



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Nam

Respondent: South West Yorkshire Partnership NHS Foundation Trust

Heard at: Hull (remotely, by video) **On:** 24 March 2023

Before: Employment Judge Miller

Appearances

For the claimant: In person

For the respondent: Mr B Williams – counsel

RESERVED JUDGMENT

The respondent's application that the claimant's claim be struck out as having no reasonable prospects of success is refused.

REASONS

1. The claimant brought a claim for constructive unfair dismissal. The claim lacks some detail and the respondent requested the claimant to provide further information in their response submitted on 30 January 2023 and then again on 22 February 2023. The respondent also applied for the claimant's claim to be struck out in their response on the grounds that it had no reasonable prospects of success.
2. The claimant replied on 23 February 2023 and refused to provide the additional information on the basis that as the tribunal had accepted her claim, it must be adequately pleaded. The respondent made applications for an extension to the length of the final hearing (addressed below) and in the course of addressing that application EJ Lancaster said, on 13 March 2023 "It is quite clear therefore that the claim does require clarification, and of course is listed for possible strike out/deposit for lack of that clarification".
3. The purpose of this hearing was to consider the respondent's applications to strike out the claimant's claim or make them subject to a deposit order.

4. Before I can consider either of those applications, it is vital that I properly understand the claim the claimant is intending to bring. This requires identifying the issues. In *Tree v South East Coastal Ambulance Service NHS Foundation Trust* [2017] UKEAT 0043_17_0407, HHJ Eady said that deposit orders or strike outs are not to be used as a substitute for case management. In this case, where the claimant has declined to provide further and better particulars, it is incumbent on me to clarify the claim with the claimant at this hearing before making any decisions about the claim.
5. I clarified the claimant's claim and the list of issues as now set out in the case management order and as amended is appended to these reasons. That includes a brief summary of the applicable principles in a constructive unfair dismissal case as well as the particular allegations on which the claimant relies. It can be seen that the claimant's allegations relate predominantly to the alleged conduct of a Dr Douglas and a Dr Mostafa, her erstwhile colleague and line manager respectively. This is the claim that I consider when deciding whether the claimant's claim has no reasonable prospects of success.
6. The other matters not recorded in the list of issues are firstly that the claimant asserts that she took steps to find out how to hand in her resignation and the period of notice required on 17 December 2021 and that information was provided the same day; and secondly that the claimant handed in her resignation, with 12 weeks' notice or thereabouts on 5 May 2022.
7. Rule 37 Employment Tribunal Rules of Procedure says, as far as is relevant:
 - (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
 - (a) that it is scandalous or vexatious or has no reasonable prospect of success;
8. It is not appropriate to conduct a "mini-trial" to determine the prospects of success but I must consider the claimant's case at it's highest.
9. The respondent's application was based on, they said, the long delay between the asserted final straw in November 2021 and the claimant's resignation in May 2022; and the inherent weakness of some of the claimant's allegations.
10. In my view, the respondent's assertions about the weakness of her individual allegations require testing in oral evidence. Mr Williams referred particularly to the claimant saying that Dr Douglas "gently interfered" in the Balint meetings and that Dr Douglas' email of complaint in July was not rude or aggressive (disregarding the fact that this was after the claimant had submitted her resignation). These incidents, he said, were obviously not breaches of the implied term of mutual trust and confidence.

11. In my view these points require explanation from the parties. The way in which senior consultants communicate with each other is unlikely to be the same as how workers in a factory might communicate with each other so that subtleties of communication that might go unnoticed by third party observers might have significant meanings for the parties involved. These arguments of themselves are not sufficient for me to be able to conclude that the claimant's claim has no reasonable prospects of success.
12. It is well established that discrimination claims are rarely to be struck out as the evidence will need to be examined and tested in detail. In my view, this case in which the alleged conduct of the claimant's colleagues is being questioned is analogous to a discrimination case. The context of the alleged acts and all the surrounding evidence are likely to be relevant and it is not appropriate to assess the strength or weakness of the allegations against Dr Douglas and Dr Mostafa on the basis of the pleadings alone. Even consideration of written communication is not sufficient to establish conduct capable or not capable of contributing to a breach of the implied term of trust and confidence without explanation of the context.
13. The claimant is likely to have some difficulty in demonstrating that she did not waive the alleged breach of reaffirm her contract after what she described – clearly and repeatedly in her pleadings and in the hearing – as the final straw in November 2021. Although there were two further alleged breaches in January 2022, the claimant did not put significant weight on them, Her main argument was that the alleged acts of Dr Douglas and Dr Mostafa in July 2022 revived any earlier breaches. The claimant referred to *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, CA.
14. The obvious difficulty the claimant faces with this argument is that she had already decided to resign before these acts so it is impossible for her to rely on these as part of her decision to hand in her resignation, albeit that they might in her view amount to retrospective confirmation of her view about the respondent.
15. In my judgment, it will be difficult for the claimant to show that she did not waive the breach of reaffirm her contract between November 2021 and May 2022 so that she was not entitled to resign in response to the respondent's alleged breach of the implied term of mutual trust and confidence.
16. However, the question of waiver or affirmation is not straightforward. The mere passing of time is not sufficient to amount to affirmation of itself, although the longer the period for which the claimant continues to work, the more likely it will be that the claimant has affirmed her contract. The claimant referred to her ongoing duties to her patients, as well as the need to secure alternative employment, before formally resigning. These arguments are not so hopeless as to mean that the claimant's claim has no reasonable prospects of success. Even if small, the claimant does have some prospect of demonstrating that she had a good reason to delay in handing in her resignation and that she did not affirm her contract.

17. For this reason, the respondent's application that the claimant's claim be struck out as having no reasonable prospects of success is unsuccessful and is dismissed.

Employment Judge **Miller**

Date 29 March 2023

Appendix – list of issues

The issues the Tribunal will decide are set out below.

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things:

- 1.1.1.1 On 24 June 2020, Dr Douglas undermined the claimant in a professionals meeting by declining a request to review a patient's medication and then "lecturing" the claimant in front of other staff about the medication. Dr Douglas then, the next day, sent the claimant a leaflet about the medication even though the claimant had said it would not be helpful to do so.
- 1.1.1.2 On 30 June Dr Douglas made it clear that his behaviour would not stop. The claimant met Dr Douglas at her request to discuss the incidents of 24 June 2020. The claimant said that it was ok for Dr Douglas to decline her referral to review the patient's medication, but that lecturing her in front of staff was demeaning and she asked Dr Douglas not to do it again. Dr Douglas said that he lacked self-awareness and could not promise that he would not do it again. The claimant formed the view that it was clear that Dr Douglas' behaviour towards her would not stop although the claimant also said in the meeting that if she told him to stop it would indicate that something was not ok and Dr Douglas agreed with that.
- 1.1.1.3 On 26 August 2020, the claimant's line manager, Dr Basu, failed to take any action to address the problems the claimant said she was experiencing from Dr Douglas. The claimant told Dr Basu that she felt undermined by Dr Douglas and gave the examples from 26 and 30 June but Dr Basu did not do anything about it. (The claimant says that she did not request Dr Basu to take any action).
- 1.1.1.4 On 2 October 2020, Dr Douglas unfairly and inappropriately blamed the claimant in an email for having to attend Folly Hall Community Centre to write a prescription for a patient during the Covid-19

pandemic. The claimant is not authorised to prescribe medication and a nurse, rather than the claimant, had requested the prescription. The claimant did not request Dr Douglas to attend the Community Centre but Dr Douglas blamed and unfairly criticised the claimant for the requirement for him to attend anyway.

- 1.1.1.5 On 10 May 2021, Dr Mostafa (the claimant's new line manager) intimidated the claimant and made it clear that he supported Dr Douglas over her. Dr Mostafa said to the claimant that he was like an African rhinoceros who storms over everything on his way to his goal. Dr Mostafa asked the claimant to be a clinical sponsor for the Clear Project (which was a secondment and additional to her duties) in a way that made it clear that the claimant was unable to decline although the claimant did not want to.
- 1.1.1.6 Throughout May 2021 to August 2021, Dr Douglas repeatedly attacked and criticised the claimant's style and competence in relation to running the Balint groups and, particularly, made it clear to the claimant that she was doing it wrong, even though there are no clear standards or explicit guidance as to how the groups should run. The claimant co-facilitated the Balint group in this period with Dr Douglas. The Balint group is a group run for the training/development of junior doctors. Dr Douglas criticised actions the claimant took in the group, including elucidating terms to junior doctors; he said that the claimant should abstain from didactic teaching; Dr Douglas wanted the claimant to deliver the training in the same way that he did. Dr Douglas heavily criticised the claimant in meetings after the groups and by email and Dr Douglas tried to "gently interfere" with what the claimant was doing during the groups.
- 1.1.1.7 On August 2021 Dr Douglas made an unsolicited and unwanted forceful recommendation that the claimant undertake training.
- 1.1.1.8 On 4 October 2021 in a planning meeting, Dr Mostafa rejected every request or suggestion that the claimant made. The claimant requested whether she could extend the offer of ward supervision to junior doctors across the wider deanery. This was refused. The claimant asked to pilot the STEPS programme and this was refused with no reason. The claimant requested additional secretarial support but this was unreasonably refused on the basis that Dr Mostafa needed to see the system fail before increasing secretarial support, rather than avoiding the failure. In

the same meeting, Dr Mostafa asked the claimant to take on on-call duties even though it was not safe for the claimant to do so because of the ongoing consequences the claimant was experiencing from a car accident. It was subsequently agreed by Dr Mathen (Dr Mostafa's manager) that the claimant was not required to do on-call at that point. In the same meeting, Dr Mostafa said that it was common knowledge the claimant and Dr Douglas did not get on, that he had supported the claimant in the past and he was now asking the claimant to start on-call. The claimant did not understand the relationship between these two statements and perceived it as Dr Mostafa saying that he sided with Dr Douglas.

- 1.1.1.9 On 9 November 2021, following a meeting on 5 November 2021, Dr Basu declined, by email, the claimant's request to move departments so that she was no longer working with Dr Douglas or Dr Mostafa. The claimant describes this as the final straw and says that at this stage she started looking for different employment and making enquiries about how to put in her resignation.
- 1.1.1.10 On 11 January 2022 the claimant was refused entry to the consultant's Balint group (a different group from the junior doctor's one). Dr Douglas told the claimant she had to explain why she wanted to join, wrongly said that she had made derogatory comments about the group in the past, and then refused her entry, even though there are no additional entry criteria except being a consultant.
- 1.1.1.11 On 18 January 2022, at a trust wide meeting, Dr Douglas alleged that the reduction in attendance at the junior doctor Balint group was because of the claimant's competence and that she should do more training on Balint groups. The claimant was not at this meeting, but she had provided a written report and was sent the minutes in which these comments were recorded.
- 1.1.1.12 On 21 July 2022, Dr Douglas sent an email to the claimant, copying Dr Mostafa, complaining about a psychotherapy report sent to him that the claimant had completed. Dr Douglas said that the claimant's tone was condescending and patronising and that the report damaged the therapeutic relationship between him and the patient. The claimant said that the criticism was unjustified as she was complying with her obligations to be honest and trustworthy with the patient.

- 1.1.1.13 On 22 July 2022, Dr Mostafa responded agreeing that the time as intimidating and damaging and he ordered the claimant to produce a reflection to remedy the situation. Dr Mostafa sent this email while on leave, which the claimant believes was unnecessary, and he copied or forwarded the email to Dr Basu, Dr Mathen and Melissa Harvey, a general manager, none of whom had any legitimate interest in this matter.
- 1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.1.2.2 whether it had reasonable and proper cause for doing so.
- 1.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 1.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 1.2 If the claimant was dismissed,]what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?
- 1.3 Was it a potentially fair reason?
- 1.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?