



EMPLOYMENT TRIBUNALS

Claimant: Ms Elaine Binnie

Respondent: London Borough of Haringey

Heard at: Watford

On: 12-14 July 2023

Before: Employment Judge Bansal (sitting alone)

Representation

Claimant: Mr R Beaton (Counsel)

Respondent: Miss C Jennings (Counsel)

RESERVED JUDGMENT

The Claimant's claim for unfair constructive dismissal is not well founded and is dismissed.

REASONS

Background

1. The claimant joined the respondent on 29 June 1998 as an administrative assistant, and resigned from her current role of HR Officer with immediate effect on 18 October 2022 on the grounds that the respondent had committed repudiatory breaches which destroyed the implied term of trust and confidence between her and the respondent.
2. By a Claim Form presented on 30 November 2022, the claimant brings a claim for unfair constructive dismissal, following her resignation from the respondent's employment on 18 October 2022. The claimant contacted ACAS on 23rd September 2022 and an early conciliation certificate was issued on 3rd November 2022.
3. The respondent submitted its response on 4 January 2023 disputing that it had committed any repudiatory breaches. Further it is contended that, if there has been repudiatory breach, in any event, the claimant has delayed too long in resigning and waived any such breach.

4. At this hearing, the claimant was represented by Mr Beaton of Counsel, and the respondent by Miss Jennings of Counsel.

The List of Issues

5. The parties did not produce an agreed List of Issues. Therefore, following a discussion with the parties, at the start of the hearing, a List of Issues was agreed as set out below.

5.1 Did the respondent act in such a way as to fundamentally breach the claimant's contract of employment by acting in breach of the implied term of trust and confidence by;

(a) treating the claimant unfairly in relation to the following breaches :-

- (i) delay in completing the investigation into her alleged conduct;
- (ii) delay in sending the completed investigation report to the claimant;
- (iii) failure to keep the claimant up to date on the progress of the investigation and disciplinary process from 18 June 2021 to 18 October 2022;
- (iv) failure to progress or deal with her grievance dated 21 June 2021;
- (v) failure to conduct the internal appeal process within a reasonable time.

5.2 If so, did the claimant resign in response to the breach/breaches or for an unconnected reason?

5.3 If so, did the claimant delay in resigning such that she could be said to have waived the breach/breaches or done anything to affirm the contract?

The Hearing

6. This was a remote hearing by Cloud Video Platform (CVP) which had been consented to by the parties.

7. The Tribunal was provided with a chronology, cast list and an agreed bundle of documents, which consisted of 731 pages. The bundle was an excessive bundle which contained a large number of unnecessary and irrelevant documents to the legal issues to be determined. In my reading I read the documents referred to in the witness statements; the chronology and those referred to in evidence.

8. I was presented with written witness statements from the claimant, and for the respondent, Mrs Annette McDermott (Head of HR Support Services), Mrs Karen Gooday (Ex-Head of Employment, Reward & Transformation), Mr Taha Asfahani (Head of Talent and Resourcing), and Mrs Stephanie Achief (Employee Relations Manager). All witnesses gave oral evidence and were cross examined. I also asked questions of the witnesses to clarify matters.

9. At the conclusion of the parties' evidence, both representatives provided written submissions which they expanded upon orally. Due to lack of time, I reserved my decision, and we agreed a provisional date for a Remedy

Hearing via CVP on 19 October 2023 at 10.00am, if so required.

Findings of fact

10. Having considered all of the evidence, on the balance of probabilities I have made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.
11. The respondent is a Local Authority in the London Borough of Haringey.
12. The claimant commenced employment with the respondent on 29 June 1998, as an Administrative Assistant. Over the period of her employment she held various roles. At the date of her resignation, she held the role of HR Officer in the HR Payroll Dept. The claimant's role entailed monitoring and updating sickness absence; maternity and paternity management; conducting personal inductions for new employees; deputising in the absence of team leaders and dealing with payroll entries. At the date of her resignation her Line Manager was Panny Papisavva (HR Operations Manager).

March 2021

13. In March 2021, Mrs Annette McDermott joined the respondent as Head of HR Support Services. She joined when the HR Dept was to be re-structured. Her first task was to carry out this re-structure.
14. According to the claimant re-structuring had become a regular feature of the HR Payroll Department and each time her role and duties were changed in the restructuring exercise. She found it challenging to have to go through another restructure and felt unsettled. Thus around March/April 2021, the date which the claimant was unable to confirm, she had a discussion with Mr Dan Paul (Chief People Officer) about the proposed restructure and enquired about being made redundant. Mr Paul informed her that redundancy was not on offer but that he would be willing to support an application for flexible retirement. According to the claimant this suited her, as she would be able to continue to work flexibly, earn an income and also claim part of her pension.

Meeting with Mrs McDermott (March – June 2021)

15. On 25 March 2021, as part of Mrs McDermott's introduction with the team, she held individual meetings with the team. At the meeting with the claimant, like some other colleagues, she expressed her preference to be made redundant. According to Mrs McDermott, at the start of the consultation meeting held on 7 June 2021, she informed the employees there was limited significant changes to the job roles and that there was no need to place anyone at risk of redundancy.
16. On 11 June 2021, Mrs McDermott held consultation meetings with each employee about the proposed re-structure. Miss McDermott made notes of her discussion with the claimant (p74). In particular, the claimant is recorded to have said, "*Needs to have clear roles and responsibilities and tasks – If it's not on the JD I won't do it; No recognition for experience/length of service; we are treated the least and not recognised; Would prefer to be made redundant who wants to come and do the job*". A copy of this note was sent to the claimant

by email immediately after the meeting. (p73) In cross examination, the claimant repeatedly said she could not verify the contents of the note of discussion as she could not recall the remarks made and neither had she been provided with a copy of note. The claimant was evasive in her reply. I find that Mrs McDermott would not have recorded the remarks had these not been made by the claimant. There was no reason for Mrs McDermott to record inaccurate notes. I find the claimant was sent a copy of the note by email after the meeting the same day.

17. Mrs McDermott in her witness statement described the claimant's manner towards her as rude, disrespectful, unprofessional and quite aggressive. She noted the claimant saying, "*if it's not in the JD I won't do it*".

Flexible Retirement Request

18. On the same day 11 June 2021, the claimant made an application for Flexible Retirement requesting to change to her working days from 5 to 3 days a week. The application was emailed to Mrs McDermott at 17.04pm. (p176). This application was supported by Mrs McDermott, who was in communication with the claimant during its process. (July and August). On 26 July 2021, the claimant emailed Mrs McDermott to enquire if the application had been considered. (p175) In early August 2021, there was an email exchange with the claimant concerning her proposed hours, when the claimant agreed to reduce her hours of work to 18 hours per week. The request was approved on 5 January 2022 effective from 17 January 2022. (p251)
19. I note that during this application process the claimant was in contact with Mrs McDermott and did chase her for updates with the application.

Consultation Meeting – 17 June 2021

20. On 17 June 2021, the claimant with other team members (14 in total) attended a meeting via Teams video. The meeting was organised by Mrs Padasavva to discuss the re-structure and job descriptions. Mrs McDermott was not in attendance. Also present were members of the School Team, which included a colleague Tenniel Francis.
21. During this meeting, the claimant had an exchange of words with Tenniel Francis about the identity of the two teams (i.e Schools & HR Payroll Officers). Tenniel Francis was of the view that the two teams should join in the HR team meetings regularly, whereas the claimant disagreed and expressed her view that they were separate teams and should remain so and not join in any of their meetings. There was an exchange of views between them both, which caused Mrs Padasavva to end the meeting. In subsequent correspondence the claimant has maintained that she was not rude or confrontational or was it her intention to offend anyone.
22. Following this meeting, Mrs McDermott received messages, emails and phone calls from 5 employees who attended the meeting complaining about the claimant's conduct. They complained the claimant showed lack of respect towards her colleagues and managers, they felt bullied, harassed and humiliated by her. This prompted Mrs McDermott to commission an investigation in accordance with the respondent's Disciplinary Policy, in

particular, Para 3.5 which states, “ *Investigations into alleged misconduct will be carried out without undue delay. The purpose of the investigation will be to establish the facts of the case and decide whether there is a case to answer in respect of the allegations and to prepare for the disciplinary hearing. Disciplinary investigations will be dealt within a reasonable timeframe and carried out or overseen by the employees line manager, where this (sic) not appropriate an investigator will be nominated by HR. A hearing will be arranged as soon as reasonably practicable after the completion of the investigation report.*” (p325) Mrs McDermott took the view that this required an independent investigation to report on the events in that meeting. She did not consider it appropriate to deal with the incident in an informal discussion with the claimant, or informally within the disciplinary process.

23. That afternoon Mrs McDermott held a meeting with the claimant via Microsoft Teams and informed her of the investigation. This was confirmed in writing by letter sent by email.(p86) The letter, stated, “*Every effort will be made to complete the investigation as soon as practicable. You will be given every opportunity to state your position as part of the investigation...*” The claimant was not suspended and continued to work as normal.
24. Mrs Karen Gooday, Head of Employment, Reward and Transformation was appointed to carry out the investigation. She was relatively new to the respondent having joined in April 2021. She wrote to the claimant (undated letter) inviting the claimant to an investigative meeting on 6 July 2021 at 10.00am via Microsoft Teams. (p89)
25. On 21 June 2021, the claimant wrote a letter to Mrs McDermott about the meeting held on 17 June 2021. The said letter sets out the claimant’s account of events in that meeting; her observations about the Team and certain individuals. She does not seek any action from Mrs McDermott. (p82-83) Initially, the claimant did not want the letter to be shared with Karen Gooday, but later agreed this to be shared. (p94)
26. On 23 June 2021, the claimant sent a letter by email to Mrs McDermott asking her to destroy her letter of 18 June 2021; wanting to know why the grievance policy was not initiated to deal with the complaint as opposed to the disciplinary process, and that she be given full details of the charges against her to enable her to state her case at the investigation meeting. (p102) in reply, Mrs McDermott sent a letter on 24 June 2021, explaining that the meeting forms part of the formal disciplinary process and that she will be provided with relevant information at the meeting. She also apologised for the delay for getting the investigation organised. (p115)
27. In response to the claimant’s question why the grievance policy was not invoked, Mrs McDermott replied by email on 24 June 2021, stating that as it is a conduct issue it is a disciplinary matter and not a grievance. (p115)
28. By letter dated 30 June 2021, addressed to Mrs Gooday the claimant requested information relating to each of the conduct allegations, with any witness statements and a request for the meeting to be rescheduled as she had not been provided with the required information.(p119) Mrs Gooday replied by clarifying that the investigation meeting was a fact finding meeting and not a

formal disciplinary hearing; and that she will explain the process in full at the meeting.(p126) In reply, the claimant sent a letter on 2 July 2021, expressing her concern at not having been given full and specific details about her alleged misconduct prior to the meeting, and that her request be given full consideration. She also asked for the meeting to be re-scheduled. (p128) Hence at the request of the claimant the meeting was re-scheduled to 21 July 2021.

29. In reply to the claimant's concern about the contents of the letter, and whether it created an inconsistency or disadvantaged the claimant, Mrs Gooday explained the letter used was a template letter and assured her the correct process was being followed. (p129)

The Investigation process

30. As part of the investigation process, Mrs Gooday was assisted by Sandra Smart, (Employee Relations Specialist) in respect of the administrative tasks. There were 15 individuals to be interviewed including the claimant. The interviews were held via Microsoft Teams, and were recorded.
31. Mrs Gooday commenced the interview process on 8 July 2021 and ended with the claimant's interview on 21 July 2021. (p512-536) At the end of the claimant's meeting Mrs Gooday explained the next steps to be, *"As I said next steps is to get a transcription of this meeting and you'll get a chance to review that. I then need to write a report up and give that to Annette. Just to say I'm on leave next week, so I'll be starting the report when I get back, but I'll try and do it as soon as I can. Annette will then give you the outcomes from that."* (p536)
32. Mrs Gooday interviewed 15 employees over the period from 8 July to 4 August 2021. The interviews were recorded by consent. The audio recordings had to be transcribed into transcripts. The respondent used an external provider DA Languages. Mrs Gooday tasked Sandra Smart of the Employee Relations Team to obtain these transcripts. During August and September 2021, Mrs Gooday chased Sandra Smart for updates. It was not until 20 October 2021, that Mrs Gooday received confirmation from Sandra Smart that the delay was because she had in error not uploaded all of the audio files. (p228) It was not until 5 November 2021 that Mrs Gooday received all of the transcripts of the interviews.
33. Mrs Gooday produced the first draft of the Investigation Report on 30 December 2021. (p264-543). In January 2022, the transcripts and report had to be edited to anonymise one of the witnesses. There was further discussion about this The final report was produced and sent to Mrs McDermott on 10 February 2022. (p263) The conclusion and recommendation of the report was that the complaint should be the subject of formal disciplinary action to consider whether the claimant had breached the code of conduct by her conduct. (p284-285)
34. In her evidence Mrs Gooday explained the delay in producing her report was due a number of reasons namely, her annual leave; the issues and delay with the transcription service; her own heavy work commitments involving a

complex workload combined with being heavily involved in the recruitment and selection process which was being undertaken at the same time; the shortage of staff, and that she needed time to compile the report, which was detailed and comprehensive. She confirmed that she did regularly chase Sandra Smart for updates, and even worked over her annual leave in December 2021 to compile and conclude the report.

35. According to Mrs Gooday, she emailed the claimant on 2 September 2021 to give her an update regarding the investigation. In the email, Mrs Gooday states, she has concluded the interviews, and is currently awaiting for the transcripts of the meetings to be returned, which have been delayed and as soon as these are back she would give an update with a completion date. (p210). The claimant, in her witness statement, accepts she received the email from Mrs Gooday on 2 September 2021, but did not reply to this as she did not feel that there was anything further to reply to. Further, she confirmed she did not chase Mrs Gooday as she did not feel that the onus was on her to do so, as Mrs Gooday should have kept her updated.
36. During the period June 2021 to March 2022, the claimant said she was in a state of emotional turmoil, which impacted her health and well-being. She did not chase up for an update because she was too scared to ask. She did not inform her Line Manager or Mrs Gooday or anyone else at the respondent that the delay with the investigation process was impacting her health and wellbeing. In the claimant's email of 20 May 2022, to Mrs Achief, she mentions for the first time the impact of this delay on her health and wellbeing. (p589)
37. The Investigation Report was received by the claimant on 18 March 2022 by special delivery. According to the claimant the report had no covering letter and neither did she receive prior warning in the form of an email or telephone call to warn her that the report was being posted to her. The Report is detailed consisting of some 300 pages.

Invite to a Disciplinary Meeting

38. Mrs Achief, was assigned the task of organising and advising on the disciplinary hearing. She wrote to the claimant by letter dated 16 March 2022 inviting her to a disciplinary meeting on 29 March 2022, with Mr Taha Asfahani, (p544-545)
39. On 21 March 2022 the claimant was signed off on sick leave due to stress at work for a period of 3 weeks. She produced a Fit Note. (p547) Due to her ill health, the claimant requested the disciplinary hearing be postponed and directed Mrs Achief to only contact her by post and to disregard her personal email address for future correspondence. (p551) The scheduled disciplinary hearing was postponed and no future date was arranged in the circumstances.
40. Due to ill health the claimant remained on sickness absence until her resignation
41. On 20 May 2022 the claimant contacted Mrs Achief requesting that the disciplinary hearing be re-scheduled. (p569). By letter dated 30 May 2022 Mrs

Achief, responded to the claimant and explained that Mr Asfahani was currently on leave until 6 June 2022, and that he would set up a date upon his return.(p571-572)

42. On 13 June 2022, the claimant was further reviewed by Ms Francis in relation to her sickness absence. The claimant declined to consent for the occupational health referral. (p573-574)
43. On 16 June 2022, the claimant contacted Mrs Achief, via email, to ask her to confirm why the Investigation Report has taken from 18 June 2021 to 18 March 2022 to complete. (p575) The claimant confirmed on this occasion she was content to be contacted by email. Mrs Achief replied, she was not in a position to give an answer and asked the claimant to redirect her question to the Investigating Manager at the disciplinary hearing.(p577)

Claimant's grievance

44. On 21 June 2022, the claimant raised a formal grievance on the basis that Mrs Gooday and Mrs Achief had not followed a full and fair procedure during the disciplinary process and as a result the breached the respondent's disciplinary policy. The claimant stated that *" I strongly believe that trust and confidence have irretrievable broken down between myself and my employer Haringey Council, therefore mediation would not be relevant. "* (p579-584)
- 45 Mr Paul Dan replied to the claimant's grievance, in which he stated, *" As your case is ongoing the place to raise your issues is at the disciplinary hearing rather than in a separate grievance..... I realise this is not the result you was hoping for however the Council will not be progressing at your grievance because the issues are to be dealt with in the disciplinary process. "* (p591)

Disciplinary Hearing

46. On 24 June 2022, Mrs Achief wrote to the claimant to confirm the rescheduled date of the disciplinary hearing for 14 July 2022. (p594-595) On the day of the disciplinary hearing, the claimant contacted Mrs Achief, to inform her that she would not be attending the hearing. The claimant did not provide any written representations. In evidence, the claimant gave a number of reasons for not attending, namely, she did not feel well enough or confident enough; she felt intimidated because three Head of Services would be present, and did not feel she would receive a fair hearing.
47. Mr Asfahani proceeded with the hearing in the claimant's absence. Mrs Achief attended the hearing with Mrs Gooday. At the hearing, there was a discussion about the delay in the investigation process and providing the Investigation Report. According to Mr Asfahani, the explanation provided by Mrs Gooday was "reasonable and plausible", and he accepted that it was reasonable for her to wait for the entire transcripts before she concluded her investigation and prepared her Report; and that the delays encountered were outside of her control. Mrs Gooday explained DA Languages did not meet the expected Service Level Agreement.

48. Mr Asfahani's decision on the disciplinary issue was that on a balance of probabilities the charge of misconduct was substantiated. This was a breach of the Code of Conduct for which a first written warning was issued effective 14 July 2022 for a 12 month period.(p624-625) The claimant was given a right of appeal.

Right of Appeal

49. On 8 August 2022, the claimant submitted her appeal to the disciplinary outcome. (p630-641) it was a detailed appeal submission, which challenged the fairness of the procedure; questioned the delay of some 9 months to conclude the investigation and deliver the Report; the impartiality of Mrs Gooday in the process; and the decision to discipline her and the sanction applied. The respondent did not acknowledge this appeal. By email on 26 August 2022, the claimant wrote to Mr Dan Murphy (Chief People Officer) requesting an update on her appeal. Mr Murphy replied by email on 5 September 2022, apologised for the delay and explained he had been away on leave and that he has asked the employee relations team to progress her appeal. (p650) In evidence, Mrs Achief explained the reasons for the delay, was because Mr Murphy was on annual leave; and she in September was occupied with other grievance hearings; and that in early October she became busy again holding several interviews for the recruitment of an ER Specialist.
50. In late September 2022, Mrs Achief was engaged in organising a chair to hold the appeal. She identified Jackie Difolco, Assistant Director of Early Help, Prevention and SEND Division. Due to the limited availability of this person, the earliest available date for the appeal was identified as 1 November 2022. This date was fixed with Jackie Difolco on 4 October 202. (p654) The claimant was not informed of this. Mrs Achief's explanation for this was she became very busy in the week of 3 October to 10 October 2022 in recruitment interviews.
51. On 4 October 2022, the claimant sought legal advice. She explained she had no option as she felt distressed at the situation. The claimant's solicitors sent a detailed three page letter dated 4 October 2022 addressed to the respondent, but without addressing it to any particular named individual or Dept. The said letter set out the factual background and in particular asserted repudiatory breaches by the respondent in relation to the disciplinary process and the delay; failure to process the claimant's grievance; and the failure to conduct the claimant's appeal within a reasonable time. The letter further stated that the claimant is intending to resign but is prepared to resolve matters amicably otherwise she will be lodging a tribunal claim. (p651-653)
52. On 13 October 2022, Mrs Achief wrote to the claimant inviting her to attend an appeal hearing on 1 November 2022.(p658-659) On the same date, Mrs Achief replied to the claimant's solicitors letter acknowledging receipt of their letter and advising to address all correspondence to their Legal Services Dept, and confirming receiving notification from ACAS on 5 October 2022. (p657)
53. By letter dated 18 October 2022, addressed to Mrs Papasavva, the claimant confirmed her resignation from her employment for the reasons as stated in her solicitors letter dated 4 October 2022. (p660) In evidence, the claimant

confirmed she had no faith or trust in the respondent as her employer.

54. By letter dated 19 October 2022, Mrs Papasavva wrote to the claimant giving her an opportunity to reconsider her decision, and encouraged her to attend the scheduled appeal hearing. She also offered to meet with the claimant. (p661) The claimant did not re-consider her position and neither did she agree to meet with Mrs Papasavva. Despite the fact the claimant had already resigned, the respondent continued with an appeal hearing in her absence.
55. On 2 November 2022, Mrs Papasavva wrote to the claimant accepting her resignation. (p688-689)

The legal framework

56. In my deliberations I gave consideration to the legal framework and relevant case law as set out below;
57. Section 94 of the Employment Rights Act 1996 ('ERA 1996') sets out the right of an employee not to be unfairly dismissed by his or her employer.
58. For the claimant to be able to establish her claim of unfair dismissal she must show that she had been dismissed. Dismissal for these purposes is defined in section 95 ERA 1996 and includes in sub-section 95(1)(c) *'the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct'*.
59. **Western Excavating (ECC) Ltd and Sharpe 1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that that employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.
60. In **Mahmood v BCCI 1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. It is implicit in the case of **Mahmood v BCCI** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that, it is necessary do serious damage to the employment relationship. That position was expressly confirmed in **Morrow v Safeway Stores Ltd 2002 IRLR 9**.
61. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on which need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract. **Lewis and Motor World Garages Ltd 1985 IRLR 465** and **Omilaju v Waltham Forest London Borough Council 2005 IRLR 35**.

62 In **Omilaju** it was said:

'19... The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. It's essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

'20. I see no need to characterise the final straw as; unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incident which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.'

'21. if the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a contrastive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'

63. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not.

Omilaju v Waltham Forest London Borough Council and **Bournemouth University Higher Education Corpn v Buckland [2011] QB 323.**

64. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed. **Bournemouth University Higher Education Corpn v Buckland [2011] QB 323.**

65. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. In **WE Cox Toner v Crook (1981) IRLR 443**, a delay of seven months fatally undermined a constructive dismissal claim.

66. The proper approach, in the main distilled from the cases has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

It is sufficient for a tribunal to ask itself the following questions:

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
- (2) Has he or she affirmed the contract since that act?*
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
- (5) Did the employee resign in response (or partly in response) to that breach?*

67. If dismissal is established. sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or it more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in subsection 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.
68. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996.

Submissions

69. I have considered the written submissions of both parties and briefly summarise them within this judgment.

Claimant's submissions

70. The claimant's case is that the breaches relied upon are singularly and/or collectively sufficient to find a fundamental breach of contract entitling her to resign. The claimant identified that the failure to conduct the appeal process within a reasonable time as the last straw.

Respondent's submissions

71. The respondent's position is that there was no repudiatory breach of contract of employment; but if there was, the claimant affirmed the breach by the delay in resigning and that she resigned for an unconnected reason namely, that she did not want to work anymore. Counsel also claimed that the claimant's pleaded case does not identify reliance on the last straw doctrine.

Discussion and decision

72. In my analysis I first gave consideration to each of the issues relied upon as amounting to a repudiatory breach, before standing back to also consider the

cumulative picture.

(i) Delay in completing the investigation to the claimant's alleged conduct and the delay in sending of the report

73. The chronology of events and timing of the investigation process is not in dispute. The investigation commenced on 18 June 2021 and was formally completed in early March 2022, with the final Report, although dated 30 December 2021 being delivered to the claimant, without prior notice, by post on 18 March 2022. This whole process took some 9 months to complete. I find there was no delay in the gathering of the evidence and interviewing the 15 individuals, which was carried out between June and August 2021. This was completed within a reasonable time. The delay was in obtaining the interview transcripts, which to an extent was caused by technical issues and errors in submitting and uploading the recordings to the transcription service by those in charge of this, and then Mrs Gooday taking time to draft and finalise the Report with her busy work schedule and annual leave. I have noted these reasons in mitigation, and accept Mrs Gooday acted in good faith during her involvement.
74. However, this delay was for some 6 months from the period September 2021 to March 2022. Looking at it objectively, in the circumstances, I find this delay was unreasonable, showed a lack of urgency and professionalism on part of the respondent. There was a failure to proceed with sufficient diligence following the completion of the interviews in August 2021. The claimant was unaware of the progress being made and remained at risk of disciplinary action even though she continued at work and did not inform the respondent the impact this process was having on her well-being. The respondent ought to have recognised the stressful nature of this situation. This delay was in breach of its own disciplinary policy to carry out the investigation within a reasonable time and to send the report within a reasonable time once it was completed sometime in February 2022. In my judgement this amounts to a breach of the claimant's contract of employment.

(ii) Failure to keep the claimant up to date on progress of the investigation process.

75. I agree with Miss Jennings submission that "context is key", in considering the failure to keep the claimant informed and updated about the progress of the investigation. There is no dispute that Mrs Gooday did send an update email to the claimant on 2 September 2021. This is the only one sent during this period. Whilst the respondent accepts this was regrettable, however, this shows the respondent's failure of communication and lack of professionalism. In evidence, the claimant accepted she did not chase for an update as she felt the onus was on the respondent to do so. That is not an unreasonable expectation. In the context of the importance of this matter, the claimant could have enquired herself, as she had been doing with Mrs McDermott about her Flexible Retirement request during this period. The fact that she did not do so, is not an excuse for the respondent and neither does it exonerate it from fulfilling its obligation to the claimant. The failure to do so amounts to a breach.

(iii) Failure to deal with the grievance

76. I do not find that the respondent failed to deal with the claimant's grievance concerning the disciplinary investigation and process. I deal with the factual background to the grievance at Paras 44-45 above. By this point, the claimant's position was that the trust and confidence with the respondent had irretrievably broken down. Mr Paul, did not refuse to deal with her concerns, instead he took the view that she should raise her concerns as part of the disciplinary process at which these would be considered. Mr Paul did not close the door on this. I have noted in the Grievance Policy, it is stated, "A grievance is not appropriate if it is raised in direct response to the application of another procedure or where it can be raised under another procedure, for example, an appeal against disciplinary sanction. (page 58). It is unfortunate that Mr Paul did not expressly refer to this section in his reply to the claimant. Notwithstanding this, the claimant failed to engage in the disciplinary process or provide any written submissions despite being given an opportunity to do so. I therefore do not find a breach.

(iv) Failure to progress the claimant's appeal

77. I find there was a delay by Mr Paul until 5 September 2022 to acknowledge the claimant's appeal submitted on 8 August 2022. This was mainly because he was absent on leave for a period of time. That is acceptable and a reasonable reason given his absence. The arranging of the appeal was left to Mrs Achief. In evidence, she explained the appeal hearing date was fixed on 4 October 2022 for 1 November 2022, this being the convenient date for the appointed individual and Mr Afashani who was to be present. The claimant was informed by letter dated 13 October 2022 of the date for the appeal hearing. Perhaps it would have been advisable for Mrs Achief to have informed the claimant immediately after fixing this date. However, this failure does not show that there was a failure to progress the appeal. Further, the fact the appeal date was not sooner than 1 November 2022, was because of the appointed individual not being available sooner. This was not in Mrs Achief control. That said, I do not find that the respondent failed to progress the claimant's appeal within a reasonable time.

78. I have given consideration to whether these matters individually or taken cumulatively as a course of conduct objectively are sufficient to destroy or seriously damage the implied term of trust and confidence. I find there was no reasonable cause or excuse for the respondent to delay the disciplinary investigation as it did, and not to keep the claimed informed and updated about the progress of the investigation. I find that this was a serious failing and that the cumulative effect was sufficient to seriously damage the implied term of trust and confidence.

79. Given the above findings I considered whether the claimant, having not resigned until 18th October 2022 affirmed the contract and lost the right to treat herself as having been dismissed. The claimant in her resignation letter relies on the breaches as set out in the solicitors letter dated 4 October 2022. In submissions, Mr Beaton argued, although not pleaded, that the failure to

progress with the appeal amounted to a final straw entitling her to resign and treat herself as dismissed. On the facts, from June 2021 to 21 March 2022 the claimant remained at work. During this period when the investigation was in progress, she did not complain or raise any concerns about the breaches she subsequently complained of starting from 22 May 2022. During this period, despite her concerns, the claimant did not maintain she is working under protest, so as not to affirm the breach. Again during the period of her sickness absence until her resignation she considered herself bound by her contract of employment and continued to receive contractual sick pay.

80. Further, I agree with Miss Jennings submission, that by 21 June 2022, the claimant in her grievance submission made it clear that she strongly believed the trust and confidence had irretrievably broken down, yet she continued in the respondent employment for some seven months before confirming her resignation. She had affirmed the breaches.
81. On the issue whether the claimant resigned in response to the breaches, I am not satisfied that this was the case against the background facts. If the found breaches were the reason for her resignation, the claimant would not have delayed in resigning until 18 October 2022, particularly as she had considered the trust and confidence had been lost by June 2021. In evidence, the claimant she “had enough”. This was for various reasons, as pointed out by Miss Jennings, namely, in early 2021, the claimant preferred to be made redundant and receive a substantial payout which was not an option; this she was not pleased about; she was dissatisfied that she had been the subject of disciplinary action and given a sanction which she did not agree with; she was not pleased the respondent did not consider the impact of the investigation and disciplinary process on her health and wellbeing, and she did not want to return to work with toxic people, with whom felt the working relationship had irretrievably broken down.
82. I therefore find the claimant’s claim of unfair constructive dismissal is not well founded and does not succeed. The hearing fixed for the remedy hearing on 19 October 2023 is vacated.

Employment Judge Bansal
Date 5 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
6 October 2023.....

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FOR THE TRIBUNAL OFFICE