



EMPLOYMENT TRIBUNALS

Claimant: D Storey

Respondent: Darlington Borough Council

Heard at: Newcastle by CVP

On: 30 September 2020

Before: Employment Judge O'Dempsey

Representation

Claimant: Mr. Mann Solicitor

Respondent: Mr. C Bourne Counsel

JUDGMENT having been sent to the parties on 26 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues identified by the parties for determination were as follows:
 - (a) was the claimant dismissed by the respondent and if so when?
 - (b) if not did the claimant terminate the contract in circumstances in which she was entitled by virtue of the conduct of the respondent to terminate the contract of employment without notice (constructive dismissal).
 - (c) If the claimant resigned, and this amounted to a constructive dismissal, was that resignation still effective as at 11 October 2019?
 - (i) did the claimant waive the breach (by delay) or affirm the contract (by participation in the redeployment process of the respondent)?
 - (d) if there was a dismissal under (a) or (b) what was the reason for that dismissal? Was it a potentially fair reason (including a substantial reason which could justify the dismissal of an employee holding the position the claimant had)?
 - (e) if so, was that dismissal fair (i.e., did the respondent act reasonably in treating the potentially fair reason identified as a sufficient reason for dismissal having regard to all the circumstances including the size and administrative resources of the respondent and equity and the substantial merits of the case?)
 - (f) if the dismissal were unfair in this sense what would have happened had a fair procedure have been adopted?

2. There were the following applications made or considered. I considered how to ensure that the hearing could be made fully open. The

parties helpfully indicated that the witness statements could be placed into a separate window on the computer screen which could be viewed by anyone attending the hearing but could be minimized by individual viewers if it were not needed. Thus, anyone attending the hearing at the time it was taking place had the opportunity to read and absorb the evidence in chief which was given.

3. I heard evidence from the following witnesses:
 - a. The claimant; and for the claimant:
 - b. DH, the claimant's sister
 - c. RS the claimant's daughter; and for the respondent:
 - d. AW ASB & Civic Enforcement Manager
 - e. MM HR Advisor
 - f. CD HR Manager

The relevant law

4. Section 95 of the Employment Rights Act 1996 provides, as relevant:

95

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)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

...

(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. The provisions of section 98 apply in the case of unfair dismissal.
6. I was referred to **Chelmsford v Teal UKEAT 0277/2011**, **Roberts v West Coast Trains [2005] ICR 254**, and **Kwik-Fit (GB) Ltd v Lineham [1992] ICR 183**.

Findings of fact

7. The claimant was employed by the respondent from 18 September 2013 as a Lifeline response officer. On 22 October 2018 she joined the Civic enforcement team. This is responsible for matters such as fly tipping, antisocial behaviour and car parking.
8. She says that in December 2018 the manager of Civic enforcement and two other senior Civic Enforcement officers began to bully her. This was after a request by her for overtime payments. She says that she was sent out alone working in dangerous situations and was humiliated by them.
9. On 12 February 2019 after an incident in which she and a colleague were told to leave the office when they had been updating the day log at the request of one of these managers because that log had not been properly completed by the shifts, and during which one of the managers was visibly annoyed by the pair of them being at in the office, the claimant put in a letter of resignation on 14 February 2019 (page 12).

10. There is no dispute between the parties that when she did this she was extremely upset and felt as she put it backed into a corner.
11. It is also common ground that she received no acknowledgement that she had put in her letter from the Civic enforcement team. The terms of the letter are as follows: – "I wish to terminate my employment as from 14/02/2019 from Civic Enforcement".
12. However, on the same day the claimant spoke to AW the antisocial behaviour and Civic Enforcement manager who told the claimant that she should have spoken to her before resigning about what was going on. She asked the claimant to come to a meeting with other management to discuss what the claimant says was the handling of her notice and the circumstances around it.
13. There is a dispute between the parties as to the date of the next meeting. The claimant, despite having said in her witness statement that meeting took place on 8 March 2019, confirmed in her evidence that the next meeting was in fact on 1 March 2019. However, whatever the date was the claimant attended with her sister DH. At this meeting, on whichever date it was, there was a discussion of what was to happen to the claimant's "notice".
14. It appears to be common ground that there was at least some reference to the grievance process and the possibility of bringing a grievance.
15. AW said that at the meeting, which she said was on 1 March and whose evidence I accept in this regard, something was said to the effect that if the respondent were to investigate the grievance fully the claimant would need to retract her resignation because otherwise the respondent would struggle to do the investigation if the claimant was no longer in employment. Similarly, MM gave evidence that the respondent did discuss the process that the claimant could go through, although there was no reference to this in the notes which were produced during the course of the hearing before me.
16. She said that the grievance procedure was discussed, and that AW said that some of the issues would be investigated whether or not the claimant put in a grievance. This was because a member of staff had raised issues in a new service and so they would be investigated regardless of whether the member of staff was putting up a grievance. MM's evidence was that she summarised the meeting in the letter at pages 448 – 451. It is a matter of considerable surprise that nothing was said relating to the withdrawal of the resignation as being an option and no reference was made to suspending the notice as an option.
17. When MM was asked about the reference she made in her witness statement to various options being discussed, she said that the options included submitting a grievance formally or informally and one of the issues was whether the claimant wanted the matter to be investigated. Her evidence was that if someone handed in notice, they would not

necessarily get the outcome because they would not be employed at the end of the process.

18. I have considered the evidence of the claimant and her witnesses as well as that of the respondent's witnesses on this point. Although plainly the claimants and her witnesses made an error, which was not rectified until the hearing before me, concerning the date of the meeting, I do not consider that this tells me anything about whether they can be believed on the main issue from that meeting which they do recollect. I accept that the claimant was told words to the effect that if she wanted to have the grievance investigated, she would need to withdraw her resignation. I think this is the most likely account of what happened.
19. I do consider that if the respondent were making a highly nuanced distinction between the difficulties of communicating the outcome of the grievance to the claimant and the difficulties of investigating a grievance, it would have made some reference to this in the letter following on from the meeting. This is especially the case if, at the meeting, there had been a discussion of the various options available to the claimant. This appears to me simply good practice for an employer to undertake. Similarly, if a HR professional made a reference to this type of option in a telephone call with an employee, it is good practice to make a note of the conversation. None of this appears to have happened. I consider therefore it is unlikely that the suspension of the notice was put to the claimant either at that meeting or later.
20. The gist of what the claimant was told made it clear that if she wished to pursue a grievance, she would need to withdraw her notice. I have also considered the claimant's reactions during the meeting that she had during the grievance hearing on 28 June 2019 (page 99). When the question of retraction came up (page 98) it was put to the claimant in that meeting that she had been looking to put her resignation on hold while she waited to see what the investigation produced. The claimant immediately denied that this was the case. She immediately referred to the email she wrote and stated that the idea of putting the resignation "on hold" was new information to her. She said that she did not know that. She was, however, very clear that her resignation had not been put on hold and had been rescinded. Reading the transcript, in fact, she states that she rescinded the resignation because of the situation "and Anna was sort of saying if you think this needs to go further you do realise... If you're not employed by the council, we can't even take it any, I said right take it back I am not going to resign blah blah blah and I thought you had a month..." Similarly, Ms. DH said that AW had said at the meeting that the claimant needed to retract her resignation for the council to go forward (page 100).
21. There is a file note from AW dated 7 March 2019. For some reason, which has not been explained adequately saved by reference to oversight by the respondent's solicitor, this document was not disclosed by the respondent in the ordinary course of disclosure. It was a plainly important and relevant document, however instead of disclosing the document the respondent chose to exhibit it to the witness statement with the result that it was only disclosed to the claimant when witness statements were

exchanged very recently. I am happy to accept that it reflects the understanding of the writer of what she thought she had told the claimant.

22. However, I am not prepared to accept that it is likely, in view of the other evidence to which I have referred, that this was the position that was conveyed to the claimant about what was going to happen to her notice and resignation. As the respondent's position was a complicated one, I find it highly unlikely that a manager would fail to respond setting out the qualifications that the respondent was placing on the withdrawal of the notice in an email (particularly when the trouble had been taken by the manager to write a file note consisting of two lines).
23. On 8 March 2019, page 23, the claimant wrote retracting her notice. The text of this is also worth quoting in full: "morning Anna I wish to retract my notice to reinstate my employment with a Darlington Borough Council." I accept the claimant's evidence on this issue. The claimant withdrew her notice.
24. AW sought to explain why she did not reply to this email by saying that she had had a conversation with the claimant in which the proposition was put to the claimant and accepted that her resignation would simply be suspended for the duration of the grievance procedure. I find that it is unlikely that the respondent simply suspended the notice without giving any indication in writing to the claimant that this was the position. In and of itself suspending the notice in this way was a highly unusual thing to do and AW was unable to explain why there was no reply to the email, including even an acknowledgement. The email that the claimant sent to her was very clear and was to the effect that she wished to retract her notice to reinstate her employment.
25. I think it is more likely that, whatever the respondent's intention, it failed to convey that there was any counteroffer being made to the claimant's clear and unambiguous withdrawal of her notice.
26. I accept Ms. AW's evidence at paragraph 19 of her witness statement that she was informed when the grievance process was concluded that the claimant had applied for a redeployment and was to continue in the Licensing Department until she was either redeployed or her employment ended. This clearly indicates to me that the respondent did not act in accordance with what it says was its counteroffer.
27. So, the respondent did not simply suspend notice during the grievance period but allowed the claimant to remain in employment for a substantial time after both the expiry of the grievance process and what would have been the contractual notice that she was required to give after the expiry of the grievance process. I do not accept therefore that it was the intention either of the claimant or of the respondent that the notice will simply put into abeyance.
28. The respondent was not entitled to rely on the resignation, even if it were construed to be a resignation with notice, if it continues to employ the

claimant after the expiry of what would have been the notice following on from the end of the grievance process. The respondent cannot rely on a notice which has expired in this way.

29. The grievance process came to an end by decision dated 23 July 2019.
30. I conclude therefore that the claimant was dismissed by the respondent on 11 October 2019. This was a dismissal stemming from the action of the respondent. It is that dismissal is I must characterise as fair or unfair.
31. During the meeting on 28 June 2019 Ms. CD raised the question of where the claimant would be working. (Page 101) There was a reference to the period of sickness absence, and she said that the respondent would expect that the absence to come to an end and for the claimant to return to the team as the default position. There would need to be work done on communication because a lot of had come out in the investigation concerning communications. CD then went on to say that if the claimant were saying that that was not an option, they would need to talk about what else was available. In response to this the claimant said that she would need some time to think about it. She said, "asking me to go back on the team I don't know how that would work". She did not appear to get a response to that question because the conversation moved on to the resignation issue.
32. On 23 July 2019, 117, Mr. Hall (head of community safety) wrote the grievance outcome letter in which he states (page 118) "I believe you were very clear at the meeting that you did not wish to return to your current role and this was strongly supported by your family." This is borne out by page 105. The claimant's particulars of claim, paragraph 24, page 174, confirms that this was the position because she says that she could not return to the team while those who bullied her were still in employed by the respondent.
33. I accept that on 28 June CD indicated that the claimant was going to be put onto redeployment for a 12-week period. That is inconsistent with the supposed suspension of the claimant's notice. On 23 July 2019 (page 117 – 8) the respondent wrote to the claimant confirming the outcome of the grievance. The allegations of bullying and harassment could not be substantiated on the strength of the evidence established during the investigation. The respondent appears to have accepted that some developmental action was required within the team in respective communication styles and expectations.
34. The claimant worked in the Licensing Department of the respondent from 12 July until 11 October 2019. It is very clear therefore that the respondent did not run the notice from the outcome of the grievance process. It cannot therefore rely on the claimant's resignation even on the terms of its own case. Therefore, even if I had found in favour of the respondents on the question of whether the claimant was told that the notice would be suspended and would run from the end of the grievance process, the respondent simply did not do this but continue to employ her for a considerably longer period.

35. However, during that time, the claimant was under a redeployment process which was only used where an employee would otherwise be dismissed if an alternative position could not be found for her. The claimant had indicated that she was not prepared to return to the post that she had occupied prior to the grievance.
36. I am satisfied that in those circumstances the claimant was dismissed and that the reason for her dismissal was some other substantial reason such as would justify the dismissal of the person occupying the claimant's post for the purposes of unfair dismissal.
37. The claimant says that during the second day of her temporary posts, which would have been in July 2019, she went for an interview with CCTV but was not really prepared for the interview and as a result did not get the post. She then went for a full-time job with Lifeline services. Although there was some dispute between the parties as to what constitutes a full-time job, it is clear that the claimant had put in an application for a job with Lifeline services because she had worked for them for around five years before starting her job in Civic Enforcement. It appears that the hours that the respondent was prepared to offer for this job were not acceptable to the claimant. There was no suggestion to any of the respondent's witnesses that there was anything untoward in the claimant not obtaining that job. In any event I do not see any evidence that suggests that something untoward did happen. The claimant made clear in her witness statement, paragraph 56, that the respondent was saying that it could only offer 10 and 12 hours per week and she explained that this was not enough for her.
38. The respondent's witnesses explained in evidence what the process of redeployment was and were not challenged on this point. There appears to have been no dispute that the claimant had been made aware of all jobs that were available. There was, in essence, no criticism of the process of redeployment as it was applied to her and the claimant accepted that she was not making any substantive criticism. She does complain however that the respondent could have done more.
39. I must consider whether the reason given by the respondent for the dismissal of the claimant was a sufficient reason for her dismissal having regard to all the circumstances of the case, the size and administrative resources of the respondent, as well as equity and substantial merits.
40. The claimant, as the respondent knew, was not prepared to work in Civic Enforcement because she felt that she had been bullied. However, the respondent had investigated whether such bullying had taken place and had reached conclusions which are not effectively challenged that bullying had not taken place. This does not mean that the way in which the claimant may have been treated was acceptable. However, the respondent reached reasonable conclusions on the grievance investigation, because of which it could not uphold the claimant's grievance.

41. MM stated that at the meeting on 1 March 2019 the claimant was very clear that she could not return to Civic Enforcement. The claimant tried to hand in her identity badge at the end of the meeting. MM also gave evidence that the claimant and AW and herself had met in April. There was discussion about redeployment at that meeting which was one of the desired outcomes that the claimant had requested as part of the grievance process. Necessarily therefore redeployment would only start at the conclusion of the grievance process. This is reflected in MM's evidence (paragraph 13 of her witness statement) which reflects that by 1 August 2019 the grievance process had concluded, and the claimant had been made aware of the outcome. It is clear from that evidence that the respondent viewed the redeployment process as a separate process to the grievance.
42. That left the respondent in a difficult position in relation to the claimant. There was no evidence that she was prepared to work in civil enforcement again. Although the claimant mentioned in her witness statement that some of the people who had been the source of what she regarded as bullying had left and although she says that if she had stayed employed by the respondent for another month or two, she never been able to return to the civil enforcement team, this was not put in any way to the respondent's witnesses. It is not clear when the people she accused left. There is no evidence that she suggested before her dismissal that she would have been willing to work in civil enforcement even though one of the senior staff who she accused remained employed there. In those circumstances there was no reason why the respondent should have considered returning her to civil enforcement. All the evidence pointed the other way.
43. Although at paragraph 25, 175, the claimant does say in her particulars of claim that her applications were referred to human resources and that she was being scrutinised at a higher level than expected, I find that this is not the case. In one example two managers were involved in her interview or matching meeting, but this was because the job was in the service that was about to change managers. There was nothing untoward about the involvement of human resources. It was not put to any of the respondent's witnesses that the scrutiny of the claimant's applications was at a higher level than expected. The evidence of Ms. CD indicated that the level of scrutiny was no more than would be expected in this type of redeployment situation. In any event the claimant's particulars of claim even after amendment do not give details of what was supposed to have gone wrong with the redeployment process to show that the respondent was behaving outside the scope of behaviour of a reasonable employer in this situation.
44. In respect of the alternative basis of the claimant's claim, namely constructive dismissal, this does not arise on the facts that I have found. However, the claimant claimed that she was constructively dismissed because of the employer's conduct and Mr. Mann clarified in submissions that she was relying on breach of the implied term of trust and confidence. That implied term is to the effect that the employer shall not conduct itself without good and proper cause in a manner which is likely to undermine the relationship of trust and confidence. As far as the events characterised by the claimant as bullying were concerned, the employer's conduct in offering to investigate and investigating the behaviour of staff indicates

that it was not in breach of that term. The claimant's conduct in seeking to pursue the grievance and in particular the redeployment process indicates that she was affirming the contract. Therefore, even if the events which the claimant characterizes as bullying (which the claimant's colleague, did not characterise in this way to the respondent in its investigation), had occurred as described by the claimant, she withdrew the resignation based on those events. She then affirmed the contract. This was not simply because she delayed in bringing the contracts to an end. On her own account she did not bring the contract to an end at all. But on the hypothesis that the events in October constitute a resignation she had insisted on the contract in terms of using the redeployment procedure as well as doing work for the respondent (albeit in a different position), drawing sick pay (albeit for a short period of time). I do not consider that by failing to appeal against the grievance outcome she contributed to any waiver or affirmation of the contract. However, given my findings of fact there is no constructive dismissal but a dismissal by the employer. I do however accept, what appears to be the claimant's submission that the earlier resignation was carried out in the heat of the moment and that the employer accepted a retraction of that resignation within, an unusually long, reasonable period. On the facts before me neither party by the time that the email of retraction was received believed that the resignation was really intended.

Discussion of unfair dismissal and conclusion

45. It may be that the respondent could have done more. One of the things that it could have done (but this was not explored in cross-examination) was to point out the stark choice that confronted the claimant at the end of the redeployment process: return to the Civic Enforcement team or be dismissed. Some employers, even if they had been of the view that at one stage the claimant had offered a resignation might have done this. But it is not my role to substitute my view of what should have happened for the correct legal test. I must ask myself whether the decision of the respondent having regard to those factors that I have mentioned, and the facts of the case falls within the band of responses to this situation that a reasonable employer would take.
46. When I asked myself that question, I have no hesitation in answering that the respondent's decision to dismiss falls firmly within that band. Unfortunately for the claimant therefore her claim must fail.

Authorised by Employment Judge O'Dempsey

Date 15 November 2020