



EMPLOYMENT TRIBUNALS

Claimant: Mrs Isabelle Cirlan

Respondent: The Montessori Children's Hospital Ltd

Heard at: London South Employment Tribunal (by CVP)

On: 15 February 2021

Before: Employment Judge Keogh (sitting alone)

Representation

Claimant: Mr K Wilson (Counsel)

Respondent: Mr R Shah (Director of the Respondent)

JUDGMENT

1. The Claimant has permission to amend the claim to re-include a claim for failure to provide full written particulars of employment.
2. The Claimant's claim for unfair dismissal is unsuccessful.
3. The Claimant's claim for constructive unfair dismissal is unsuccessful.
4. The Claimant's claim for wrongful dismissal is unsuccessful.
5. The Claimant's claim for failure to provide full written particulars of employment is unsuccessful.

REASONS

1. By her claim form dated 15 January 2020 the Claimant, Mrs Isabelle Cirlan, brought claims of unfair dismissal, wrongful dismissal, a failure to provide full written particulars of employment as required by section 1 Employment Rights Act 1996, and a failure to pay holiday pay.
2. This claim was listed to be heard for two days on 15 and 16 February 2021 however as explained to the parties at the outset of the hearing due to judicial resources only one day could be allocated to it. In the circumstances

I decided to hear evidence on liability only with any remedy issues to be left to another occasion.

3. At a preliminary hearing on 14 July 2020 it was confirmed that the Claimant did not pursue claims of failure to provide full written particulars of employment or a failure to pay holiday pay. By letter of 16 July 2020 the Claimant indicated she did in fact wish to pursue the claim for failure to provide full written particulars of employment. Employment Judge Khalil considered the letter and deemed it to be an application to amend the claim. The Respondent was asked to comment by 14 October 2020. No response was provided. At the commencement of the hearing Counsel for the Claimant, Mr Wilson, confirmed that the Claimant did wish to proceed with this claim. Mr Shah on behalf of the Respondent confirmed that there was no objection to me hearing it. In the circumstances I gave permission to amend the claim to re-include the claim for failure to provide full written particulars of employment.
4. I received a bundle of documents which I reviewed and witness statements from the Claimant and her husband Mr Sandu Cirlan, and for the Respondent Mr Rohit Shah, Ms Viktoria Garaiova, Ms Hema Jayanthi and Ms Mathumai Sivasubramaniam. I heard oral evidence from all six witnesses. I also received a Skeleton Argument from Mr Wilson.

Facts

5. The Claimant was employed by the Respondent from 2012, initially as support staff but progressing to the role of a Teacher and Key Person. She had a clean disciplinary record.
6. On 16 September 2019 the Claimant was sick at work and was sent home by her manager, Ms Viktoria Garaiova, to recuperate. On 17 September 2019 she wrote a private text message to Mr Garaiova saying that she was recovering and would return to work the next day. In this message she misspelled Ms Garaiova's first name with a K instead of a V, so it read 'Kiktoría' instead of 'Viktoría'. Ms Garaiova reposted the message on a WhatsApp group for all staff. The Claimant then noticed that she had misspelled Ms Garaiova's name and wrote by text message and to the WhatsApp group to apologise.
7. On 18 September 2019 the Claimant returned to work. She was asked to come upstairs to the office by Ms Garaiova. It is not in dispute that Ms Garaiova brought her to task for sending the misspelled text message. She considered the Claimant's action in misspelling her name to be very provocative and offensive behaviour. The Claimant explained it was a mistake as she had not been wearing reading glasses. It was accepted by Ms Garaiova in cross examination that she called the Claimant childish and stated that only a bully would act in this way. There is then a dispute as to

how the conversation progressed. Ms Garaiova states that the Claimant called her a bully, unprofessional and insecure and that after giving her explanation that she was not wearing reading glasses her accusations continued with her shouting loudly and aggressively. This was overheard by teachers and one child who was already in the classroom. The child was taken to the garden by Ms Mathumai Sivasubramaniam.

8. I find that the conversation which took place was as described by Ms Garaiova. I am assisted by the evidence of Ms Hema Jayanthi and Ms Mathumai Sivasubramaniam, both of whose evidence I found to be candid, straight forward and credible. Ms Jayanthi reports that on 18 September she was in the garden when she heard the Claimant talking very loudly and arguing with Ms Garaiova. She came inside to see what was going on. She saw that there was a child in the classroom who was shocked and looked upstairs with a jerk at the Claimant's loud voice. She and Ms Sivasubramaniam took the child outside. Ms Sivasubramaniam reports that she was in the classroom assisting a child who comes in at 8am. She saw the Claimant going upstairs. Within a minute or two she heard a very loud aggressive voice of the Claimant shouting and arguing with Ms Garaiova, including her using the words, "You are a bully, you are a bully". These accounts are more consistent with Ms Garaiova's version of events. Ms Garaiova's version of events is also recorded in an incident regarding the events of 18 September. While this is not contemporaneous it appears to have been written within the week following the event and is consistent with what is said in Ms Garaiova's evidence.
9. During the day Mr Shah, the director of the Respondent, came to the school. He spoke with the Claimant, who asked for time off work to care for her son, which was agreed. The Claimant did not mention the argument which had taken place with Ms Garaiova in the morning.
10. At the end of the day the Claimant and Ms Garaiova had a further conversation. Again there is a dispute about what was said. The Claimant contends that she complained about the mistreatment of her from that morning, requesting an apology and said that she felt that Ms Garaiova was picking on her and had been overly sensitive regarding the misspelling of her name. She said that posting her private message on the group chat was more likely to be bullying than her spelling mistake. She states Ms Garaiova said she knew her well and she didn't do misspellings and we are supposed to be like a family. Ms Garaiova was behaving more like an enemy.
11. Ms Garaiova's account is that the Claimant waited for her in the upstairs office and started shouting and threatening her. She warned her how vigilant she should be from now on, as everything would be noted by her. The Claimant accused her of being insecure and unprofessional. She then states that the Claimant yelled at her, among other things, that she should be ashamed of herself for what she had done, that Ms Garaiova was the

bully and insecure, that they would be enemies from now on and that she wished Ms Garaiova's family to suffer.

12. This conversation was not witnessed by anyone else. I find that it is likely to have occurred in the manner described by Ms Garaiova. It is plain that the Claimant was angry and upset about Ms Garaiova's reaction to what she believed was a simple error. Having not resolved the matter in the morning it is not disputed that she complained to Ms Garaiova. A version of Ms Garaiova's account is contained in the incident report regarding 18 September. While this is shorter than the account given in Ms Garaiova's witness statement it is consistent with it. I accept Ms Garaiova's evidence that she did not feel the need to include all the details in that early account. It is also consistent with Ms Garaiova's evidence that she felt the need to take some action, and did take action. She felt there was a safeguarding issue.
13. The next conversation between Ms Garaiova and the Claimant took place the following morning, 19 September 2019. There is broad agreement that during this conversation Ms Garaiova told the Claimant she needed to leave the premises. The Claimant states that she asked why and was told that she was dismissed for gross misconduct. Ms Garaiova states that she told the Claimant she was suspended for the day. It is agreed that when the Claimant protested she was told that if she did not leave the police would be called. The Claimant says that she pleaded with Ms Garaiova saying that her whole career was at stake. She said she would take legal advice. Ms Garaiova gives a slightly different account, that the Claimant said, "You are ruining my career, all these years. Be sure I will see you in court!".
14. On balance I prefer Ms Garaiova's account of this conversation. I find that she told the Claimant she was suspended for the day. This is supported by the following evidence: (i) Ms Jayanthi states that on the morning of 19 September at 8am Ms Garaiova told her she would be suspending the Claimant for the day for her unacceptable behaviour; (ii) Ms Sivasubramaniam spoke to Ms Garaiova on the morning of 19 September. Ms Garaiova told her she was not going to let the Claimant in that day, she was scared for her life. She was in the classroom when the front door opened and she heard Ms Garaiova say to the Claimant, "I am suspending you for today". Ms Sivasubramaniam was strongly challenged as to how she could have heard this conversation from the classroom, as there are closed double doors, a hallway and stairs leading to the front door. As the hearing was conducted by CVP Ms Sivasubramaniam was able to take her laptop around the premises to show the Tribunal the layout of the building. There is a kitchen situated between the classroom and the hallway. The door to the kitchen was open. There is a large open hatch leading from the kitchen to the classroom. She explained that she was leaning over the hatch to put a bag in the kitchen when she heard the conversation through the open door. She did not hear the whole of the conversation as she thought it was

not to do with her, but caught snippets of it. She says she heard words like 'police' and 'court', which is also consistent with Ms Garaiova's account. I found Ms Sivasubramaniam to be a credible witness. If she had made up overhearing the conversation she is likely to have volunteered more detail. (iii) There is a note hand written by Ms Garaiova dated 19 September 2019 which states, "Isabella has been suspended today as a result of her threatening behaviour and offensive behaviour, which happened on the previous day... I have taken the decision to suspend Bella to maintain the safe environment for the children and the staff as I was worried about her reaction or another conflict between us." It was not suggested in cross examination that this was not a contemporaneous note. It goes against the Claimant's suggestion that Ms Garaiova and Mr Shah together decided to say that the Claimant had been suspended at some point in the following week in order to 'backtrack' having realised that Ms Garaiova should not have dismissed the Claimant.

15. I have considered whether it is likely that the Claimant would have pleaded for her career if she had just been suspended for the day. I have also considered the email that the Claimant sent to Ms Karamat, the Respondent's administrator, very shortly after the conversation occurred which stated that she had been sacked by Ms Garaiova. I find that the Claimant must have misheard or misunderstood what was being said by Ms Garaiova. She plainly had a genuine belief that she was being dismissed and not suspended. However I find it is more likely that she misinterpreted the conversation than that Ms Garaiova, Ms Jayanthi and Ms Sivasubramaniam are deliberately lying.
16. The Claimant has produced telephone records which suggest that a call was made by her to Mr Shah at 8.31am on 19 September and a call was received from him at 8.39am. The duration of the calls is not recorded. The Claimant did not mention any such calls in her claim form or witness statement. Rather she suggested that Mr Shah called her the following day, 20 September 2019. However in her oral evidence she said that she called Mr Shah but he did not pick up the phone. He later called her back. She explained the situation and he said he would do an investigation and get back to her. At around 4pm there was a further call where Mr Shah requested that the Claimant have a meeting with Ms Garaiova, which she declined. Mr Shah was firm that he did not speak to the Claimant that day but only the following day 20 September 2019. The calls were brief but he agrees he invited the claimant to attend a meeting with Ms Garaiova. He states the Claimant originally agreed to this but then declined and requested a meeting with Mr Shah instead. This is what then took place. I find that given the telephone records it is likely that conversations took place on 19 September and possibly on 20 September as well (records not having been provided for that day). However I find that the content of the conversations are likely to have been brief as suggested by Mr Shah, otherwise it is likely

that the Claimant would have recalled the conversations in her claim form and witness statement.

17. A meeting took place on 24 September 2019 at a hotel. Mr Shah brought Ms Karamat with him, and the Claimant brought her husband. There is broad agreement as to what was discussed at the meeting. Mr Shah's objective in the meeting was to try and persuade the Claimant to return to work. He accepted in cross examination that he asked the Claimant not to put anything in writing. He further accepted that at no time did he mention that the Claimant had only been suspended. This is unfortunate, as it might have resolved the matter at that point. It appears that the parties were probably talking at cross purposes. The Claimant accepts that she asked for compensation and references. There is a dispute as to whether the Claimant requested an apology letter. I find that she did request this and Mr Shah agreed to pursue it. It is clear that Ms Garaiova did not want to produce an apology and it is unlikely that she would have done so unless Mr Shah had requested this, believing that it may assist to resolve the situation.
18. An apology was sent by email from Ms Garaiova to the Claimant on 25 September 2019. This was the first time that the suspension had been confirmed in writing.
19. The same day the Claimant's solicitors sent a letter to Mr Shah. This states at the outset, "We have been instructed to act on behalf of the above named in relation to her dismissal from employment." The Claimant's version of events is then relayed. The letter asserts that the Claimant had been unfairly dismissed, alternatively that she considered the treatment towards her as so serious that it would have entitled her to resign with immediate effect and bring a claim for constructive dismissal. She did not see any point in lodging a formal grievance.
20. Mr Shah replied to the letter by email on 4 October 2019. The email states that further to an investigation the Claimant's conduct towards Ms Garaiova had been found unacceptable and therefore on the following day she was asked to leave, she was clearly not dismissed. The letter requests that the Claimant return to work on 14 October 2019 and that the Claimant was treated as being absent without leave.
21. By email dated 7 October 2019 the claimant's solicitors wrote again to confirm the Claimant's position that if she had not been expressly dismissed, she was constructively dismissed and accepted that dismissal and breach of contract.

The Issues

22. The issues to be determined in this matter are as set out in the record of the Preliminary Hearing on 14 July 2020:

- (i) Was the Claimant expressly dismissed; if not
- (ii) Was the Claimant constructively dismissed, i.e. (a) did the Respondent breach the so called 'trust and confidence' term, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant? (b) If so, did the Claimant affirm the contract of employment before resigning? (c) If not, did the Claimant resign in response to the respondent's conduct? If the claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice.
- (iii) The conduct the Claimant relies on as breaching the trust and confidence term is set out at paragraph 23 of her Grounds of Complaint. In summary, the Claimant relied on the following conduct:
 - a) Ms Garaoiva's conduct on 18 and 19 September 2019;
 - b) Ms Garaoiva's letter of apology;
 - c) Mr Shah's communication of 4 October 2019 (alternatively, this communication amounted to a 'last straw').
- (iv) If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA") and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

23. Additionally, if the claim for unfair dismissal is successful, did the Respondent provide the Claimant with full written particulars of employment? (This claim is only available where a claim for unfair dismissal or constructive unfair dismissal is successful).

Conclusions

24. It follows from my findings as to the conversation which took place on the morning of 19 September 2019 that the Claimant was not expressly dismissed, but was suspended for one day.

25. I have considered carefully whether the matters set out at paragraph 23 of the Claimant's grounds of complaint and elaborated upon in the list of issues give rise to a breach of the implied term of trust and confidence. I remind myself that any breach of the implied term of trust and confidence is a fundamental breach of contract. The question of whether there has been a

breach is an objective test, i.e. to be judged by the standard of a reasonable man. A series of relatively trivial breaches in which the final breach is a 'last straw' can amount to a breach of the implied term so as to repudiate the contract. The last straw must contribute something to the breach, but must not be utterly trivial in the sense of being de minimis (*London Borough of Waltham Forst v Omilaju* [2005] IRLR 35).

26. The first matter relied upon is Ms Garaiova's conduct on 18 and 19 September 2019. It is surprising that Ms Garaiova considered the Claimant's action in misspelling her name to be sufficiently serious to amount to childish behaviour or tantamount to bullying rather than a simple error. However I do not find that Ms Garaiova's conduct on the morning of 18 September was sufficiently serious to amount a breach of the implied term of trust and confidence. She was upset and raised her concern with the Claimant in an informal manner and it was not indicated that any warning might be given or disciplinary action taken. The Claimant's reaction was equally surprising. Rather than simply reiterate her apology she shouted at her line manager that she was insecure and a bully, to the extent that other staff overheard her and a child had to be removed from the area.
27. The Claimant could then have taken appropriate action to complain about Ms Garaiova's accusation, and had the opportunity to speak to Mr Shah that day about it but did not do so. Rather she waited to speak to Ms Garaiova at the end of the day and launched into a heated and personal attack of her. I do not find that Ms Garaiova conducted herself in any way so as to contribute to a breach of the implied term of trust and confidence during this second conversation on 18 September 2019.
28. I have considered carefully whether suspending the Claimant for a day on 19 September 2019 and the surrounding conversation was serious enough to be a breach of the implied term of trust and confidence or to contribute to such a breach. Suspension is not a neutral act. It should not be a 'knee jerk' reaction, and if it is there will be a breach of the implied term (*Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402).
29. I find that the Claimant's own conduct was such on 18 September 2019 that it was not surprising that Ms Garaiova found her conduct to be unacceptable and was reluctant to risk a further confrontation the following day. I find that she was justifiably scared of a further personal verbal attack. She did not immediately suspend the Claimant but took the evening to consider her course of action. She did not seek to suspend the Claimant indefinitely but for one day only pending a meeting with Mr Shah the following Monday. In the circumstances the one day suspension was a proportionate response aimed to calm down the situation before a meeting could be held with Mr Shah the following week. I therefore find that it did not amount to or contribute to a breach of the implied term of trust and confidence.
30. It is suggested in the Grounds of Claim that the Claimant resigned at the meeting on 24 September 2019 in response to Ms Garaiova's conduct. That does not appear to be the way the matter was pursued before me. In any

event I find that the Claimant did not clearly resign on 24 September 2019. She gave Mr Shah the impression that she might return to work if an apology letter was sent.

31. However, it was made clear in the letter of 25 September 2019 that the Claimant was not going to return to work and that she considered herself to have been constructively dismissed if not expressly dismissed. I find this letter amounted to a resignation.
32. In the circumstances Mr Shah's response to the letter on 4 October 2019 does not appear to have caused the Claimant to have resigned, as she had already made her position clear on 25 September that she was not returning to work. In any event, I would not have found that the letter amounted to or contributed to a breach of the implied term of trust and confidence. It reiterated that the Claimant had not been dismissed (which was the correct position), and invited the Claimant to return to work.
33. I therefore find that the Respondent did not on any of the occasions alleged or cumulatively breach the implied term of trust and confidence. The Claimant was not therefore constructively dismissed but resigned voluntarily. Her claims for unfair dismissal and constructive unfair dismissal fail.
34. It follows that the Claimant's claims for wrongful dismissal and for failure to provide full written particulars of employment must also fail.

Employment Judge Keogh
Date: 16 February 2021