



EMPLOYMENT TRIBUNALS

London South Employment Tribunal (in person) 9 & 11 May 2023

Claimant: Agnes Ojuroye
Respondent: Oxleas NHS Foundation Trust

Full merits hearing

Before: Judge M Aspinall (sitting alone as an Employment Judge)
Appearances: Mr O Ojuroye (representing Claimant)
Mr C Kennedy (Counsel for Respondent)

JUDGMENT WITH REASONS

1. This was a multi-day hearing, conducted in person, during which I considered relevant pages from multiple bundles, witness statements and the oral evidence of the Claimant, three Respondent witnesses and submissions from both the Claimant (in writing) and Counsel for the Respondent (orally).
2. By an ET1, received by the Tribunal on 3 June 2021, the Claimant brought a claim for Constructive Unfair Dismissal against the Respondent - her former employer - the Oxleas NHS Trust. In fact, the correct name for the Respondent is the Oxleas NHS Foundation Trust and I ordered that the record will be so amended.

The issues before the Tribunal

3. A preliminary hearing, before Employment Judge Norris and attended by the Claimant and Counsel for the Respondent, was conducted by telephone on 1 September 2022. On 6 September 2022, the learned judge completed the drafting of the subsequent Case Management Order which was sent to the parties on 21 September 2022. Neither party raised issues with that order. For ease I will call this the Primary CMO.
4. The Primary CMO set out, at paragraph 39 (39.1 - 39.4) the issues which the Tribunal had to decide. The Primary CMO is included in the hearing bundle and the relevant paragraph is on page 88.
5. The issues, given in the Primary CMO were:

39.1 Did the Respondent, 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 it and the Claimant, so as to entitle the Claimant to resign with or without notice, in circumstances pursuant to s95

Employment Rights Act 1996?

The alleged acts upon which the Claimant relies as constituting the breach are bullying, harassment, intimidation and retaliation against the Claimant by the Respondent from June 2020 up until the Claimant's resignation, as follows:

(a) Following the findings against Ms Hambley on 8 March 2021, the Respondent failed to take any action against Ms Hambley; and

(b) The Respondent's failure to act upon the Claimant's separate complaint of 22 March 2021.

39.2 If so, was any proven conduct sufficiently important (and a breach of contract) to justify the Claimant resigning, or else was it the last in a series of incidents which justified her leaving?

39.3 If so, did the Claimant resign in response to the breach and not for some other, unconnected reason?

39.4 If so, did the Claimant delay and therefore, waive the breach?

6. On three occasions during the first day of the hearing, first and last at my own instigation and the second on the suggestion of Counsel for the Respondent who had the benefit of having seen the written submissions of the Claimant, I took time to explain to the Claimant (and to her husband who has been her Representative throughout) that these were the issues recorded as being for determination. That they were quite narrow in scope and related to two very specific things which the Claimant says that the Respondent did, or did not, do.
7. On all those occasions, I asked the Claimant to carefully consider what those issues were and whether they were correct.
8. On each occasion, the Claimant confirmed them to be correct and confirmed that the issues were about how the Respondent's failure to take disciplinary action against Ms Hambley (her former line manager) as a result of the outcome of the first grievance hearing on 8 March 2021 and, secondly, the Respondent's failure to take any action at all, including acknowledging it in a timely manner - or to have delayed taking action - in relation to the second so-called 'retaliation' grievance that she sent to HR on 22 March 2021.
9. The Claimant was clear that both of those issues led to her decision to resign on 21 April 2021.
10. At regular intervals throughout the hearing, I reminded the parties of the agreed issues; the Claimant persisted in her agreement that those recorded in the Primary CMO are correct.
11. The Claimant made an application, long before the hearing before me, to amend her claim to include claims related to her disability. An open preliminary hearing was held on 24 February 2023 and Employment Judge Martin, having heard argument from both sides, refused the application.
12. So it was that, before the Tribunal for this hearing were the issues - and only those issues - that I have already set out from the Primary CMO.

The law

13. The Employment Rights Act 1996 is the primary statute governing Unfair Dismissal, including Constructive Dismissal, in England and Wales. It stipulates that an employee has the right not to be unfairly dismissed by his employer (Section 94).
14. Constructive Dismissal is specifically covered under Section 95(1)(c) of the Employment Rights Act 1996. This section states that an employee is dismissed if he or she terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct.
15. In *Western Excavating v. Sharp* [1978]: In this case, the Employment Appeal Tribunal (EAT) set out the basic test for Constructive Dismissal. They said that for a Constructive Dismissal to occur, there must be a fundamental breach of contract by the employer, and the employee must leave in response to that breach.
16. In *Lewis v. Motorworld Garages* [1985]: In this case, the court added that the breach of contract must be significant enough to go to the root of the contract, and that the employer's conduct must show that they no longer intend to be bound by an essential term of the contract.
17. In *Mahmud & Malik v. Bank of Credit and Commerce International SA* [1997]: The House of Lords confirmed that the employer's duty of trust and confidence with the employee was an implied term in all employment contracts. A serious breach of this term could be sufficient grounds for Constructive Dismissal.
18. In *Martin v. Devonshires Solicitors* [2011]: The Court of Appeal confirmed that an employer could remedy a breach of contract before the employee resigned, thus preventing a claim for Constructive Dismissal.
19. In *Auckland v. Department for Work and Pensions* [2015]: In this case, the EAT clarified that an employee must resign promptly after a breach to argue that they were constructively dismissed. Waiting too long could be seen as affirming the contract and losing the right to claim.

Discussion

20. The Claimant was employed in a nursing role by the Respondent from 28 February 2006 until her employment ended on 19 May 2021. Her employment ended because she had resigned, with notice, having been on sickness absence since early April 2021.
21. To prove a constructive dismissal, the Claimant must be able to show that there has been a serious breach of their contract of employment, and that they resigned in response to that breach and not for some other reason. Such a breach can include a breakdown in the implied term of trust and confidence. It is for the Claimant to show:
 - a) that an express or implied breach of their contract occurred
 - b) that the breach was serious
 - c) that they resigned because of that breach and that they did not delay in doing so

- thereby affirming the contract

d) that resignation was the only reasonable option in the circumstances; that there is sufficient evidence to show that the employer's conduct was so bad that leaving was the only option (instead of, say, submitting a grievance).

22. Counsel for the Respondent, in closing submissions, made the point that in her own cross-examination evidence, the Claimant stated that by September 2020 when she filed her first grievance (the outcome of which was the subject of the first issue) that the relationship between her and her employer had broken down to the extent that she considered there to be no trust or confidence left. Counsel argued - correctly - that by continuing in her employment for a further 7 months, she must have affirmed the contract and decided not to resign over those issues. Counsel said that this disposed of the claim. I disagreed.
23. The issues were not about what was happening, or not happening, in September 2020. The issues were about what happened in relation to any actions taken, or not, by the Respondent after the outcome of the first grievance (so from 8 March 2021) and whether the Respondent acted improperly in relation to the second grievance (22 March 2021) such that the combined effect entitled the Claimant to hold that her contract had been materially, fundamentally, breached to the extent that she was able to terminate it on a constructive basis.
24. The law is very clear. The question for the Tribunal, based on all the oral evidence and the written evidence to which it was directed can be summarised thus:

Did the Respondent, without proper or reasonable cause, do or not do something - or conduct itself - in a way that was intended or likely to seriously damage or destroy the implied term of trust and confidence between the Respondent and the Claimant so that it meant that the Claimant was entitled to resign - pursuant to s95 The Employment Rights Act 1996?

25. Based on the alleged behaviours (the issues at a) and b) of paragraph 39 of the Primary CMO), I found that the Respondent did not behave, act, or conduct itself in such a manner.
26. The first grievance was filed in September 2020. It was thoroughly investigated. The alleged perpetrator was removed from the Claimant's line management and did not return to it. There was a hearing, arranged, postponed, rearranged, attended, and concluded on 8 March 2021. For nuanced reasons, three of the allegations were upheld, and one more was partially upheld.
27. The Claimant was informed of the outcome of her grievance in writing shortly thereafter. She was not told what actions might be taken by the Respondent in relation to Ms Hambley - and I found it quite proper that she was not since that involved the relationship between the Respondent and a different employee.
28. A day later (on 9 March 2021), Miss Adegbite from HR - of her own volition - contacted the Claimant to check in with her and to address some further possible complaints that had been intimated during the grievance hearing. I was satisfied that this demonstrated a level of support which was reasonable and appropriate in the circumstances.

29. There followed a period when it could be said that the Claimant did not engage with the HR team. I was satisfied that during that time she was, in fact, marshalling her second grievance. There can be no criticism of the Claimant in that.
30. The second grievance, which provided the genesis of the second issue that was before the Tribunal, arrived with HR on 22 March 2021 and was, within an hour, acknowledged by a manager within the HR team. The Claimant did not refer to that fact in her own evidence and rather gave the impression that it was not until much later that anyone from the HR team responded to her. That was simply not correct as a matter of evidential fact. The Claimant accepted, under cross examination, that she had – in fact – received the acknowledgment of her grievance which was sent by the HR manager within an hour of her grievance being sent in.
31. A delay of 16 calendar days then ensued before the HR Officer, Miss Adegbite, contacted the Claimant to take her grievance forwards. The Claimant argued that this was an unreasonable delay and, on the face of it, that could be considered correct. However, detail is everything. In fact, between filing her grievance and receiving the communications from Miss Adegbite 16 calendar days later, there were at least two weekends and the Claimant herself was on annual leave.
32. Even were we to ignore the annual leave and weekend points (which amount to around 9 elapsed days out of the 16), on any rational basis – given the circumstances as they were in the NHS at the time with Covid restrictions, home working and very limited access to colleagues, reduced workforce availability and considerable workload within the HR department, I found that – on balance – a period of 16 calendar days, where the Claimant knew that her grievance had been received and would be processed, was not so excessive as to be reasonably open to criticism.
33. The situation would have been different if there had been complete silence from the moment the Claimant sent her grievance to the moment Miss Adegbite picked it up. That, however, was simply not the case here.
34. Once Miss Adegbite contacted the Claimant on 7 April 2021 to progress her grievance, the Claimant disengaged entirely and went on sickness absence before resigning.
35. The simple fact was, I found, that on any measure, even if I could have found that the Respondent had been under some duty to discipline Ms Hambley - which I did not - the Claimant resigned from her position before allowing time for anything at all to happen because of the first grievance outcome.
36. In relation to the second grievance, before the Respondent could take any steps, despite Miss Adegbite offering on 7 March 2021 to do so, she went on sickness leave and then resigned. Her resignation was accepted, and she formally left her employment on 19 May 2021.
37. Overall, based on all of the evidence laid before me, and taking the law and issues before the Tribunal into account, I could not be satisfied that the Respondent without proper or reasonable cause did, or did not do or not do something - or conduct itself - in a way that was intended or likely to seriously damage or destroy the implied term of trust and confidence between the Respondent and the Claimant so that it meant that the Claimant was entitled to resign.

38. The claim was, therefore, dismissed.

Judge M Aspinall
Saturday, 3 June 2023

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