EMPLOYMENT TRIBUNALS

Claimant: Mr Ayodele Martin

Respondent: London Borough of Southwark (1)
The Governing Body of Evelina Hospital School (2)

OPEN PRELIMINARY HEARING

Heard at: Croydon (by video) **On: 9 February 2021**

Before: Employment Judge C H O'Rourke

Representation
Claimant: Mr R Kohanzad - counsel
Respondent: Mr P Linstead - counsel

RESERVED JUDGMENT

1. The Claimant's effective date of termination was 17 December 2019 and accordingly, it having been presented two days out of time, his claim of constructive unfair dismissal will be listed (by separate case management order of same date) for a further open preliminary hearing, to determine whether or not the Tribunal has jurisdiction to hear it.

2. The Claimant's claims of protected disclosure are struck out as being res judicata/an abuse of process.

3. The Claimant's claim of failure to pay a redundancy payment is dismissed, by way of withdrawal.

REASONS

Background and Issues

1. This Hearing was listed to determine the Respondents' strike-out applications, as set out in their grounds of resistance, as well as case management issues, as follows:

    a. The correct identity of the Respondent. The Claimant had named only the Second Respondent in his claim form (albeit both of

them are named in his particulars of claim) and the Respondents considered that both should be included. Mr Kohanzad having no objections to the inclusion of the First Respondent, both Respondents are now included, as set out in the Case Management Order of same date.

b. Whether the Claimant is entitled to a redundancy payment. Mr Kohanzad agreed that such claim should be withdrawn and it was accordingly dismissed on that basis.

c. Whether the Claimant has had unlawful deductions made from his wages. Following indications from Mr Kohanzad that instructions would be taken from the Claimant as to whether or not such claim continued to be pursued, Mr Linstead withdrew his application for strike out, or deposit order, pending the Claimant's decision, to be communicated within fourteen days of today's hearing.

d. Whether the Tribunal had jurisdiction to hear the Claimant's claim of constructive unfair dismissal, on the basis that it may be out of time.

e. Whether any of the Claimant's protected disclosure claims can continue, or should be struck out by reason of abuse of process, or issue estoppel.

2. The Claimant had been employed as a teacher, until his resignation in December 2019, on a date to be determined. As a consequence, he brought the claims set out above, by an ET1 presented on 18 March 2020.

3. This is the fifth such claim the Claimant has brought against the Respondents. The first claim, for unlawful deductions from wages, was struck out, in May 2019, as having no reasonable prospects of success. The second, third and fourth claims related to alleged protected disclosures and those claims were dismissed, following a final hearing in September 2019, with judgment sent to the parties on 20 March 2020 (therefore two days after he had presented this claim to the Tribunal).

4. The Claimant has subsequently appealed that latter judgment (in May 2020) and that appeal is currently before the Employment Appeal Tribunal, awaiting full hearing, on a date yet to be determined.

5. The two issues before me, to determine, therefore, are whether or not the Tribunal has jurisdiction to hear the unfair dismissal claim and whether or not the protected disclosure claims are *res judicata*/an abuse of process.

6. On a procedural point, the Respondents sought leave to amend their joint response, as set out in the draft amended response of 20 November 2020 [A198] and Mr Kohanzad having no objection, leave was granted.

7. However, as a preliminary issue, Mr Kohanzad submitted that the Claimant was not in a position to give evidence today, as to whether or not, if his unfair dismissal claim is out of time, it was not reasonably practicable for him to submit the claim in time. He said that while the Claimant had personally received notification from the Tribunal, in July 2020, of the purpose of this hearing [47], he had subsequently instructed solicitors, passing that correspondence to them. He was not subsequently re-advised as to the nature of this hearing (it being held some seven months later) and in fact, Mr Kohanzad confirmed, he himself was under the impression that this hearing was purely in relation to case management and was not aware otherwise, until receipt of Mr Linstead's skeleton argument on Sunday evening last (the 7th). Mr Kohanzad stated that the Claimant is suffering from depression and anxiety and without due notice of being required to give evidence and to have time to prepare himself, is unable to do so. It was therefore suggested that if that issue remains live (subject to Mr Kohanzad's submissions on the Effective Date of Determination (EDT)), then it would need to be adjourned to a further preliminary hearing. Mr Linstead objected to such a proposal, stating that no medical evidence had been provided to support the Claimant's contentions as to his medical condition, which seems to be long-running and despite which, in the two-week final hearing of the previous proceedings, in September 2019, he was able to act competently, as a litigant-in-person. The Claimant is apparently not working and his counsel having been notified on Sunday, it should have been possible for him to provide a witness statement on this discrete issue, in time for today's hearing, on Tuesday. However, I concluded that this matter would, if necessary, need to be adjourned, for the following reasons:

    a. Regardless of the notice of hearing being sent to the Claimant, it was some considerable time ago and he had since left such matters in the hands of his solicitors. It was evident from Mr Kohanzad's submissions that actual notification of the true purpose of the hearing was belated.

    b. That being the case, there is insufficient time for the Claimant to adduce medical evidence to support his contention that he cannot give evidence at short notice.

    c. The prejudice caused to the Respondents can be ameliorated by a potential costs order.

The Law

8. I was provided with extensive reference to statute and authorities, which I summarise below.

9. EDT. As to determination of the EDT:

    a. S.97(1)(b) Employment Rights Act 1996 (ERA) states that '*the EDT, in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect'.*

b. **Edwards v Surrey Police [1999] IRLR 456 UKEAT**, which found that '*before a contract of employment can be terminated, there must have been communication by words … such as to inform the other party to the contract that it is at an end. … Unless there has been a proper communication by the employee of the fact that they are regarding themselves as no longer employed … their employment relationship was not terminated.'*

c. **George v Luton Borough Council [2003] All ER(D) 04 UKEAT**, in a case in which an employee wrote to her employer, on 30 July, stating that she would be resigning as of 31 July, enclosing with it a doctor's certificate, confirming that she would be unable to work for 28 days. The letter was received on 1 August. On a tribunal subsequently concluding that her EDT was 1 August, it found that her claim was out of time. She appealed, arguing that her letter should have been read as meaning no more than that, as at 31 July, she was giving four weeks' notice, thereby extending her EDT to permit her claim to be within time. The EAT dismissed the appeal, concluding that the meaning of the letter was clear that '*so far as the employee was concerned, the conduct of the authority had been such that she could no longer be expected to work, and as from the day after the letter, she would be resigning.'*

d. **Fitzgerald v University of Kent at Canterbury [2004] IRLR 300 EWCA**, in which the employee applied for and was accepted for early retirement, on 2 March, but it was subsequently agreed between the parties that her retirement date would be 28 February. When she presented an unfair dismissal claim on 1 June, a tribunal found it was out of time, as it considered her EDT to be 28 February. The EAT rejected her appeal. The Court of Appeal allowed her appeal, stating that the EDT '*is to be objectively determined and cannot be fixed by agreement between employer and employee. The EDT is a statutory construct which depends on what has happened between the parties over time and not on what they may agree to treat as having happened.'*

e. In **Feltham Management Ltd v Feltham & Ors UKEAT/0201/16** HHJ Richardson reiterated the principles in **Societe Generale v Geys**:

*'It is an "obviously necessary incident of the employment relationship" that the other party should be notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised and how and when it is intended to operate: see **Societe Generale v Geys** per Lady Hale at paragraphs 52 and 57 in a passage with which Lord Hope, Lord Wilson and Lord Carnwath agreed. Whether such notification has been given is to be objectively ascertained, having regard to what a reasonable recipient would understand…*

…However, given its statutory setting and importance, section 97(1)(b) in my judgment requires words or conduct which in their

context amount to a plain and unambiguous termination by an employer. The termination may be by words or conduct or a mixture of the two; but it must unequivocally convey to the employee on an objective reading or understanding that the employer is terminating the contract. Words or conduct which reasonably leave the employee in doubt as to whether the employer has terminated the contract will not trigger the effective date of termination.' (with the principle also applying in reverse).

10. Estoppel. As to the principles of estoppel:

a. **Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] 1 AC 160 UKSC** established that (as relevant to this claim) three different principles restrict litigation of similar matters on different occasions, as follows:

i. Cause of action estoppel: where a cause of action has been determined in litigation.

ii. Issue estoppel: where the cause of action is not the same, but an issue has been determined in litigation between two parties, that issue cannot be raised again. Both this and the preceding principle are res judicata in the strict sense and are strictly applied, (except if '*fraud or collusion is alleged*' (20)), to avoid '*offend*(ing against) *the core policy against the re-litigation of claims'* (25&26).

iii. The rule in **Henderson v Henderson [1843] 3 Hare 100**: even where a cause of action or an issue has not been determined already, there may be an abuse of process for the cause of issue to be raised, such as where a party seeks to litigate an issue which should have been raised in the earlier proceedings between them. This is a procedural rule (as opposed to a substantive rule of law) and states:

"… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." [emphasis added]

b. **Sheriff v Klyne Tugs Ltd [1999] ICR 1170 EWCA**, which indicated that for there to be any exemption from this rule there

'*must be an adequate explanation of why the claim now made was not made in the earlier proceedings.'*

Submissions

11. On behalf of the Respondent, Mr Linstead made the following submissions:

    a. EDT.

        i. There is no dispute that if the Claimant's EDT is the date of his email to the Respondent (and numerous other recipients), of 17 December 2019 (sent at 13.38), stating that he resigned, then his claim is out of time, by at least one or two days. This is the day on which his resignation was communicated (**Edwards)** and only the employee can decide if they are resigning and how to communicate such a unilateral decision. That email stated the following:

            'On 2 December 2019 I sent an email complaining about the fact that I had not been paid wages that I am owed. I explained this was making it difficult for me to continue in this employment because of my financial situation, which has made my mental health worse.

            I stated that my mental health difficulties are a workplace injury and that sufficient medical evidence was provided to support that claim. I drew your attention to the definition of injury at work as defined by paragraph 9.1 of the 'Burgundy Book' (the collective agreement which is incorporated into my contract of employment) and by failing to pay me my wages under that provision, you are in fundamental breach of my contract (per Roberts v Whitecross School).

            I explained that from the 11 February 2019 I was put on half pay for 100 days and after that my pay completely stopped. According to the 'Burgundy Book' my full pay should have continued for 6 months because of my injury at work, follow by 100 days at half pay. The unpaid wages I am asking for is the difference between my full pay and the pay I have received from you for the six months starting 11 February 2019, then after the six months, the half pay up to 17 December 2019.

            I am resigning in response to a series of serious breaches of contract including the breakdown of mutual trust and confidence, the last straw is the decision of: Ann Mullins; Maarten Crommelin; David Freeman; Kate Bennet; David Quirke-Thornton; the Governing Board of EHS and Southwark Council not to pay wages owed to me for injury at work.

I gave you until the 16 December 2019 to deal with my pay issue, which is causing me extreme financial pressure and mental stress. This you have not done. I regard your behaviour in not paying my wages a fundamental breach of my contract.

In these circumstances as the last straw, the pressure of not being paid has caused me to leave. I have no alternative but to resign.'

By this letter, he was alleging constructive unfair dismissal and accepting what he considered to be a fundamental breach by the Respondent of his pay entitlement, so, as a matter of contract, his employment terminated on that date. In the context of such claims, employees can choose to work out their notice, which the Claimant could have done, but did not. However, employees who make this choice may face arguments by employers that by doing so, they have, following the breach, affirmed the contract, thus weakening their claim. However, if an employee asserts that they no longer work for the employer, by saying, as the Claimant did that the Respondent's breach '*caused me to leave'* (past tense), then there cannot be an implicit offer to work their notice, reliant on the case of **George**, which is closely aligned to this present case.

ii. While there could be a different contractual EDT, the determination of the EDT, for the assertion of employment rights, is a statutory construct, not open to subsequent alteration, by agreement of the parties (**Fitzgerald**).

iii. The contents of the resignation email are quite clear. The Claimant sent it to both the Respondent and numerous others. The language he used ('*I am resigning'*) and in reference to the Respondent's alleged failure to pay the correct wages, being a '*last straw',* it '*has caused me* (past tense) *to leave'*, removes any doubt, to either a lawyer, or a layman. This was a 'proper communication' (**Edwards**) and 'clear and unambiguous' (**Feltham**). The context here is that the Claimant, who had been on lengthy sick leave, was no longer receiving any form of enhanced sick pay and therefore could not stay a moment longer, on no pay. There would have been no point in him giving notice, as he would not have been paid during it.

iv. His resignation was promptly accepted, the next day, the 18th, by the Headteacher, thus indicating that that was the latest date at which communication of the resignation took place, although, as the Claimant's email was sent during working hours on the 17th, it could be assumed, as instantaneous communication, to have been communicated that day. In her letter [214], the Headteacher refers to his email as '*tender(*ing*) your resignation'* and that she accepted

it. She released him from his notice requirement (the end of the Spring term – 30 April 2020) and stated that his '*termination date will be brought forward to 17 December 2019, subject to the return of all school property.'* She was not, in this letter, asking the Claimant for his agreement to waive his notice requirement, but confirming that '*you have agreed to release the School from any further obligation to pay you after that date.'* There is no basis, in logic or commonsense, in the face of this clear communication, to conclude otherwise than that the Claimant resigned on the 17th, but it is being suggested by the Claimant that instead we should look at subsequent communications to determine this point.

v. The Claimant immediately, on the 18th, embarked on ACAS Early Conciliation, receiving his certificate the next day [48].

vi. On 24 December, the School's HR Business Partner, Mr Freeman, emailed the Claimant [284], seeking confirmation of the Claimant's '*last day of service'*, either 16 December or 30 April. He refers to the Headteacher's letter, but misquotes it as seeking confirmation of which was the Claimant's last day of service. It didn't, it simply sought his signed agreement that it was 17 December. Mr Freeman's email, Mr Linstead suggested, was a 'soft' approach by HR, perhaps anxious not to be seen to be pressing the Claimant into waiving notice, but seeking confirmation of the date of termination. The Claimant had already been highly litigious to that point and it is understandable that the School needed to be clear that he would not come back and claim PILON.

vii. The Claimant's response, the same day [283], was that '*I can confirm that my last day of service was 16 December 2019 and I will again confirm this with the Headteacher today.'* There were, in fact, no further communications to her and he had already told her the situation, in his letter of the 17th. It was not the Headteacher who was opening up this question, but HR departing from previously clear communication. There was never any suggestion by either side that the Claimant would be paid in lieu of working his notice and there is no suggestion that a resignation of itself must be considered to be on notice. While the Claimant now seeks to argue that this subsequent communication casts doubt on the EDT, his response at the time was clear and unequivocal.

viii. The Claimant seeks also to rely on an internal email of the Respondent, dated 20 December [S34], containing discussion between Mr Freeman and others as to the Claimant's '*employment status, capability and outstanding grievance'*. This email, which the Claimant asserts, shows ambiguity, is really the 'high point' of his case, but all it

actually shows is internal uncertainty, or the participants' musings on the issue and are neither here nor there, particularly in view of the Claimant's answer to Mr Freeman's email of 24 December.

ix. ACAS Early Conciliation does not extend time, as s.207B(3) ERA states that in working out when a time limit expires, the period beginning with the day after commencement of early conciliation (the 19th) and ending with the day when the certificate is received (also the 19th) is not to be counted. Accordingly, therefore, the time limit for presenting the claim expired on 16 March 2020, but the claim was presented on the 18th.

b. Estoppel

i. The legal position is uncontroversial, as set out in **Virgin Atlantic Airways Ltd** and it is contended that all three types of estoppel are relevant. Paragraph 20 of that case makes clear that there is an 'absolute bar' to the bringing of estopped claims.

ii. **Henderson** makes it clear that there is no requirement that a litigant seek to deliberately abuse process. It may be inadvertently or accidently done, but the principle still applies.

iii. In **Sheriff**, it was appropriate to strike out a personal injury claim that could have brought in earlier proceedings, unless there are 'special circumstances', which 'must afford an adequate explanation' as to why it was not brought previously (25).

iv. It is apparent from the alleged disclosures and detriments set out in this current claim [97-100] that they are repeated verbatim from the third and fourth claims brought by the Claimant [166 and 181], with the addition of some further detriments. The previous judgment dealt with all the alleged disclosures and dismissed them [35-43]. A discrete finding was made that the detriments set out were not causally connected to any disclosure made by the Claimant.

v. It is unclear from the current pleadings as to whether or not there are, in fact, any new allegations, but there are two dates mentioned that are not set out before and there is also reference to a trade union meeting, but even, which is disputed, these matters are new, they would be 'part and parcel' of the previous proceedings and therefore the rule in **Henderson** applies, as the Claimant clearly chose not to raise such matters in the previous proceedings.

vi. Regardless as to whether or not the Claimant's appeal against the previous judgment is successful, there is a jurisdictional bar to this current protected disclosure claim proceeding.

12. On behalf of the Claimant, Mr Kohanzad made the following submissions:

a. EDT

i. The post-termination correspondence is appropriate for the Tribunal's consideration and it would be wrong to exclude it.

ii. The test for the Tribunal is an objective one. How did the parties understand the situation? It is not sufficient to simply look at the face of the documents and it would be reasonable to consider the background of both parties.

iii. It is accepted that an EDT and a contractual termination date can be different, but that will not change the EDT. So, when looking for the EDT, it will not be one that has been agreed.

iv. The Respondent's best point is that the Claimant's letter of resignation is unambiguous and if that is found to be the case, then it wins.

v. It is correct, in the letter that the Claimant is resigning, but is it unequivocally without notice? If it was, then it would say so. This is not the case here. There is no reference to a notice period and it is possible, if claiming constructive dismissal, for an employee to work their notice and the mere fact they may do so will not invalidate such a claim.

vi. The thrust of the letter is that the Claimant has not turned his mind to the question of notice. He doesn't say, for example that he will drop off the Respondent's equipment.

vii. Unambiguous and unequivocal notice is required (**Societe General**) and as in **Feltham**, if there is ambiguity, it should be determined in the Claimant's favour.

viii. The Respondent's response to the resignation letter should be examined. It implies that acceptance of the resignation is required, with the possibility of the Claimant working out his notice and that therefore a termination date needs to be agreed. A retrospective termination date is sought, as long as the Claimant returns the School's property. It is the Headteacher's letter that amounts to termination and as it was received by the Claimant on 19 December, that is the EDT, which renders the claim in time.

ix. The Claimant does not respond to that letter, but is given the option by Mr Freeman to choose to terminate his

employment on 30 April, to which the Claimant could have responded positively. Therefore, the contract was still in existence. The only explanation for the sending of that email is that that is how the parties understood the situation at the relevant time. It is easy for legal representatives to say that such correspondence is unambiguous, but it actually hinges on how the parties understood it at the time, regardless of the law. Mr Freeman clearly did not agree that the Claimant's letter was unambiguous, as to notice. By him suggesting that the Claimant's last day of service could be 16 December, he was attempting to create a new contractual term.

x. It is more likely that the EDT is 24 December, based on the Claimant's ability at that point to choose a termination date of 30 April, but his decision not to.

b. Estoppel. Mr Kohanzad submitted that there should be a stay of the protected disclosure claim, pending the outcome of the appeal to the EAT.

Conclusions

13. EDT. I find that the EDT was 17 December 2019 and that therefore the claim is two days out of time and I do so for the following reasons:

a. It is for an employee resigning to choose the content and form of resignation. Provided they are clear that they no longer work for the employer, particularly, as in this case, they consider that the employer has fundamentally breached the contract of employment, then the date of their communication of that decision is the EDT. While Mr Kohanzad invites me to consider how the parties understood the situation, it is not the parties' understanding that matters, merely that of the Claimant's. Provided he was clear as to what he meant, that is sufficient.

b. I consider, objectively that the Claimant's email is unambiguous and unequivocal, for the following reasons:

i. He opens the email by complaining that he has not been paid wages he considers he is owed, the consequences of which '*was making it difficult for me to continue in employment because of my financial situation …'*. In other words, 'I'm not being paid and therefore I can't remain in your employment' (with the implication that he may find paid employment elsewhere). Clearly, if he had given notice that would have simply prolonged his unpaid employment and not resolved his financial situation. This is the context in which goes on to announce his subsequent decision to resign.

ii. He states that the Respondent is in '*fundamental breach of contract'* in not paying him wages and also breaching the implied term of trust and confidence. Bearing in mind, by that point, the Claimant's extensive experience of Tribunal litigation, it seems more than likely that by thus alleging fundamental breach, he was indicating he no longer felt himself bound by the contract, to include any requirement to give notice. I am confident, based on the Claimant's legal knowledge at this point that if he had intended to give notice, he would have done so (just as, in fact, Mr Roberts did, in the case the Claimant refers to in his email (**Roberts v The Governing Body of Whitecross School UKEAT 0070/12**), with the difference being, in that case that Mr Roberts was still on half pay and therefore had some benefit to gain by giving notice.) I note also, in **George**, there was no finding that explicit resignation without notice was required, to rule out the possibility of an employee subsequently seeking to claim such notice, even when, as in that case, the employee seeks to rely on having referred to having four weeks' sick leave remaining.

iii. The Claimant says '*I am resigning'* in response to those breaches, having previously given the Respondent an ultimatum '*to deal with my pay issue'* by 16 December. He uses the past tense to indicate that this failure by the Respondent '*has caused me to leave'* (i.e. not resign on notice and leave next May, but to have already terminated his employment, in fact in his view, on the 16th, as that is the date he subsequently refers to in his response to Mr Freeman, on the 24th). He then immediately embarks on these proceedings.

iv. Having, to my mind, unequivocally communicated that decision in writing to the Respondent, his contract of employment was at an end and no subsequent action or communication from the Respondent can alter that situation. It's understandable, in view of the preceding litigation that the School should seek to confirm the EDT, in order to avoid any subsequent effort by the Claimant to claim notice pay and while Mr Freeman's communication was clearly misguided in this respect (the resignation email having been clearly responded to by the Headteacher already), I don't consider that it, or the internal email referred to, made any difference to the EDT.

14. Estoppel. There was no real dispute that the protected disclosure claims set out in the current claim either mirror those of the previous proceedings, or are too imprecise to be determinable, or are matters of which the Claimant was clearly cognisant at the time and therefore could have included in those previous claims, but did not. Applying the 'absolute bar' in **Virgin Atlantic Airways Ltd** and there being no explanation (adequate or otherwise) as to why any potentially new claims could not have brought in the previous proceedings, I see no reason to consider any exemption to the **Henderson** rule. Those claims are therefore struck out, as *res judicata*/an abuse of process.

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Employment Judge O'Rourke

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Date 12 February 2021