



EMPLOYMENT TRIBUNALS

Claimant: Mr S Kilroy

Respondent: Community Inclusive Trust

Heard at: Nottingham by Cloud Video Platform

On: Monday 15 February 2021

Before: Employment Judge Blackwell (sitting alone)

Representatives

Claimant: Mr Hamilton, Solicitor

Respondent: Mr Hoyle, Employment Consultant

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 succeeds.

REASONS

1. A matter which had been overlooked throughout the history of this claim is that by reason of a TUPE transfer which took place in November 2018 the correct Respondent is Community Inclusive Trust.

History

1. On 25 April 2019 the Original Decision was sent to the parties upholding Mr Kilroy's claim of constructive unfair dismissal.

2. On 27 June 2019 following an Application for Reconsideration by Mr Hoyle a Reconsideration decision was sent to the parties and it confirmed the Original Decision.

3. Following an appeal to the Employment Appeal Tribunal a decision dated 29 July 2020 was sent to the parties.

4. The conclusions of Mr Justice Soole are set out below:

“39. I have considerable sympathy with the ET in this case. It was not provided by the parties with the two decisions of the Court of Appeal which were of direct relevance to the issues before it. On the Respondent’s reconsideration application, it was provided with the decision in Kaur but not the decision in Folkestone Nursing Home on which this appeal now places its focus.

40. Nonetheless, having the advantage of the latter decision, I am clear that the ET’s conclusion about the effect of the Claimant’s adoption of the contractual appeal process cannot stand. In my judgment, the observations of Sales LJ in Folkestone Nursing Home have direct application. By his adoption of the contractual appeal process and viewed objectively, the Claimant was thereby and necessarily treating the contractual relationship as continuing to exist. I do not accept that his subsequent statements that he did not intend to return to work can amount in law to any qualification of his objective acceptance of the continuation of the contract. Expressed in terms of the principles of affirmation, his act in pursuing his appeal under the contractual procedure was an unequivocal election to treat the contract as continuing.

41. However, that is not the end of the matter. The Claimant’s case is that breaches of the implied term of trust and confidence continued through the Respondent’s conduct of the contractual appeal process. In consequence, the principles reaffirmed by the Court of Appeal in Kaur potentially come into play; and the five questions identified in that Decision fall to be answered. As the final parenthesis in question four makes clear, if the answer to the first four questions is ‘yes’, any previous affirmation is immaterial. An example is provided by the ultimate decision in Folkestone Nursing Home itself.

42. Accordingly I reject the Respondent’s argument that only the contents of the letter of 22 October can be taken into account for the purpose of deciding the issue of constructive dismissal. The ET considered the Claimant’s complaints about the Respondent’s conduct after his invocation of the appeal procedure and was sharply critical of various aspects of that conduct. However, its attention not having been drawn to Kaur, it did not go on to consider the five questions. The only apparent reference to the effect of the Respondent’s conduct of the process was in paragraph 46 of the Judgment.

43. The five questions were posed to the ET in the Application to Reconsider and these have been answered in the Reconsideration Judgment. On the face of it, the answer to the first question identifies an event which precedes the Claimant’s affirmative act of invoking the appeal procedure. However, these answers were given (i) in the context of the ET’s finding on the issue of affirmation and (ii) without full argument.

44. In respect of its answer to the first question I add that the Judgment at paragraph 30 recorded that the Claimant's solicitors' letter of 19 September had complained about the continuing delay in transmitting the result of the appeal. In circumstances where the ET evidently understood Mr Kilroy to be contending that there had been a continuing breach of the implied term of trust and confidence, I reject any suggestion that the answers in the reconsideration Judgment demonstrate that the claim would have failed in any event.

45. In my judgment, Mr Hoyle was right to accept that even if successful on the point of affirmation, this was a matter which should be remitted and to the same ET. In any event, that is my decision.

46. In all the circumstances I conclude that the ET's Decision that there was a constructive unfair dismissal should be set aside; and that the determination of that issue should be remitted to the same ET for reconsideration in the light of this Judgment and the five questions identified in **Kaur**."

5. The operative paragraph is paragraph 46 and requires me to reconsider in the light of Mr Justice Soole's judgment and the five questions identified in **Kaur**. They are as follows:-

5.1 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?

5.2 Has he or she affirmed the contract since that act?

5.3 If not was that act (or omission) by itself a repudiatory breach of contract?

5.4 If not was it nevertheless a part (applying the approach explained in **Omilaju**) of a course or conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the **Malik** term? (If it was there is no need for any separate consideration of a possible previous affirmation for the reason given at the end of paragraph 45 above.)

5.5 Did the employee resign in response (or partly in response) to that breach? The relevant part of paragraph 45 reads as follows:

"If the Tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the **Omilaju** test), it should not normally matter whether it had crossed the **Malik** threshold at some earlier stage; even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so."

6. The **Omilaju** test is set out at paragraph 40 of the **Kaur** judgment:

“40. The particular issue in **Omilaju** was, as Dyson LJ formulated it at para.19 (p.488 F-G), “what is the necessary quality of the final straw if it is to be successfully relied in by the employee as a repudiation of the contract?”. He answered that question as follows (pp. 488-9):

“19.... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase ‘an act in a series’ in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as ‘unreasonable’ or ‘blameworthy’ conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. *Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so.* If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle. [Emphasis supplied.]”

7. On 16 September 2020 Regional Employment Judge Swann held a case management summary setting down this hearing. It was agreed that no live evidence would be submitted and that reliance will be placed on the existing Tribunal bundle, evidence and any witness statements that were taken into consideration at the previous hearing. The parties were to make their submissions through written argument.

8. The parties duly complied with the order to submit written submissions and orally today they both commented on each other's submissions:

9. Kaur: Question 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?

10. Mr Hoyle submits "it is the Respondent's position that because there was a reinstatement and any claim to prior breaches were waived, the Claimant had nothing which he could rely upon post reinstatement which he could hold as being a new breach or series of breaches entitling him to resign". It seems to me that this is at odds with paragraph 42 of Mr Justice Soole's decision.

11. Mr Hamilton submits that the answer to this question is the Respondent's letter of 16 October 2018 ie the letter communicating the outcome of Mr Kilroy's appeal against dismissal. I agree.

12. Question 2: Has he or she affirmed that the contract since that act?

13. On 22 October 2018 Mr Hamilton writing on Mr Kilroy's instructions (see paragraph 94 of Mr Kilroy's proof of evidence) says the following:

"Our above named client has asked us to acknowledge receipt of your letter to him of 16 October and to respond to the content.

The expectation that our client will return to work on Monday 29 October expressed in the penultimate paragraph of your letter is unrealistic. We have been advising Mr Kilroy since his suspension last May and whilst initially he hoped that he would be reinstated, the way in which he was treated prompted our letter to Ms Betha of 23 July and, when she disclaimed responsibility our letter of 24 July to Mr Rose.

Nothing that has happened since has altered the position other than to convince our client that his decision was correct. Not only has there been the protracted delay in resolving his issue, there has also been a persistent disinclination on the part of the academy to address the matter of his personal possessions at the school and for him now to be told that after a period of more than 5 months he is to receive a final written warning and is "expected" to return to work, despite the letters to which we refer, is a continuation of an attitude which is wholly inconsistent with a normal employer/employee relationship.

Whilst, as a matter of law, the decision that our clients purported misconduct was a capability issue as opposed to gross negligence cannot be criticised and, if the allegations were true, was inevitable we have to make it clear on our client's behalf that he does not consider himself as having been guilty of any misconduct during his twenty years of employment with the academy. There are eleven bulleted findings in your letter but no consideration appears to have been given to the fact that the original allegation of gross misconduct covered the period September 2017 to July 2018 – a period which extended more than two months after our client's suspension. At the time of his suspension he pointed out that it was a crucial time in examination process and was told that it was not his responsibility.

Our client's application to the Employment Tribunals based on unfair dismissal/constructive dismissal was submitted on 8 October 2018. So that there is no misunderstanding we must make it clear that he will not be back on work on Monday 29 October 2018 and it is his intention to pursue his constructive dismissal application."

14. In my view there is no evidence to suggest, that Mr Kilroy did affirm the contract post 16 October 2018.

15. Question 3: If not, was that act (or omission) by itself a repudiatory breach of contract?

16. Mr Hoyle referred me to the case of **Alidair v Taylor** [1977] ICR beginning at page 445. Mr Hoyle said that in the light of that judgment I should not substitute my own view as to the correctness of the Respondent's decision in substituting capability for conduct in their outcome of appeal letter. I am not doing so and in my view it is not relevant to my decision to do so. The matters complained of in Mr Hamilton's letter of 22 October beginning at page 234 which I have set out in full above are the protracted delay in resolving the employment issue and secondly the matter of the return of Mr Kilroy's personal possessions.

17. There was further delay in both hearing the appeal (I say that notwithstanding that Mr Kilroy was not present at the Governors' appeal hearing) and in delivering the outcome. There was also a failure over a period of 7 weeks to deal with the return of Mr Kilroy's possessions. Taken together, I do not consider that they amount to a repudiatory breach of contract. However, they clearly meet the last straw test set out in **Omiljau**, the conduct being both blameworthy and unreasonable. So, the answer to Question 3 is no.

18. Question 4: If not was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which viewed cumulatively, amounted to a repudiatory breach of the Malik term (if it was there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of paragraph 45 above.

19. Mr Hoyle submits "it is not for the Tribunal to now go in search of other breaches such as deficiencies in the appeal procedure (including any perceived delay) as the Claimant has not complained of anything which could amount to such a breach either in correspondence or in oral submissions". I do not accept the first sentence of that submission. Mr Hamilton's letter of 22 October does complain of the delay and in addition the failure to resolve the question of the return of Mr Kilroy's personal possessions.

20. In my view the delay in dealing with the appeal and with the separate issue of the return of Mr Kilroy's possessions was a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a repudiatory breach.

Those acts remain the conversations held between Mr Kilroy and Mrs White and Mr Almond as set out in paragraph 38 of the Original Decision. I also rely on paragraph 41 of the Original Decision which reads as follows:

“It is clear beyond doubt that on or about 23 July Mr Kilroy formed the view that he could not return to the Trust and in accordance with his instructions the letter at page 150 and 153 was sent in those terms. Had this letter not been rendered a nullity by Mr Rose’s telephone call informing Mr Kilroy that he had been summarily dismissed and had Mr Kilroy then brought proceedings swiftly, in my view a claim of constructive unfair dismissal would have succeeded.”

21. Thus, in accordance with **Kaur** at paragraph 45 cited above there is no need for any separate consideration of a possible previous affirmation,

22. Question 5: Did the employee resign in response (or partly in response) to that breach?

23. Mr Hoyle submits correctly that on several occasions Mr Kilroy made it clear that he would not return to work most recently in Mr Hamilton’s letter of 22 October and also in Mr Hamilton’s letter of 19 September, page 220 in which he said:

“It seems that those with whom our client is communicating are unaware that irrespective of the current appeal there is no question of our client returning to his former employment and as he points out to us as well as to them his personal possessions are quite separate from the outstanding issues.”

24. Mr Hoyle also correctly points out that in his Application to the Tribunal Mr Kilroy stated:-

“If I were successful in my appeal my intention was to pursue my claim based on constructive dismissal.”

25. However, whilst it is clear beyond doubt that Mr Kilroy had formed the view as early as 23 July that he was determined not to return to his employment, nonetheless as Mr Hamilton says (on Mr Kilroy’s instructions see paragraph 94 of his evidence):

“Nothing that has happened since (ie since 23 July) has altered the position other than to convince our client that his decision was correct.”

26. Mr Hamilton goes on:

“Not only has there been the protracted delay in resolving his issue, there has also been a persistent disinclination on the part of the academy to address the matter of his personal possessions at the school and for him now to be told that after a period of more than 5 months he is to receive a final written warning and is “expected” to return to work, despite the letters to which we refer, is a continuation of an attitude which is wholly inconsistent with a normal employer/employee relationship.”

27. I therefore conclude that Mr Kilroy did, partly in response to the trigger of the appeal outcome letter, resign in response to the delay in determining the appeal and the continuing failure to deal with the issue of Mr Kilroy's personal possessions. It can be seen from the letters of 19 September and 22 October referred to above that both issues were in Mr Kilroy's mind and that is confirmed by paragraphs 86, 87, 88, 89, 90 and 94 of Mr Kilroy's proof of evidence. I therefore conclude that Mr Kilroy resigned partly in response to the issues of delay and the failure to return his personal possessions. They were confirmation of the conclusion that he had earlier reached that there had been a breach of the implied term of trust and confidence.

28. The Answers to the Kaur questions are:-

28.1 The Respondent's letter of 16 October 2018 giving the outcome of Mr Kilroy's appeal.

28.2 No.

28.3 No.

28.4 Yes.

28.5 Yes (partly in response).

29. I therefore conclude that Mr Kilroy's claim of constructive unfair dismissal succeeds.

Employment Judge Blackwell

Date: 23 February 2021

JUDGMENT SENT TO THE PARTIES ON

25 February 2021

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FOR THE TRIBUNAL OFFICE

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