4 Was the conduct likely to seriously damage the relationship of trust and confidence?
- 1.2.5 Did the claimant affirm the contract?
- 1.2.6 Did the claimant resign in response to any breach of contract?
- 1.2.7 If the claimant was dismissed, what was the reason for dismissal?
- 1.2.8 The claimant says that the reason for her dismissal was the TUPE transfer that had occurred on 1 August 2018. If the TUPE transfer was the sole or principal reason for dismissal then it would be automatically unfair (section 7(1) TUPE).
- 1.2.9 The respondent does not assert any other potentially fair reason for dismissal but relies solely on its case that the claimant resigned in circumstances where no constructive dismissal occurred.
- 1.2.10 In the event that dismissal is unfair, the respondent says that compensation should be reduced on grounds of failure to comply with the ACAS Code and/or contributory conduct.

EVIDENCE

2. I heard evidence from the claimant and from Mr Penny, the managing director of the respondent and from Miss Sheppard, the respondent's HR officer. I should record that the claimant had not produced a witness statement but she confirmed on oath the correctness of the matters set out in her ET1 and in a document headed 'Claimant's Response to respondent's ET3'. The claimant's failure to produce a witness statement led to a practical difficulty because the claimant's "evidence" was largely a response to the respondent's ET3. That made it difficult to understand what the claimant was advancing as her positive account of what had occurred. For that reason, although Mr Penny began giving evidence first, it became difficult to follow the cross examination because it was not clear what the claimant's account of the relevant events was. For that reason, Mr Penny's evidence was interrupted. The claimant then gave her evidence and I asked her some supplementary questions to ensure that we all understood what she was

saying was the chronology of relevant events. The claimant was then cross-examined by the respondent's representative and Mr Penny's evidence was resumed and the claimant put questions to him. During Mr Penny's evidence, questions arose as to the timing of the respondent being admitted as a member of the local government pension scheme and as to the preparation of a payslip. Ms Sheppard was in attendance and was able to give evidence about those matters and so she gave oral evidence without a witness statement. The claimant had an opportunity to put questions to her.

3. The claimant clearly felt very strongly about the correctness of her account and during the hearing she engaged in some distracting behaviour when Mr Penny was giving evidence with which she disagreed, laughing and chuckling to herself, and I had to ask her to stop this.

FACTUAL FINDINGS

4. The claimant began her employment on 2 December 2013. She was employed as a cleaner at the Maiden Erlegh School working 10 hours a week between 2.30 and 4.30. She worked for 38 weeks during term time and plus an additional two weeks to be worked by agreement at other points of the year.
5. Her terms and conditions of employment included that she would have pensionable service under the local government pension scheme and would receive paid sick leave for a period referable to her length of service.
6. On 24 May 2018, the school wrote advising the claimant that her employment was going to be transferred to the respondent and that the transfer would take place on 1 August 2018 and would take place pursuant to TUPE. The letter stated that her contractual terms would be unchanged and that her continuity of service would be preserved. It was a condition of the transfer that the respondent would become an admitted member of the local government pension scheme and the letter stated that staff would be seconded to the respondent if this was delayed. In fact, the respondent's admission as a member of the local government pension scheme was delayed for over a year but staff nonetheless transferred on 1 August 2018. Arrangements were made to regularise their pension position retrospectively on the respondent's admission to the scheme.
7. Consultation meetings took place between the school and the respondent and the transferring staff at various points during June and July. During these meetings, the transferring staff were asked, and agreed, to work the additional two weeks that their contract provided for in two tranches: eight days at the end of the current term from 25 July to 6 August; and two days before the school re-opened for the new term in September 2018. The respondent regarded the school as dirty and was also aware that it would require some additional clean up after some building work which was due to take place over the summer holidays. Staff were therefor asked to keep, in particular, the 4th of September free so that they were available to come in and do that clean up before the start of term.

8. Although some of these days were worked before the transfer of employment, they were an advance on the two weeks' non-term time working days that were due to be worked in the school year following the transfer. For that reason the respondent paid the staff for this work (which was performed in late July), rather than the school even though the work preceded the date of the transfer of employment.
9. On 19 and 23 July 2018, the claimant sent two emails to Ms Sheppard asking questions about the transfer. In particular she asked whether the respondent had by this time become an admitted member of the LGPS whether the hours of work that were being proposed for late July were going to be treated as overtime and who would be responsible for paying them, given that some of them would be worked pre-transfer. The respondent does not admit that these emails were received. Ms Sheppard has no recollection of them and the respondent's IT systems have since changed and it has been unable to locate proof one way or another. However, they appear to have been sent to the correct email address and I accept that these emails reflected the claimant's concerns at the time. I find that they were sent and consider it likely that the respondent overlooked them.
10. In late July, the claimant worked 16.5 hours at the respondent's behest. She was at work conducting the proposed deep cleans on several days. Over those days, she had discussions with Mr Penny and other members of staff of the respondent. The precise dates of those discussions are disputed but are not material and there is also a dispute between the parties as to exactly what was discussed. Again, I do not consider the precise contents of the discussions to be material. The key point, which both parties accept, is that the claimant at some stage raised a concern about the pension position with Mr Penny, that her concern remained unanswered and that she said that she wanted to speak to Mr Peck (who was an official at the school) before she agreed to transfer to the respondent's employment on 1 August 2018.
11. The claimant had reservations not just about the treatment of overtime and pensions but also a potential difference in the approach to sick pay as the standard terms and conditions which had been supplied by the respondent suggested that sick pay was not paid. I find therefore that she had a concern at this time about whether or not the respondent was indeed going to honour TUPE and preserve the existing terms and conditions of the transferring staff. However, the school term had finished by this time and she was unable to contact Mr Peck and she decided that she would join the respondent anyway and raise any concerns about her terms and conditions at a later stage.
12. The respondent's evidence, which I accept, is that following the transfer, the respondent has complied with TUPE and that it does pay sick pay to staff in accordance with the pre transfer terms and conditions and that arrangements have been made, albeit rather belatedly, to join the LGPS and for back payments of staff pension contributions in order to ensure that staff had continuous pensionable service in that scheme.

13. On 30 July, the claimant informed the respondent that she would indeed be joining its staff and she provided some outstanding personal information. On 1 August 2018, the claimant's employment transferred to the respondent and she went onto the respondent's payroll at that time.
14. On 31 August 2018, the respondent prepared a payslip reflecting the 16.5 hours that the claimant had worked in July and paying her in advance for two hours to be worked in September. The claimant was liable to work 20 hours but worked for only 18.5 and the payslip reflects this.
15. A P45 which was subsequently prepared showed the claimant's employment as terminating on 22 August but I find that this was an error as the claimant was not in fact working on that day. She did not work on any particular day in August and she did work subsequently on 4 September, as the respondent was aware.
16. On 4 September, the claimant attended at school. She arrived early at around 12.30 or 1 o'clock and completed two hours' work cleaning. She had not sought approval from the respondent to arrive early but believed that no objection would be raised because school was not in session and so there was usually flexibility accorded as to start times. Another employee, Samantha, had also begun work early.
17. There is a dispute as to what then occurred when the claimant finished her work at around 3 pm. The claimant says that she encountered Mr Penny and told him she had finished her work. Mr Penny replied that she would not be paid because she had started early and when she offered to show him the work that she had done, he said that she "*didn't work for him*". The claimant then left, believing herself to have been dismissed by the respondent.
18. Mr Penny's account, which was amplified in his oral evidence, was that he and a Mr Giurega had met the claimant around 3 o'clock and that she informed them that she had finished her work. He was surprised that she had finished already and asked to look at what she had done. He inspected it and complimented her on the standard of the cleaning but said that what she had completed did not look like two hours work and Mr Giurega agreed. The three of them then walked back to where the other cleaners had by then arrived and were waiting for some training, it being expected by the respondent that some training and briefing would take place. Mr Penny was walking ahead by this point but Mr Giurega and the claimant were still talking. Mr Penny understood that the claimant was objecting to remaining for the training and could hear Mr Giurega asking the claimant to listen to him. The claimant then threw her hands in the air and said that she was resigning and left. Both Mr Penny and Mr Giurega were surprised by the claimant's actions.
19. There is obviously a very stark dispute between the parties as to what occurred on 4 September. I do not accept the claimant's evidence that Mr Penny said that she would not be paid because she had begun work early or that she did not work for him. Such a comment would have made no

sense as the respondent understood that the claimant had transferred to its employment. She was by this time on its payroll as is evidenced by the August payslip and she also appeared on the respondent's timesheets for late July and August. It was suggested by the claimant that the respondent wished to dismiss her because she had been raising questions about her rights on transfer. However, I do not consider that this is likely. I have found that the respondent was in fact complying with TUPE in the way that it dealt with staff and so it seems unlikely that it would have been concerned by the claimant raising questions on this point.

20. The claimant also suggested that the P45 and its leaving date of 22 August evidenced that the respondent had already decided to dismiss her. However, I do not consider that this supports her account. The P45 was completed on 27 September, so after the claimant's alleged dismissal. A P45 with a leaving date of 22 August would not have assisted the respondent. It was a post-transfer date so it was not as though the respondent could have argued on that basis that the claimant had never transferred. It was also not consistent with the case that the respondent has been advancing that she resigned on 4 September. I consider it likely to have been a simple mistake and nothing more and draw no inference from it.
21. Had the claimant been dismissed in such an egregious fashion on 4 September, one would have expected her to make some protest – for example, to write to the respondent and appeal. She took no action at all until late November when she wrote to Mr Peck at the school, stating that she considered herself to have been unfairly dismissed. For all these reasons I found that the Claimant was not dismissed by the respondent but rather chose to resign.
22. On 5 September, the respondent wrote to the claimant at her address, setting out her understanding that she had resigned and asking if she wished to reconsider, in which case, she was to let the respondent know by 12 August 2018 or it would respect her decision to resign. The respondent sent the letter in the ordinary post rather than recorded delivery. The claimant denies ever receiving the letter and I accept that it may have gone astray. Neither the claimant nor the respondent were in any further contact with each other after that date. On 19 November 2018, the claimant wrote to Mr Peck at the school saying that she had been unfairly dismissed because she had told Mr Penny that she would not join until she had clarified matters regarding the transfer with the school.
23. On 26 November, Mr Peck replied that it was not a matter for him because her employment had transferred to the respondent.
24. On 3 December, the claimant contacted ACAS and then subsequently filed an employment tribunal claim on 7 December.

SUMMARY OF LAW

25. The burden of proof is on the claimant to show that she was dismissed by the respondent rather than that she resigned. If I conclude that the claimant was not expressly dismissed by the respondent but resigned, it is necessary to consider whether or not her resignation occurred in circumstances amounting to a constructive dismissal.
26. A constructive dismissal occurs according to section 95(1)(c) of the Employment Rights Act where an employee terminates her contract of employment in circumstances where she is entitled to terminate without notice by reason of the employer's conduct.
27. That test is explained in the case of Western Excavating v Sharp. Constructive dismissal occurs when there is a significant breach of contract which goes to the root of the employment contract or shows that the employer no longer intends to be bound by one of its essential terms. The breach must be serious and repudiatory in nature. A breach of contract may be actual or anticipated. Where it is argued that there is an anticipatory breach of contract, the question is whether an employer has demonstrated an intention not to be bound by the contract in future. A breach of contract may be of an express term of contract or a breach of the implied term of trust and confidence. The case of Malik v BCCI sets out the relevant test in relation to constructive dismissals derived from breaches of the implied term of trust and confidence. In essence the question is whether or not the respondent had reasonable and proper cause for the conduct complained of and whether the conduct was likely to destroy or seriously damage the relationship of trust and confidence.

CONCLUSIONS

Was the claimant dismissed?

28. I have found that the claimant was not dismissed by the respondent but that she chose to resign. I have considered whether her resignation occurred in circumstances that it amounted to a constructive dismissal on the respondent's part so I have asked myself whether the respondent was in fundamental breach of contract either or any express term of the contract or of the implied term of mutual trust and confidence.
29. I consider that the claimant had a lingering concern about whether her terms would be honoured after the transfer as a result of the respondent's failure to reply to her emails or address her concerns about pension directly and explicitly. She was frustrated about being challenged about why she had arrived at work early and about the work that she had done, and frustrated at being asked to stay on for training having already worked her hours and she resigned in response. That is consistent with the claimant's failure to challenge the position at all at the time. However, I do not consider that these matters amount to a fundamental breach of contract.
30. At the relevant point in time, there had been no express breach of contract on the respondent's part, whether actual or anticipatory. The claimant had not been refused sick pay and the respondent had said nothing explicitly to

suggest that it would not honour existing terms and conditions. The respondent's expectation was that the pension arrangements were being put in hand to enable membership of the local government pension scheme.

- 31. I have considered whether or not there was a breach of the implied term of mutual trust and confidence in relation to the cumulative effect of the respondent's failure to confirm the position regarding terms and conditions, and to reply to the claimant's email and in relation to the events of 4 September.
- 32. I have concluded that such matters did not amount to a breach of the implied term of trust and confidence.
 - 32.1. The respondent would not have been in a position to clarify in July the position as to continuing pension as that point was still outstanding at that time.
 - 32.2. Sick pay had not been expressly raised by the claimant as a concern with the respondent's management but the point that the claimant had raised about overtime had not been answered.
 - 32.3. I consider that the respondent did not behave unreasonably in expecting the claimant to arrive at the normal time for work having not sought permission to start early, or in enquiring about what she had been doing whilst unsupervised or in asking her to demonstrate what work she had carried out whilst unsupervised or in asking her to remain on site for a briefing with other cleaners.
- 33. In short, I consider that the respondent did have reasonable and proper cause for its conduct, save in relation to the failure to clarify the position regarding overtime, but I consider that such failure is not of such a degree that it could, viewed objectively, be regarded as such as to seriously damage the relationship of trust and confidence between the parties. I do not therefore consider the claimant to have been actually or constructively dismissed by the respondent.

Employment Judge Milner-Moore

Date: 19 November 2019

Judgment and Reasons

Sent to the parties on:

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For the Tribunal Office

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