



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L M Guy

**Respondents:** London Borough of Hounslow (R1)  
Governing Body of Oaklands School (R2)

**Heard at:** Croydon **On:** 16/10/2019

**Before:** Employment Judge Wright

## **Representation**

**Claimant:** Ms L Kwame

**Respondent:** Mr D Hodge - solicitor

# JUDGMENT

It is the Judgment of the Tribunal that the claimant's claim of constructive dismissal under s. 95(1)(c) of the Employment Rights Act 1996 fails and is dismissed.

# REASONS

## Introduction

1. By a claim form presented on 7/3/2019 the claimant presented a claim of constructive unfair dismissal. She resigned from her post as Teaching Assistant at the second respondent on 19/12/2018. The second respondent (the school) was a Community Special School within first respondent's Borough.
2. At the start of the hearing, the claimant said she had suffered a panic attack. Her sister then stepped in to represent her. The Tribunal heard evidence from the claimant. Her sister's evidence was not challenged. The claimant also relied upon a witness statement from her Trade Union representative,

however, she did not attend the hearing and so her evidence (to the extent that it was relevant) could not be tested. For the respondent, the Tribunal heard from Ms Anne Clinton, Headteacher of the school and from Ms Mairead Standing, Head of School. The Tribunal had before it an agreed bundle of documents of approximately 440-pages. The Tribunal considered the documents in the bundle to which it was taken during the course of the hearing.

3. The hearing was listed for one day. It was apparent that concluding the case within one day would be challenging. As it was, the evidence and submissions were concluded in the late afternoon. There was not enough time for deliberation and for judgment to be delivered. As such, judgment was reserved.

#### Law

4. The law on constructive dismissal is found in s. 95 (1)(c) of the Employment Rights Act 1996, which provides:

Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

5. In Western Excavating (EEC) Ltd v Sharp 1978 ICR 221 the Court of Appeal held that for the respondent's conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. Lord Denning said:

'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 so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

6. In order to claim constructive dismissal, the claimant must establish that:
  - a. there was a fundamental breach of contract on the part of the respondent;
  - b. the respondent's breach caused the employee to resign; and
  - c. the employee did not wait too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

7. A constructive dismissal is not necessarily an unfair one.
8. The term of the contract relied upon by the claimant is the 'implied term of mutual trust and confidence' as per Malik v Bank of Credit and Commerce International SA [1998] AC 20 – it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test of whether there has been such a breach is objective.
9. The claimant says the term was breached by the respondent's actions from her suspension on 10/7/2018 and ended in the final straw of the letter of 6/12/2018 inviting her to an absence management meeting on 12/12/2018 (page 257) and the events on that day.
10. Both parties provided closing submissions.

Findings of fact

11. On 6/7/2018 there was a written complaint to the school by a local resident. That resulted in the second respondent writing to all members of staff it considered had been present during the incident (page 251). Ms Clinton said it was decided it was more appropriate to send a letter, rather than to take disciplinary action and the incident was of a more minor nature. That is the extent that the issue played in the following events.
12. A letter was accordingly handed to the claimant on 9/7/2018. She was upset by this and saw it as a blemish on her otherwise excellent conduct record.
13. Ms Clinton says she was in a Senior Leadership Team (SLT) meeting which was interrupted. There was an allegation that the claimant had 'pushed' another member of staff and that she had thrown a chair. This was at the end of the school day and the claimant subsequently left. The claimant said she was in tears. Ms Clinton decided to suspend the claimant in accordance with the School's policy in view of the seriousness of the allegation.
14. The Tribunal finds that the decision to suspend the claimant was a reasonable one. There was an allegation of assault and of throwing a chair. This was in a school and at the end of the school day when pupils (who are vulnerable children) could be around. The claimant says there were in fact no pupils around; however, that misses the point that she lost control (as she later admitted) when pupils *could have* witnessed this.
15. The claimant did not attend work the next day, on the 10/7/2018. She said she woke up suffering from a migraine. Ms Standing called the claimant as she had not reported for work and subsequently informed the claimant of the suspension. This was later confirmed in writing (page 129). Ms Standing acknowledged that she would rather have spoken to the claimant face-to-face, however, she was unable to do so as the claimant was ill.
16. The claimant then sent a statement to the school and to her TU representative. She was aware of the allegation of 'assault'. She thought this

related to an incident between her and Mr Hassan on the 9/7/2018 (page 140). The claimant said she thought Mr Hassan had 'falsely accused' her of being part of the group that was the subject of the complaint on the 6/7/2018. She said she 'became emotional' and:

'I entered the class and shouted "you fucking little shit why the fuck did you call my name to [the deputy head teacher]?"'

17. Ms Standing was tasked with conducting an investigation. On 10/7/2018 she interviewed five witnesses. On 10/7/2018 the claimant was invited to an investigation meeting scheduled for 16/7/2018 (page 135). The claimant's TU representative asked for the hearing to be put back so as to allow her more time to meet with the claimant. The school agreed to this, however, this meant that there was then even less time for any further steps to be taken before the end of term. It is also not immediately clear why more time was required before an investigation meeting, rather than a disciplinary or appeal meeting.
18. When the meeting took place on 18/7/2018, it became clear to the claimant that the 'assault' allegation related to her colleague Ms Bullock, not Mr Hassan. The claimant was shocked by this allegation and denied she had 'pushed' or assaulted Ms Bullock. She also denied she had thrown a chair.
19. As a result, Ms Standing interviewed two more witnesses at the claimant's request on the 19/7/2018 (pages 175 and 177).
20. The school was due to close on 19/7/2018 and the pupils left at 1.45pm. The school was moving in its entirety to a new site, ready to open for staff training on 30/8/2018. Absolutely everything (including the computers) had to be packed up and moved. There were 50 new staff to induct. The school had expanded to take on a primary school and a college for 19+ students.
21. There was a legitimate concern from the school as to whether it would be able to conclude matters for the claimant before the end of term. The claimant was asked on 18/7/2018 by Ms Standing if she would consent to the 10-day period of notification of a disciplinary hearing to be shortened, to which she consented (page 171).
22. Once she received Ms Standing's investigation outcome, Ms Clinton decided to convene a disciplinary hearing (witness statement/11) and she instructed HR to send out the invitation to a disciplinary meeting (page 187).
23. Due to all the upheaval at the school, Ms Clinton said the invitation to a disciplinary hearing was not sent to the claimant until the 25/7/2018, but she said that it was sent without delay. The letter set out the allegations as:

'On Monday 9<sup>th</sup> July you shouted inappropriately at the Deputy Head Teacher in her office, during school hours whilst students were still on the premises.'

On the same afternoon you entered a classroom and shouted inappropriately at a colleague, in the presence of an assistant head teacher.

You refused an instruction from that assistant head teacher and continued to shout in an inappropriate and aggressive manner despite being told that your behaviour was aggressive.

You shouted at a junior colleague in your care as an apprentice, in an aggressive manner and barged past her which was potentially dangerous.'

24. The disciplinary hearing was scheduled for 18/9/2018. Ms Clinton said that due to the end of the summer term and taking into account the opening of a much expanded school on a new site and the fact the disciplinary panel needed to be comprised of the head teacher and two school governors; this was the earliest the hearing could be convened. The claimant remained on paid suspension.
25. The claimant now complains about this delay. There was clearly a delay, however, neither the claimant nor her TU representative raised this at the time. It is accepted that the claimant had indicated that she agreed to the 10-day notice period being shortened. This did not help however if the school was not able to convene a panel compliant with the procedure in time. The Tribunal finds the disciplinary hearing was convened within a reasonable period of time.
26. The claimant complains that she did not know until she received this letter, what of the original allegations had been dropped. That is correct and the school could have been more proactive and clearer in its communications to the claimant as to which allegations were or were not proceeding. Although the school could have done more, as was noted by Ms Clinton, it is now clear that the claimant's TU representative was in contact with her over the summer and they continued to discuss the situation (pages 289-300). This was not raised at the time on the claimant's behalf.
27. There was then a further delay as the claimant was declared as unfit for work on 11/9/2018 due to 'stress and anxiety' (page 211). She was signed off for one month. Upon receipt of the claimant's sickness certificate, the respondent postponed the disciplinary hearing and referred her to occupational health (OH), informing her of this on 14/9/2018 (page 213). OH were instructed on the same day (page 215). A date was received on 17/9/2018 for an appointment on the 24/9/2018 (page 217). The consultation (by telephone) with OH took place on 24/9/2018. OH reported to the school that the claimant had chosen to review the report before it was released on 28/9/2018 (page 219). The report dated 26/9/2018 was released to the school on 2/10/2018 (page 221 and 223).
28. The report said:

'... related to a workplace incident, she will need to engage with you in order to contribute to any investigations you may choose to arrange. I recommended to her that she should ensure a union representative continues to be involved to help her at what is obviously a very worrying time.'

29. Two matters arise here. Firstly, OH recommended that the claimant engage with the school's processes. Secondly, the claimant misinterpreted the recommendation that she ensure continued TU representation. The key comment is that '*she*' (the claimant) should ensure continuous representation. The claimant contends that the responsibility was with the school; that is incorrect. The school facilitated the claimant being represented by engaging with the claimant's representative, but it was not obliged to do so or to do any more than it did. At every meeting it offered the claimant the right of representation. The school cooperated, for example by postponing the investigation meeting to allow more time for the claimant and her representative to prepare.
30. There was an issue with receipt of the report by the claimant. The claimant exercised her right to see the report prior to it being sent to the school. The claimant says she did not receive the report and her representative chased this up with the school on the 11/10/2018 (page 225). The school quite rightly assumed OH had sent the report to the claimant and had had her permission to release it. HR sent the report to the claimant promptly upon being asked for a copy of it.
31. The Tribunal finds that the school acted responsibly and reasonably as soon as it became aware of the claimant's health condition. There was no delay by the school. OH indicated that if the claimant was able to start medication in the next few weeks, she may be well enough to engage and to take part in any disciplinary matters by the end of October. Accordingly, the school rearranged the disciplinary hearing for 13/11/2018 and informed the claimant of the same on 19/10/2018 (page 201).
32. In the meantime, the claimant was certified as unfit for work from 4/10/2018 to 31/10/2018 due to stress and anxiety (page 233). Notwithstanding this certificate, the letter of 19/10/2018 confirmed the claimant remained suspended on full pay.
33. On the 13/11/2018 the claimant attended the disciplinary hearing and was accompanied by her TU representative.
34. By an outcome letter dated 16/11/2018 the claimant was given a written warning to last for 12 months (page 209). The panel (comprising two governors and Ms Clinton) upheld the decision that:

'On 9<sup>th</sup> July 2018, you behaved in an inappropriate manner, shouting at a junior colleague in an unprofessional tone. This unprofessional conduct is a breach of the School's Code of Conduct and is considered serious misconduct.'

35. The claimant was clearly upset about this outcome, but she did not appeal against this decision. At no time, did the claimant raise a grievance.
36. The claimant's suspension was lifted on 19/11/2018. The claimant did not return to work and on 19/11/2018 she informed the school she had a GP appointment on 23/11/2018. She was then provided with a sickness certificate from 23/11/2018 for one month (page 243) due to stress at work.
37. The claimant had had a previous period of sickness absence earlier in 2018 and unrelated to the incident in July 2018. The period of sickness absence which started in September 2018 triggered the school's absence management process. The claimant was invited to a stage 2 absence management meeting on 12/12/2018 (page 257) by letter dated 6/12/2018 (page 257).
38. In response the claimant asked for a list of questions to be given in advance on 10/12/2018 (page 259). HR responded and said the purpose of the meeting was to discuss the claimant's absence in accordance with the Management of Absence Policy; and furthermore, said there was no prescribed list of questions.
39. Correspondence was exchanged and HR offered the claimant a meeting at an alternative site. On 12/12/2018 the claimant said she would try to attend the meeting via email (page 267). She did not arrive. The school tried to contact her and could not do so. The school was concerned for her well-being in view of some of the comments in the claimant's email. The school contacted the claimant's next of kin as per its records (her sister) and her sister was able to confirm the wellbeing of the claimant.
40. As a result, the meeting was postponed to 11/1/2019 (page 271) with the school informing the claimant by letter dated 19/12/2018. The school set out that they were concerned about the claimant's wellbeing as she had not been in touch since her failure to attend the meeting on 12/12/2018 and asked her to get in touch. The claimant said in evidence that she had not seen this letter prior to her resignation.
41. The school acted reasonably in postponing and then informing the claimant that if she did not attend the meeting, it could potentially go ahead in her absence. The meeting scheduled for the 12/12/2018 was postponed when the claimant failed to attend.
42. Although the claimant takes issue with this, the Tribunal finds that the school was correctly following its own process. It was also following OH advice, which was to refer her back to OH and for the consultation to be in person, once the claimant had returned to work (page 224), which was:

'I am not minded that we must have that contact before she returns to work but as a minimum it should be in the early stages of any phased return to work programme.

I would also think it prudent for it to be a face-to-face appointment.'

43. The claimant said the school's actions were dangerous to her health and well-being and that the school demanded that she attend meetings under the Absence Management policy. In fact, the school had re-referred the claimant to OH on 19/12/2018 (page 245).
44. The school was not oppressive and it did not disregard the claimant's well-being, in fact it was aware of and acted in accordance with its duty of care. Ms Clinton and Ms Standing both said that a phased return to work would have been discussed, if appropriate at the meeting. It is accepted that this was the appropriate place to have such a discussion. The school cannot be criticised for not discussing or proposing a phased return to work until it had had a discussion and until there was a prospect of the claimant returning to work. Furthermore, the school was understanding when the claimant did not attend the meeting on 12/12/2018, did not take any issue (other than understandably asking the claimant to confirm she was safe) and rearranged the meeting. There was nothing wrong in that and certainly this was not a school demonstrating that it no longer intended to be bound by the contract of employment.
45. Another issue which the claimant now took, but which was not raised at the time was the issue of the offer of counselling. On HR's email of 11/12/2018 recorded that as previously advised, the counselling service was available to her and the details had been provided to her the previous week (page 265). The claimant says she never received the details. Even if that were the case, the reference was made by HR to the offer of counselling and if HR had overlooked providing the details, the claimant should have asked for them if she wished to take up the offer.
46. The claimant resigned by letter of 19/12/2019 (page 275). She said that she could not come to terms with the way the school had treated her and felt that mutual trust and confidence has broken down. She said this was as a result of the 'situation' and the impact it had had on her health, wellbeing and family.
47. Ms Clinton replied on 7/1/2019 and said she was sorry about the claimant's decision and that regardless of the outcome of any of the recent processes undertaken at the school, that she had not lost trust in the claimant's ability to carry out her role and to participate as a member of staff (page 277).

#### Conclusions

48. Mr Hodge referred to the five questions the Court of Appeal set out for a Tribunal to ask itself in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978:
- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
  - (2) Has he or she affirmed the contract since that act?



- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the [implied term of trust and confidence]? (If it was, there is no need for any separate consideration of a possible previous affirmation, if that conduct as a whole is considered to be repudiatory and the final act is part of that conduct, the final act is to revive the employee's right to accept the breach and resign)
- (5) Did the employee resign in response (or partly in response) to that breach?
49. Putting those questions to the case the claimant has put, the conclusions follow.
50. The most recent act relied upon by the claimant was the issue over the absence meeting which was due to take place on 12/12/2018; the claimant having said she had not seen the letter of 19/12/2018 when she sent her resignation letter.
51. The claimant has not affirmed the contract since that act.
52. The act of inviting the claimant to attend an absence meeting is not a repudiatory breach of contract. Furthermore, at no point has the respondent acted in a manner to show that it no longer intends to be bound by the contract. As the Court of Appeal said in Kaur at paragraph 75:
- 'I believe that the Judge was right to find, ... that what occurred in this case was "the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process". Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee.'
53. Furthermore, Kaur also stated at paragraph 77 that it is not the role of this Tribunal to decide the rights and wrongs of the incident of 9/7/2018 and it did not and would not expect to have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the claimant's contract of employment.
54. Put another way, in the absence of bad faith, which was not argued, the act of the school following its own disciplinary process, even though the claimant

was dissatisfied with the outcome, cannot amount to a breach of a repudiatory breach of the claimant's contract of employment.

55. Accordingly, there was no course of conduct which cumulatively amounted to a breach of contract. There was no breach for the claimant to 'accept'. The claimant's resignation was as a result of her inability to accept the school's disciplinary outcome and her dissatisfaction at the school applying its absence process to her – which it was entitled to do.
56. Accordingly, the claimant's claim fails and is dismissed. The provisional remedy hearing listed for 3/3/2020 is vacated.

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Employment Judge Wright  
24 October 2019

**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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