



EMPLOYMENT TRIBUNALS

Claimant: Mr J Carrington

Respondent: Liverpool City Council

Heard at: Liverpool

On: 12 October 2023

Before: Employment Judge Buzzard (sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: Mr Tinkler (Counsel)

JUDGMENT having been sent to the parties on 18 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issue

1. The claimant makes a single claim of unfair dismissal. There is no dispute that the claimant resigned. Accordingly, to claim unfair dismissal the claimant would need to establish that his resignation amounted to a constructive dismissal.
2. The respondent invited the Employment Tribunal to strike out the claimant's unfair dismissal claim on the basis that he has no reasonable prospect of establishing that his resignation was a constructive dismissal.

Relevant Law relating to Strike Out

3. The power to strike out all or part of a claim is contained in Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

37 Striking out

(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 ... has no reasonable prospect of success*

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

4. The power to strike out is discretionary and is to be applied in a two stage test as described in **HM Prison Service v Dolby [2003] IRLR 694, EAT**. At the first stage the tribunal must find that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response. Failure to exercise the discretion at the second stage may lead to the strike out decision being overturned. In **Hasan v Tesco Stores Ltd UK EAT/0098/16**, Lady Wise found that the second stage is '*a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit*'.
5. The power to strike out on the grounds of no reasonable prospect of success will only be exercised in rare circumstances **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**.
6. A claimant's case must ordinarily be taken at its highest. In **Odukoya v Wandle Housing Association Limited UKEAT/0093/15** it was made clear that it was not satisfactory for a Tribunal "*to accept major parts of the respondent's case without a trial at which the respondent's witnesses would be heard and cross examined about it*".

The Claimant's case at its highest

7. The parties made submissions and referred the Employment Tribunal to relevant documents.
8. The claimant does not dispute that he needs to establish that his resignation was a constructive dismissal to be able to pursue an unfair dismissal claim.
9. For a resignation to amount to a constructive dismissal the claimant must establish that he resigned in response to a fundamental breach of his contract of employment. The claimant confirmed at the outset that the only breach of contract he will seek to rely on is the implied term of mutual trust and confidence.
10. The claimant broadly refers in his claim to two threads of events, which had been identified at an earlier hearing in discussion with the parties. These are (expressed as the claimant states they occurred):

- 10.1. The claimant was put under significant pressure by the respondent in the period of months (or even years) leading up to his resignation; and
- 10.2. A decision was made shortly before the claimant's resignation that the respondent would not be willing to exercise a discretion to allow him to take enhanced early retirement under schemes and policies that applied at the time.
11. To establish that either or both of these things collectively amounted to a fundamental breach of trust and confidence the claimant would need to establish that the respondent's relevant managers had conducted themselves in a way that had no proper cause and was either calculated or likely to destroy trust and confidence in the employment relationship. This is the essence of the test established in **Malik v. BCCI [1997] IRLR 462**.
12. In **Claridge v Daler Rowney Ltd [2008] IRLR 672 EAT**, it was reiterated that an employer's conduct must amount to a breach of contract fundamentally undermining the employment relationship for there to be a constructive dismissal. Unreasonable conduct by itself is not sufficient.
13. The claimant at this hearing was very clear that he does not seek to suggest any conduct was calculated to destroy trust and confidence in the employment relationship. The claimant only seeks to argue that the conduct would have been likely to have that effect, and that it had no proper cause. Accordingly, the question at this hearing is whether the claimant has any reasonable prospect of establishing that the two threads of conduct identified, either individually or together, were likely to have the effect of destroying mutual trust and confidence.

14. Pressure

- 14.1. It is clear that the respondent organisation was under immense pressure at the time because of events historically that had occurred coupled with an ongoing police investigation into alleged corruption.
- 14.2. The claimant was a very senior member of the respondent organisation. The claimant as a very senior member of staff was expected, when managing his team as he did, to cope with such pressures.
- 14.3. The fact that there was immense pressure does not mean that the respondent has in any way acted improperly.
- 14.4. Even if pressures became unreasonable, that could not, of itself, meet the threshold for a breach of mutual trust and confidence. There is absolutely no suggestion from the claimant, and the claimant to his credit was very candid on this point, that he was singled out or treated differently to other comparable senior staff working for the respondent at the time. The claimant's concern is no higher than that the pressure on the respondent organisation, and thus on him, had become so high that he simply was unable to successfully continue to perform his duties.

- 14.5. Accordingly, there is no reasonable prospect of the claimant establishing that the pressure he identifies amounted to a fundamental breach of mutual trust and confidence.

15. Enhanced Early Retirement refusal

- 15.1. There was some argument in this hearing as to whether the documentary evidence supported the claimant's contention that he had actually applied for enhanced early retirement. Noting that, for the purposes of this application the claimant's case must be taken at its highest, it is taken for these purposes that the claimant has a reasonable prospect of establishing that he had made such an application, and that application was denied.
- 15.2. There is no suggestion from the claimant that he had a contractual right to take enhanced early retirement.
- 15.3. There is no dispute that respondent organisation was short of staff at the claimant's level at the time. The documents record that the respondent organisation did not want to lose any more staff. The claimant accepts this.
- 15.4. The claimant's own words at the time very clearly set out that if he was not allowed enhanced early retirement he would carry on being as committed and loyal as always. This does not appear to be something that could credibly be consistent with the claimant's suggestion now that it would be a breach of mutual trust and confidence to refuse his application. Even if the claimant could establish this, the respondent's desire to retain senior staff is an entirely proper reason not to allow the claimant to take enhanced early retirement. There is no suggestion from the claimant that there was any other motivation behind any refusal.
- 15.5. Accordingly, there is no reasonable prospect of the claimant establishing that refusing to allow him to take enhanced early retirement amounted to a fundamental breach of mutual trust and confidence.

Conclusions

16. Neither of the two basis upon which the claimant argues that there was a fundamental breach of mutual trust and confidence have any reasonable prospect of being well founded.
17. Considering them together does not in any way disturb that position. Accordingly, the claimant is found to have no reasonable prospect of establishing that he was constructively dismissed.
18. The second stage in a strike out decision, which is '*a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit*', requires the exercise of a discretion to strike out in all the circumstances. The circumstances in this case support the exercise of the discretion. The claimant makes a single claim of unfair constructive dismissal which cannot succeed if he was not dismissed.

19. Accordingly, the claimant's sole claim of unfair constructive dismissal is struck out on the ground that it has no reasonable prospect of success.

Employment Judge Buzzard

8 November 2023

REASONS SENT TO THE PARTIES ON

9 November 2023

FOR THE TRIBUNAL OFFICE

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