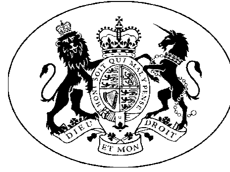

EMPLOYMENT TRIBUNALS

Claimant: Z

Respondent: Y

Heard at: Bury St Edmunds (CVP) **On:** 27 & 28 June 2022

Before: Employment Judge Laidler

Members: Ms J Costley
Mr B Smith

Representation

Claimant: Mr Z, Claimant's husband

Respondent: Mr A Hodge, Counsel

JUDGMENT

1. **The claimant was constructively unfairly dismissed by the respondent.**

2. **There was no continuing act in relation to the Equality Act claims which were submitted out of time. The tribunal having no jurisdiction to determine them they are dismissed.**

3. **A remedy hearing is listed for the unfair dismissal claim and case management orders for that are set out in a separate document.**

REASONS

1. The full merits hearing in this matter was heard between the 30 September and 3 October 2019. The tribunal met in chambers on 5 & 6

December 2019 and its reserved judgment sent to the parties on 15 January 2020.

2. The claimant appealed to the EAT which appeal was heard on 25 March 2021. Its judgment was delivered on the 19 July 2021. Various issues were remitted to this tribunal.

3. At a Case Management Hearing on the 13 December 2021 all were agreed that the following were the key aspects of the EAT's decision: -

   (i) That pursuant to paragraph 42 the EAT substituted a finding that the claimant did resign in response at least partially to the fundamental breach of contract.

   (ii) That the Tribunal will need to decide whether the breach was waived and there was an affirmation of the contract. On this matter only further evidence may be heard.

   (iii) The remitted hearing will address the question of whether there was a continuing act which will be dealt with solely on submissions.

4. Mrs L Daniels had retired since the original hearing and Mrs J Costley was appointed by the Regional Employment Judge in her place for this hearing.

Without prejudice correspondence

5. The tribunal was aware at the full merits hearing that there had been without prejudice discussions between the parties prior to and continuing past the claimant's resignation from her substantive role. In a witness statement prepared on the remitted issues the claimant referred to without prejudice correspondence and wished such documents to be admitted in evidence arguing that whilst labelled without prejudice they were not genuinely so. It was accepted that the tribunal could not reach a decision without seeing the relevant documents. It was provided with a bundle of 41 pages of correspondence and documents between the parties and it considered that with the parties' written submissions.

6. Having considered the documents and submissions a suggestion was made to the parties which they accepted. As the tribunal was already aware of the without prejudice discussions it was agreed that 'At the date of resignation the 1 June 2018 there were still without prejudice discussions taking place between the parties.' The hearing continued on that basis.

7. The claimant was cross - examined on her new witness statement but paragraphs 12 – 15 taken out (save the reference to page 872) and then 18 – 20 inclusively. Save as has been set out above the tribunal's

findings from the original hearing remained and this decision therefore has to be read in conjunction with the Reserved Judgment and Reasons sent out following it.

The first remitted issue - whether the breach was waived and there was an affirmation of the contract

8. The EAT did not accept the submission made on behalf of the respondent that Hogg v Dover College UKEAT/88/88 could be distinguished (paragraph 26 of the EAT decision). It cited paragraph 42 (8) at which Garland J stated:

> 'The question then arises of whether he accepted the employer's conduct as a repudiation of their obligations or whether it has to be said that by his conduct there was in the event no acceptance or indeed an affirmation. Of course, one asks for affirmation of what it could only be of a totally different contract, that is not the affirmation of the continuance of the contract where one term has been broken. This is a situation where someone is either agreeing to be employed on totally new terms or not at all'.

9. As stated in Hogg the question is whether the claimant accepted the employer's conduct as a repudiation or whether by conduct she could be said to have accepted it. The court posed the question 'acceptance of what'. It could only be of a totally different contract.

10. Applying that to the case before this tribunal where the breach was of the implied term of trust and confidence by not making the recommended reasonable adjustments it would be the continuation of that contract on that basis whereas in fact the claimant made it clear throughout that those adjustments were required.

11. The meeting of 31 January 2018 followed up with a letter of 6 February 2018 which made it clear to the claimant that the respondent was not going to be bound by her contract related to her current role. She was given the option of placing herself on the redeployment register or choosing a without prejudice conversation. From the tribunal's original findings, we know that the claimant elected the without prejudice conversation which continued past the date of her resignation on 1 June 2018.

12. In cross examination at this hearing Mr Hodge asked the claimant whether on 5 March 2018 (page 871) and 27 March 2018 (page 875) she was prepared to return to work and she was very clear as she has been throughout that she was but only with the adjustments that were necessary as recommended by her medical advisers to remove the stress that had caused her absence. That was always clear in her correspondence with the respondent

13. When the claimant received the notes of 31 January 2018 meeting she made some amendments and replied on pages 873F and 875B that she was fit to return to work with the reasonable adjustments as already discussed. She was just referred to Suffolk Legal.

14. The claimant took voluntary work in a hospice to help prepare herself for returning to work and this having assisted her mental health applied for a job elsewhere in the respondent on 12 April 2018. She was successful and started on 1 May 2018

15. The EAT has held that this is not fatal to her claim for constructive dismissal and that the fundamental breach remained one of the issues for her ultimate resignation. It stated at para 27 that the 'issue of waiver is in relation to the particular contract and not in relation to whether the person continues with the employer under a different contract'.

16. Although the claimant commenced that new role on 1 May 2018 the correspondence shows that she had not immediately resigned her previous role as she was not sure that all checks and references had been obtained and therefore that the new position was secure

17. On 2 May 2018 (page 983) there is reference to a meeting on the day of her return and her 'forthcoming resignation'. The claimant replied stating she still had not received confirmation that all relevant checks had been undertaken satisfactorily. In her witness statement for this hearing she confirmed that on receiving the confirmation she submitted her resignation on 1 June 2018

18. The authorities are clear that it is not just the passage of time that can lead to affirmation or waiver but that the employee's conduct must be taken into account during that relevant period. When an employee is on sick leave it is not so easy for it to be inferred that they have decided not to exercise their right to resign. Not only was the claimant on sick leave but she was no longer in receipt of any pay be it sick pay or ordinary salary.

19. When the claimant chose the option to embark upon without prejudice discussions, she still made it clear that she considered the respondent to be in breach of its obligations to make reasonable adjustments for her to enable her to resume her existing role.

20. The tribunal does not find that by engaging in those without prejudice discussions the claimant affirmed the contract. When the negotiations were continuing but not coming to fruition the claimant felt in limbo and was entitled to start looking for employment which she did. The case law is clear that an employee can still be given time to do so where there has been a fundamental breach and that the time taken to do so does not necessarily amount to having waived the breach

21. Taking into account the EAT guidance given to us in this matter and all of the above circumstances the tribunal has concluded that the claimant did not delay unduly in her acceptance of the repudiatory breach of contract and that she was when she resigned resigning within the meaning of the Employment Rights Act section 95(1) (c) by reason of the employer's conduct.

22. The claimant's representative referred to the case of Lauren de Lacey v Wechseln Ltd t/as The Andrew Hill Salon UKEAT/0038/20. In that case

the EAT found that the ET had erred in law in failing to consider whether the constructive dismissal was itself discriminatory. The tribunal does not find it relevant in the circumstances of this case as it was never one of the tribunal's issues that this was a discriminatory constructive dismissal.

23. There was a Case Management Hearing held on the 7 February 2019 at which the issues in the claim were discussed. Further information was needed from the claimant and an order made for that to be provided. The draft list of issues prepared by the respondent was then to be finalised.

24. At the outset of the full merits hearing on 30 September 2019 there was further detailed discussion of the issues in the case. These were set out at pages 2 – 8 of the written reasons. That the claimant's dismissal was discriminatory was not one of those issues.

25. As the tribunal had now found that there was a dismissal within the meaning of the Employment Rights Act it was noted that in the list of issues the respondent advanced a potentially fair reason for that dismissal namely capability or alternatively some other substantial reason. The question was also still posed as to whether if the Tribunal found the dismissal to be for one of those reasons whether the respondent had acted fairly. On taking further instructions Mr Hodge confirmed that having reviewed the tribunal's findings the respondent no longer pursued an argument that it had a potentially fair reason and had acted reasonably.

Second remitted issue – whether there was a continuing act.

26. Section 123 Equality Act 2020 provides:

Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

27. The statute is clear as is the case law that where there has been an omission time runs from the date of the failure to act. The Court of Appeal in Kingston Upon Hull City Council v Matuszowicz [2009] IRLR 288 confirmed that position. The failure to make a reasonable adjustment is not a continuing act.

28. The other matter remitted to this Tribunal was that the tribunal had omitted to deal with whether in relation to the two matters it found to be discriminatory there had been a continuing act. Those matters appeared at paragraphs 3.1 and 3.2 of the reserved judgement:

3.1 Unfavourable treatment because of something arising in consequence of disability when the claimant was told on 31 January 2018 that she would not be returning to her existing role and any circumstances

The tribunal has to accept the respondent's submissions that this was a one-off act albeit with continuing consequences. Time ran from 31 January 2018 and the claim submitted on the 23 October 2018, following a period of ACAS Early Conciliation between the 16 August and 24 September 2018 was consequently submitted out of time

29. 3.2 That the respondent failed to make reasonable adjustments when it enforced a practice that all members of the team needed to be co-located at specific desks for operational reasons

It is clear from the minutes of the meetings of both the 19 and 27 December 2017 (pages 822 and 824c) that the respondent's position in this respect was made clear at those dates. The claimant would have to return to the bank of desks where she had worked and near to the person she had raised a grievance about. The respondent refused from 27 December at the latest to make any reasonable adjustments to that requirement.

30. It follows that the Tribunal still finds that it does not have jurisdiction to determine the complaints of disability discrimination they having been submitted out of time and it not being just and equitable to extend time

Employment Judge Laidler
5 September 2022

REASONS SENT TO THE PARTIES ON
12 September 2022
....

....

FOR THE TRIBUNAL OFFICE