



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

v

RESPONDENT

Mrs L Killip

GEN2 Property Ltd

Heard at: London South
Employment Tribunal

On: 17 and 18 January 2022

Before: Employment Judge Hyams-Parish (Sitting alone)

Representation

For the Claimant: Mr D Lemer (Counsel)

For the Respondent: Mr R O'Dair (Counsel)

JUDGMENT

The claim of constructive unfair dismissal fails and is dismissed.

REASONS

A. CLAIMS AND ISSUES

1. By a claim form presented to the Employment Tribunal on 24 March 2020, the claimant brings a claim of constructive unfair dismissal against the respondent.
2. The way the claimant put her case was that the respondent's conduct, over time, breached the implied term of mutual trust and confidence. The final straw for her was receiving the outcome to a grievance she had raised.

B. THE HEARING

3. Witness statements were provided by the following individuals, all of whom were called to give evidence at the hearing:
 - (a) Lisa Killip, the claimant.
 - (b) Paul Jones, Executive Chairman for the respondent.
 - (c) Tracy Davis, claimant's line manager.
 - (d) Viv Lindley, Senior HR Advisor.
 - (e) Mark Shipton, HR and Payroll Manager for Cantium Business Solutions.
4. I was also provided with a bundle of documents extending to 363 pages.
5. The evidence was completed by the end of the first day. I then heard submissions at the beginning of the second day and took some time to consider my decision. I gave the parties my decision, with oral reasons, at 14:00. These written reasons are provided at the request of the respondent.

C. BACKGROUND FINDINGS OF FACT

6. I decided all the findings referred to below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I failed to consider it. I have only made those findings of fact necessary for me to determine claims brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
 7. The claimant commenced employment with Kent County Council ("KCC") as an assistant client services manager on 30 June 2014. In that role she was responsible for the inspection and monitoring of the service provided by school catering companies to ensure that they were meeting their contractual obligations with the council.
 8. The claimant performed this role during term time because the inspection and monitoring of the catering companies took place when pupils were at school.
 9. Prior to starting the role, the claimant was provided with an offer letter which stated "*Your starting salary will be £20,878 per annum (pro rata if part-time) within grade KR7*". In her contract, however, there was no reference to 'pro rata'.
 10. Under the heading "Pay", the claimant's contract of employment said as follows:
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It is your responsibility to check your pay slip each month and immediately notify your manager of any overpayment made to you.

In the event of an overpayment, for any reason, this will be corrected in the pay period immediately following identification. Your manager will be notified and will discuss this with you.

If the overpayment has been on a recurring basis, therefore increasing its value, or if there will be insufficient funds to reclaim it from the next pay period, this will still be corrected and steps will be taken to arrange a repayment plan with you to ensure that the full value of the overpayment is paid back to KCC.

Should it not be possible to reclaim the overpayment either whilst you continue to be in KCC employment, or at the point that you leave, the matter will be pursued through KCC's debt recovery process.

11. The claimant was separately employed by the claimant as a celebrant, conducting weddings. I was told by the claimant that she had a separate contract for that position. She was paid a certain amount per wedding in the early years, but in 2019 that arrangement changed so that she was paid a certain amount a year to conduct a certain number of weddings.
12. On 1 May 2016, the claimant's employment transferred from KCC to the respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 under her existing terms and conditions.
13. In May 2019, the claimant was given a promotion to a new role, Soft FM Officer. The claimant queried the variation of her contract because it did not appear to reflect the fact that she worked term time only. That issue was corrected, but in the course of doing so, it appears that the respondent discovered that the claimant had been overpaid since she started her employment with KCC back in 2014. It is alleged that she had received a full time equivalent salary (namely £20,878) rather than the pro-rated or reduced amount to reflect that she did not work all year round. This overpayment totalled £15,086.55 and had continued up until it was discovered by the respondent.
14. On 4 July 2019, the claimant was called to a meeting with Paul Jones, Executive Chairman of the respondent, to discuss the overpayment. I accept that at that stage, whilst Mr Jones had been informed of the overpayment, he had more questions than answers, and importantly had not excluded the possibility that the sum was wrong.
15. In an email from Mr Jones to the claimant following up that meeting, he said [sic]:

Although you may need more information hence the questions above before we can come to an agreement on a figure, I asked you to consider what you could afford. If the attached figure is incorrect then we will change it.

We won't charge interest on the amount, we want you to think about how much monthly you could afford to pay back. Not looking for answer yet, just think for now. If the value is as detailed then we wouldn't ask for it in a lump sum, we would need to work together to establish the length of term of payback. I understand this is causing worry and am pushing hard to get this resolved asap.

16. On 23 August 2019, the claimant wrote to Mr Jones in which she said [sic]:

I have however been able to speak, at length, with ACAS & the Citizens Advice Bureau who have both given the same advice at this stage. The have advised that I have the 3 following defences regarding the over-payment:

- *The over-payment was not caused by the fault of the employee*
- *The Employer had the Employee believe that they were entitled to treat the money as their own*
- *The Employee has spent the monies in good faith as 'was my own'.*

If at this stage, your position is to remain the same I feel I have no alternative but to raise a Formal Grievance in order to attempt to resolve this.

17. In or about July or August 2019, the claimant noticed that sums had been deducted from her celebrant salary by KCC. She thought that the respondent had begun the process of recovering the overpayment from her without her consent. In fact, although it was as a consequence of the overpayment, it was a tax adjustment and not repayment of salary. When Mr Shipton discovered that these adjustments had been made without the claimant's knowledge, he quickly set about reversing the sums that had been deducted from the claimant's KCC salary. I accept that this matter was resolved within a short period of time.

18. Mr Jones asked to meet with the claimant to discuss the overpayment further with her. Mr Shipton and Ms Davis were also invited to attend.

19. That meeting took place on 20 September 2019 when the following was discussed, and certainly agreed by Mr Jones, Mr Shipton and Ms Davis:

- The claimant's pay had been corrected to reflect her term time working.
- The total overpayment was £15,086.55.
- Mr Shipton, HR and Payroll Officer were available to support the claimant and answer questions.
- There would be a final meeting on 4 October 2019. In the meantime, the claimant would give thought to a repayment plan.

20. I accept that the claimant had not accepted the overpayment or agreed that she should repay any of it.
21. A further meeting was scheduled for 4 October 2019. The claimant requested that she be accompanied by a KCC colleague which Mr Jones agreed to for that meeting only.
22. On 1 October 2019 the claimant raised a formal grievance which set out three complaints:
 - The requirement to repay the respondent was unreasonable given that it was the respondent's mistake
 - That certain deductions had been made from her celebrant salary without her consent
 - The situation was having a detrimental affect on the claimant's health.
23. The claimant instructed solicitors who wrote to Mr Jones by letter dated 3 October 2019. This letter suggested that it was unfair to require the claimant to pay back the money bearing in mind the period of the overpayments, the fact that the overpayments were not the claimant's fault, and the fact that she had since spent the money.
24. Mr Jones responded to this letter stating that the matter was being dealt with internally.
25. At the meeting on 4 October 2019, the claimant did not have any suggestions or proposals to make regarding the overpayment. In the meantime, Mr Jones had given thought to the issue and decided that as there was fault on the part of the respondent and KCC, that everybody, including the claimant, should share joint responsibility for the overpayment, each paying a third (£4,811.62). This would be the amount the claimant would need to repay.
26. The claimant did not want to commit or agree to this at the meeting and said she wanted to go away and think about it.
27. On 18th October 2019, Ms Davis emailed the claimant because she was concerned that the claimant had expressed concern that the overpayment issue was causing her stress. The claimant had already accessed the Support Line that was made available to her. Ms Davis offered a stress assessment meeting which the claimant agreed to and attended on 29 October 2019. As well as the overpayment issue, the claimant explained that she had taken on the promoted role and the extra hours were also causing her stress. The new role meant that she was required to audit schools for cleaning as well as catering. A number of action were agreed with the aim of helping the claimant. I accept, however, that the claimant's main concern was the overpayment.

28. The claimant's grievance meeting was held on 31 October 2019. I accept that the claimant continued to be unhappy about the prospect of having to repay the sum of money arising from the overpayment and that her demeanour was hostile and she tended to talk over people at the meeting. The meeting was brought to an end prematurely by the claimant.
29. The outcome of the grievance was sent to the claimant by letter dated 15 November 2019. It was a detailed letter which addressed each of the concerns raised by the claimant.
30. The claimant was unhappy with the grievance outcome and she resigned by letter dated 26 November 2019.

D. LEGAL PRINCIPLES

(a) Constructive unfair dismissal

31. Section 95(1)(c) ERA defines a constructive dismissal as follows:

(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.
32. In order to claim constructive dismissal, the employee must establish that:
 - there was a *fundamental breach* of contract on the part of the employer that repudiated the contract of employment;
 - the employer's breach *caused* the employee to resign; and
 - the employee did not *delay* too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
33. The claimant in this case relies on a breach of the implied term of mutual trust and confidence, which means that the employer "*shall not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee*": **Malik v BCCI [1997] ICR 606**. The test of whether there has been a breach of the implied term of trust and confidence is objective: the question is whether the conduct relied on as constituting the breach, when looked at objectively, is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.
34. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA** the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series. The

effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct. This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.

35. Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.
36. The court in ***Kaur*** identified the following questions to be asked in a constructive dismissal case:
- What was the most recent act that the employee said had caused their resignation?
 - Had the employee since affirmed the contract?
 - If not, was the act by itself a repudiatory breach of contract?
 - If not, was it nevertheless part of a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
 - Did the employee resign in response to that breach?
37. If the tribunal finds that the claimant was constructively dismissed, it must then go on to decide whether the dismissal was unfair.
38. The law relating to the right not to be unfairly dismissed is set out in s.98 ERA. Section 98(1) says as follows:

(1) In determining...whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

39. What is clear is that there are two parts to establishing whether someone has been unfairly dismissed. Firstly, the Tribunal must consider whether the employer has proved the reason for dismissal. Secondly, the Tribunal must consider whether the Respondent acted fairly in treating that reason as the reason for dismissal. For this second part, neither party bears the burden alone of proving or disproving fairness. It is a neutral burden shared by both parties.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

40. I now turn to my conclusions, applying the legal principles to the facts of the case.
41. The claimant said in evidence that she believed the salary stated in her contract of employment (£20,878) was the pro-rated amount, reflecting the fact that she worked term time only.
42. Given the allegations against the respondent and the criticisms regarding the way they have conducted themselves, it is inevitable that I have to make a finding whether or not the claimant was in fact over paid, particularly given what the claimant said in evidence and the questions that have been asked of the respondent witnesses. To leave that question open could undermine the reasoning behind the conclusions I am about to give.
43. I am satisfied, and find as fact, that the salary of £20,878 was the full time equivalent salary. By full time I mean someone employed to work all year round. I find that Ms Davis and Mr Shipton gave clear evidence on this point and their understanding of the position. Their evidence was that £20,878 was the full time salary and that it needed to be reduced to reflect the fact that the claimant worked term time only, therefore 37 weeks a year. It is also evident from the offer letter (albeit not as clear on the contract) that the 20,878 would need to be pro-rated for anyone working part-time. Term time working is of

course a form of part-time or fractional working; whatever one chooses to call it, it was not full time.

44. Regarding whether or not the claimant knew at the time that she was receiving more than she was entitled, I have concluded that the wording of the offer letter ought to have raised questions in the claimant's mind as to whether the 20,878 was the full time equivalent salary. Unlike many contracts of employment, the claimant's contract expressly put the responsibility on the claimant to check her pay for overpayments, albeit I accept that the employer must also share some responsibility for getting the pay right in the first place.
45. I do find it strange, if the claimant is to be believed and she thought that the £20,878 was the actual (pro-rated) salary she would receive, why her first reaction was not to state that there had been no over payment at all and she had been paid the correct amounts throughout. What happened here is that when the claimant wrote to Mr Jones in August 2019, following advice she had received, her primary defence appears to be that as the overpayment had been caused by the employer and she had treated the money as her own, she should not be required to pay the money back. She therefore appears to have accepted that she was overpaid but in all fairness did not believe she ought to pay it back.
46. Despite there being an express term in the contract of employment permitting the respondent to recover overpayments in salary, a claimant still has a right to claim constructive dismissal if the manner in which they seek to recover the overpayments breaches the implied term of mutual trust and confidence between employer and employee.
47. The basis of the claimant's claim, as set out in the list of issues, is that the following conduct, viewed collectively, breached that implied term:
 - 47.1.1. Holding the Claimant to account for all or any of the alleged overpayment;
 - 47.1.2. the deduction by KCC of sums from the Claimant's wages for her role as a Celebratory Officer without consultation, warning, knowledge and/or her consent;
 - 47.1.3. the retrospective changes made to the Claimant's payslips with her knowledge or consent including the incorporation of a series of dates that did not feature on the original payslips;
 - 47.1.4. the conduct of the Claimant's grievance including the failure to allow her to be accompanied by a KCC colleague at the grievance hearing and/or the aggressive manner in which the grievance hearing was conducted and any delay;
48. During evidence and questioning of the respondent's witnesses, an important addition to the above, is the failure to engage properly with what the claimant

was saying via her solicitors. She also complained about the sharing of information in breach of her rights under GDPR. These matters contributed to the conduct which the claimant complains breached the implied term of mutual trust and confidence.

49. Dealing with each of those in turn:
- 49.1. Firstly I find nothing wrong with the respondent holding the claimant to account for the overpayments. The contract is clear that they are entitled to do so. In dealing with the revelation that the claimant had been overpaid, I find that the respondent acted reasonably; they invited her to make representations about the overpayments and asked her for proposals for repayment. In the end they reduced the amount significantly to account for the concession that they shared some responsibility. It was a very unfortunate situation but a fair and equitable solution was found. The respondent was amenable to reaching an arrangement for the claimant to pay back the £4,800 over a period of time. They were very conscious of the impact on the claimant which is why they wanted the claimant to suggest something that she could live with. I find that they did their best to accommodate the claimant. However, she maintained the view that she should pay nothing and would not move from that. Apart from wiping the debt completely, there is not much more that they could have done.
- 49.2. Regarding the deductions by KCC from the claimant's celebrant salary, I accept that this was not an attempt to claw back the overpayments. They were adjustments to tax which I accept were deducted by KCC without the claimant's knowledge or consent. It is hard to think how the respondent can be responsible for this as they did nothing. In any event, the deductions were reversed. The claimant has complained about sharing information and breaches of GDPR. I do not have sufficient evidence before me to conclude that there were such breaches, particularly in light of the contractual relationship between KCC and the respondent, they shared the same payroll company, and shared the burden of the overpayment from which the tax adjustment stemmed.
- 49.3. With regards the third point, I simply do not see how the claimant can complain about this. Certainly at pages 64 and 65 of the hearing bundle, the respondent was simply reflecting the position as existed at that time. Those documents were prepared after the resignation. The other documents I was referred to are those prepared by KCC
- 49.4. Turning to the grievance, I can find nothing wrong with the way this was dealt with. Strictly speaking, according to the respondent's policies, the claimant was not permitted to bring with her someone who was not employed by the respondent. The grievance meeting on 31 October 2019 was no doubt a difficult meeting. Ms Davis was mindful of the impact on the claimant which is why she undertook a

stress risk assessment. By that stage the claimant was aware of the legal position as had been advised by her lawyers. I do not accept that the meeting was hostile or that those attending on behalf of the respondent acted in a hostile manner. The claimant did speak over others at the meeting. She was unhappy and she was dissatisfied when it became clear that the debt was not going to be written off, which is why she prematurely ended the meeting.

50. Turning finally to what appears now to be a central part of the claimant's case, namely the alleged failure on the part of the respondent to engage, in particular to respond to the points raised by the solicitor, I have concluded that there were no failures on the part of the respondent here either. In the round they did respond to the points made by the claimant's solicitor even if they did not respond specifically to the legal points made. Essentially, and in broad terms, the claimant's solicitors were alleging that it was unfair for the claimant to have to pay back the overpayments. The respondent did not ignore what was being said there; it was a point that the claimant herself had made in her written grievance and previously. Indeed, having considered the fairness and equity of the situation the debt was reduced by two thirds. Their insistence on her contributing something to the overpayment, having gone through a lengthy process, was not unreasonable. However the only conclusion that would have been satisfactory to the claimant was for the debt to be written off.
51. I find that the reason for the claimant's resignation was the respondent's insistence on being repaid the overpayment. That position was made clear in the outcome letter to the claimant's grievance. I accept it was upon seeing that position that the claimant resigned. The outcome of the grievance itself was not a fundamental breach of contract. I therefore have to look at the conduct of the respondent as a whole and ask myself whether, taking into account all of the allegations, they without reasonable or proper cause, conducted themselves in a manner calculated or likely to destroy or seriously harm the relationship of trust and confidence between employer and employee and I have concluded that they did not.
52. In those circumstances, I find that the claimant was not dismissed but that she resigned. As she was not constructively dismissed, then her claim of unfair dismissal also fails.

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Employment Judge Hyams-Parish
05 May 2022

Case Number: 2301169/2020

SENT TO THE PARTIES ON

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