EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 3/3/2022

Claimant: Mr D Da Costa

Respondent: Interpub Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: Mr A Gloag (Counsel)
Respondent: Ms D Gilbert (Counsel)

JUDGMENT

The constructive unfair dismissal claim is struck out.

REASONS

1. The judgment followed an OPH to consider an application to strike out or deposit the Claimant's constructive unfair dismissal claim (but not his claim for unfair dismissal by way of a dismissal under section 95(1)(a) ERA 1996).

2. I received written and oral submissions and was referred to legal authorities.

3. The Claimant was employed from 28/5/2013 and his employment terminated on 30/6/21. He issued a claim for unfair dismissal on 15/7/21. In his home-made particulars of claim he stated that he had been constructively dismissed but also accused the Respondent of "*falsely claiming that he resigned voluntarily"*. He set out a narrative in which he had from 23/3/21 threatened to leave (his employment) if certain conditions were not met, then been asked by the Respondent for a resignation letter which he had refused to provide, and then before termination denied orally and in writing to the Respondent that he had in fact resigned. The Respondent entered its ET3 contending in its Grounds of Resistance that the Claimant had not been dismissed but that he had resigned.

4. The real dispute between the parties over the termination is whether the Claimant did resign (which the Claimant denies) or whether the Respondent is to be taken as having dismissed the Claimant because it wrongly treated his threats to resign and other related conduct as an unconditional resignation (the Claimant's case).

5. For purposes of a trial listed for 3 and 4 March on 23/3/22, on 7/2/22 the Claimant served a witness statement, which contains a signed statement of truth, an in which he maintains that whilst he expressed an intention to leave if working conditions did not change, he did not ultimately resign from his employment, and in fact his employment was terminated by R. There are numerous and repeated references to this effect. One example of many is as follows Para73: *"my contract was terminated on the basis of expressing an intention to leave...I was only asking for my working conditions to change alongside the long hours..."*

6. Mr Gloag submitted in his skeleton argument that the Claimant *"has set out, in his witness statement and attached exhibits, the conduct of R. C's position is that he was dismissed and if not dismissed, he was constructively dismissed. …The question is; Who really terminated the contract of employment? .The task for the Tribunal in a factual dispute, is to hear the evidence (at a final hearing) and to make findings of fact. It is not unusual to have a lack of clarity about whether the employee was dismissed and/or was constructively dismissed (as a result of R's action). Such matters are resolved after hearing evidence. One only has to consider C's witness statement and contemporaneous documents to appreciate that there is clearly merit in C's claim. No strike out and/or Deposit Order should be made."* In oral submissions Mr Gloag suggested that the Respondent's application was a "construct", based on a pure technicality and intended to prevent the tribunal being able at the trial to deal with the case on its facts, and that *"if I was concerned about the state of the pleadings then the Claimant could amend to plead that he resigned*"

7. However, I note that even while his employment continued, and in the run up to the termination date, the Claimant denied in writing several times (for example in a grievance on 18/6/21 and in an email to the Respondent dated 29/6/21) that he had resigned. His evidence is completely inconsistent with any suggestion now to be made, with the benefit of legal advice, that after all he had resigned with the intention of accepting the Respondent's claimed repudiatory breaches. Secondly, the Claimant has not in fact made any application to amend to plead that he did resign with such an intention or at all. If such an application to amend had been made, I would not have allowed it, not only because it would far too late, but because it would fly in the face of the Claimant's own repeated and clear evidence to the contrary. One can plead in the alternative but not give evidence in the alternative, and the Claimant had given a solemn statement that he did not intend to resign and did not resign.

8. The question is whether, despite the Claimants denial of resignation, it would be open to the Tribunal to find on the Respondent's evidence that in fact he had resigned, and so complete the Claimants case for him, so allowing his claim for unfair constructive dismissal. It would seem not. The main reason for this appears to be that it that it is wrong in such a case to impute to a Claimant an intention and a motivation which he denies he ever had.

9. The case Logabox Ltd v Titherley [1977] ICR 369 is directly on point. Following the employer's refusal to honour commission agreements the employee opted to obtain employment elsewhere. He wrote to his employers stating explicitly that he had not resigned, and that his employment contract had expired. At first instance the tribunal found that his contract had not expired, and that in fact he had been constructively dismissed as a result of the employer's conduct in refusing to honour the commission agreements, which amounted to a repudiatory breach of the employment contract. The EAT overturned this decision. Having found that the employee's denial of any question resignation was "significant", at 374 Kilner Brown J said: *"...the tribunal overlooked the fact that under the common law the other party has to accept and act upon the repudiatory breach." And at 375: "The industrial tribunal in our view correctly found that there was not an expiry of the contract, but they were not justified in themselves finding another basis for a claim for unfair dismissal, namely, that he was constructively dismissed. As has been pointed out, they skated over the essential difficulty in the employee's way, namely, that he was not saying that he was entitled to regard an existing contract as repudiated and therefore regarded himself as dismissed. In fact he said exactly the opposite. It seems to us that under common law the employee is not entitled to claim benefit from an alleged repudiation when he did not treat the contract as repudiated. …We next turn to the wider aspect which we believe paragraph 5 (2) (c) of Schedule 1 to the Act of 1974 entitles a*

tribunal to consider. But even there it seems to us that an employee must signify his attitude in clear unambiguous fashion. Although it may be argued that an employee does not have to go so far as to demonstrate a fundamental breach as the common law requires, nevertheless the words of the sub-paragraph seem to us to imply that the employee must indicate that he is exercising his entitlement to claim a constructive dismissal.".

10. A further necessary ingredient in any constructive dismissal claim is that the employee resigned in response to the breach. In Walker v Josiah Wedgwood & Sons [1978] ICR 744 the EAT held at 751: "*We think for our part that it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves — at any rate in any circumstances at all similar to the present. And secondly, we think it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligations to him."*

11. Further, the employee's acceptance of the breach must be clear and unequivocal. Conduct which is equivocal and is as consistent with the contract being kept alive as it is with an acceptance of the repudiatory breach will not constitute the clear acceptance necessary (Spencer v Marchington [1988] IRLR 392) .

12. Therefore, in order to succeed in a claim of constructive dismissal an employee himself must prove not only that his employer committed a breach of the employment contract but that he accepted and acted upon that breach, by terminating the contract himself, i.e. by resigning. Those latter requirements relate to the employee's subjective intentions and cannot be proved for an employee by the employer, or imputed to him by the tribunal in the face of the employee's own evidence to the contrary.

13. In this case C has repeatedly insisted that he did not resign. He contends that he indicated only a conditional and equivocal intention to resign if his working conditions did not change. He contends that R took the decision to terminate his employment. His witness statement confirms this position. In light of his evidence, there is no basis upon which a reasonable tribunal could conclude that C unequivocally accepted and acted upon any alleged breach by R, by terminating his own employment. On the contrary, his case is that he did not.

14. Even if C's case is taken at its highest, and his evidence accepted as correct for the purposes of the application, he cannot succeed in establishing the essential requirements. In these circumstances I find that the claim of constructive dismissal is hopeless and has no prospect of success and hence I strike it out under rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

15. It has already been decided on a previous occasion that no strike out or deposit order should be made on the claim brought for ordinary (not constructive) unfair dismissal. That claim will proceed to trial.

J S Burns Employment Judge
London Central
3/3/2022
For Secretary of the Tribunals
Date sent to parties: 3/3/22