EMPLOYMENT TRIBUNALS

Claimant: **Dr Paul Leaney**

Respondent: **Loughborough University**

Heard at: Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE

On: 25 and 26 September 2024

Before: Employment Judge Adkinson sitting alone

Appearances

For the claimant: Mr D Flood, Counsel

For the respondent: Ms W Miller, Counsel

JUDGMENT

UPON hearing from Counsel for the Claimant and Counsel for the Respondent

IT IS THE TRIBUNAL'S JUDGMENT THAT

1. The respondent constructively unfairly dismissed the claimant.
2. The respondent must therefore pay to the claimant:
   2.1. a basic award of £16,140, and
   2.2. a compensatory award of £22,505.08 made up of
      2.2.1. £18,583.87 for past loss of earnings, and
      2.2.2. £3,921.20 for loss of employer's pension contributions.
3. Pursuant to **rule 66**, the Tribunal orders that the Respondent must pay these sums to the Claimant by no later than 10 October 2024.

REASONS

1. This is the second hearing in this case. This judgment should be read alongside my first judgment in this case (dated 5 August 2022). Following the claimant's successful appeal (**[2023] EAT 155**) against my first judgment, the Employment Appeal Tribunal (His Honour Judge Auerbach, Mrs Gemma Todd, Mr Steven Torrance) ("EAT") remitted the matter to me to consider further.

2. At the hearing Mr D Flood, Counsel, represented Dr Leaney. Ms W Miller, Counsel, represented the respondent. Ms Miller did not appear at the first hearing or before the before the EAT. I am grateful to both for their help.

3. The case proceeded by way of submissions only. No party applied to adduce new evidence. Neither party produced written submissions for this hearing. I have taken into account their oral submissions and previous written submissions prepared for the first hearing.

4. After hearing the submissions I took time to consider my decision on liability. Because there was already a written decision on the Tribunal's register and because there had been an appeal, I told the parties my conclusions at the hearing with reasons in writing to follow. These are those reasons.

5. The claimant produced a schedule of loss on the second day. I afforded the respondent time on the second day to consider that schedule. The result was that remedy in effect resolved itself by agreement between the parties..

6. During the course of the hearing we took breaks as appropriate. No adjustments were required.

7. No party has suggested this hearing was unfair. I am satisfied it was fair.

Issues

8. In the first judgment I found as a fact that the last straw was the 29 June 2020 (paragraph 203).

9. The claimant did not argue that this act itself was a fundamental breach of contract but was part of a series that together amounted to a fundamental breach.

10. The parties agreed that the remaining issues are those identified in paragraph 198.2 to 198.5 of the first judgment. Amended as appropriate they as follows:

    10.1. Has the employee affirmed the contract since that act?

    10.2. Was the act or omission part of a course of conduct which taken together amount to breach of implied term of trust and confidence?

    10.3. Did the employee resign in response to that breach?

    The University accepted that, if there were a dismissal resulting from a fundamental breach of the implied term of trust and confidence, the dismissal would be as a result unfair. The University confirmed to the Tribunal it would not seek to argue that any compensation should be reduced under the principle in **Polkey v AE Dayton [1987] UKHL 8**, or that there had been any relevant contributory fault. The Tribunal could not see anything that could be said to be culpable or blameworthy conduct of the claimant either and so this issue does not arise.

11. If Dr Leaney succeeded, then remedy became a relevant issue. Dr Leaney limited himself to a basic award and compensatory award for lost earnings plus employer's pension contributions and so these were the only issues to resolve.

Law

12. Except for paragraphs 199-200 (which relate to affirmation), I repeat what I said about the relevant law in my first judgment under that sub-heading.

13. In the subsequent appeal, the EAT ruled that I fell into error in my approach to affirmation. It would be disproportionate to quote the EAT judgment in full, though I have had read all of it and have all of it in mind. However the key to the approach I should have taken (and which I now take) is at [36] of that judgment, where the Appeal Tribunal said:

    "36. ... [W]hat the tribunal needed to focus on was the question of what conduct there had been during the relevant period that might or might not have amounted to an express or implied communication of affirmation."

14. As to length of service, the Tribunal said (at [45]), the longer an employee's service, the longer he may need to make up his mind but that it is a fact sensitive.

Discussion and conclusions - liability

15. I have already made primary findings of fact, and I have not heard new evidence. Therefore, I have proceeded directly to conclusion. If I have drawn any new inferences that may be appropriate in light of the EAT's decision, I have set them out below.

Has the employee affirmed the contract since the act of 29 June 2020?

16. No. I set out my reasons below.

17. From 29 June 2020 to resignation was the summer recess, when work at the University would be less than it had been in the run up to recess and when the students were present. Dr Leaney's work was to 29 June 2020 focused on teaching and working with students and undertaking work in relation to their assessments (first judgment paragraphs 25-26, 184). Work during the summer holidays was less demanding, less intense and less involved than during term time. I have therefore drawn the inference therefore that there was a qualitative difference in his work life between 29 June 2020 and 28 September 2020. It follows he would not be in the same situation as if (a) if were term time or (b) he had a more usual employment where workload and demands might be more consistent.

18. The University and Dr Leaney commenced negotiations between them from about 1 July 2020 until about 3 weeks before his employment ended (paragraphs 169-173). I still do not know what was discussed. However in submissions to the EAT, Dr Leaney said that they were "obviously not talking about the weather" (at EAT decision [53]). I accept Dr Leaney's argument that I can properly infer it would have been about his employment and dissatisfaction with what had thereto occurred based on the surrounding circumstances. The EAT said the phrase appeared to capture the thrust of his case, and I conclude it captures the trust of the facts. This is because of the surrounding circumstances – appeal going nowhere, university's own conduct and Dr Leaney's dissatisfaction with the University's handing of the complaint and his grievance immediately before he instructed solicitors. There is nothing else that they would obviously have had to discuss. The University does not suggest there were other topics

that they could be discussing, unconnected to Dr Leaney's employment or complaints. The EAT made the point (also at [53]) that pursuit of a grievance procedure would not generally be affirmation. I consider in this case that having solicitors represent and negotiate over an employment dispute with one's employer should be seen the same way in this case because it clearly related to issues and disputes in the employment – what by any other name were grievances.

19. Dr Leaney was signed off from work sick for the last 3 weeks of his employment. I accept that being away from work because of illness for a period of 3 weeks in the circumstances of this case is not something that in should be held against the claimant. At this particular time the negotiations had ended unsuccessfully. He was entitled to time to reflect on their failure and the next steps. Considering he was ill, 3 weeks is not a significant period of time.

20. I acknowledge that between 29 Jun 2020 and resignation on 28 September 2020 there is a gap of 3 months. During this time the University paid to the claimant his salary as normal. I also acknowledge there is no suggestion he expressly said he was working under protest. These factors pointing in favour of affirmation are outweighed by the other factors in my view.

21. I also note that there was no overt evidence of any positive or clear act of affirmation that the respondent could point to.

22. There is one factor that caused me to pause. He wrote a note to Professor Conway in advance of the meeting on 29 June 2020 (paragraph 164) in which he confirmed his commitment to the end of September 2020. This suggested that Dr Leaney had already decided he was going to end his employment at that time. However I am persuaded this is not the correct conclusion to draw for the following reasons.

    22.1. The note says that he feels he needs to retire before his planned retirement date. However it also says "[he is] committed to seeking out [his] obligations up-to 30Sept2020 [sic.] at least". To the reasonable reader this only says he plans to stay to 30 September 2020 and wants to retire before September 2021. It does say that he has brought forward his retirement to September 2020 or is planning to do so.

    22.2. Secondly after writing this note, Professor Conway said he could not help Dr Leaney with the Student X incident that he had raised as point 1 in his note. This was a material influence on Dr Leaney's decision because it was when he realised the University was not going to help him (paragraph 168). As noted this is what triggered his decision to resign.

23. I finally deal with the issue of length of employment because Dr Leaney raised it. In this particular case, I cannot see it as particularly relevant. As the EAT pointed out it is fact sensitive. The above factors in my view demonstrate conduct that explains the delay from the final straw to resignation. In addition there is no evidence it played any particular role in this case. The length of service neither adds not detracts from the reasoning in this case. I put it to one side.

Was the act or omission part of a course of conduct which taken together amount to breach of implied term of trust and confidence?

24. Taking the matters together, I am satisfied that the University has breached the implied term of trust and confidence the following reasons.

25. The University's statutes and ordinances set out the procedure that must be followed (paragraphs 34 to 48). It is however worth me highlighting the process of informal grievance, formal grievance and an absolute right of appeal which the University must hear (paragraph 47.1). In particular the University cannot refuse to hear an appeal because a manager thinks mediation is better or more suitable (paragraph 47.2), cannot delay or postpone an appeal except in exceptional circumstances (paragraph 47.4) and cannot refuse to consider a grievance or appeal because it is considered vexatious or malicious – in such cases it must commence a disciplinary process (paragraph 47.5). While I accepted that a delay may be exceptional because of difficulties trying to convene a panel, a consideration that mediation would be better is not an exceptional circumstance. The following matters showed the University failed without reasonable or proper cause to follow the substance of the statutes and ordinances.

    25.1. Ms Truby (the investigator) did not follow the standard template for conducting and reporting on an investigation. As a result her investigation was flawed because she did not follow a reasonable process.

    For example, she did not set out the allegations against Dr Leaney either before or at the investigation.

    Later, the University itself concluded her investigation and report was "not fit for purpose": see the report from Mr Euden of 7 February 2019 set out at paragraphs 81 onwards of the first judgment for the various failures he identified in Ms Truby's report. See also Mr Ahlawat's report (paragraph 96) which likewise identifies Ms Truby's failures.

    25.2. Mr Taylor in effect ignored Mr Euden's report and substituted his own decisions. He had no reason or power to do so. This is demonstrated by for example Mr Taylor's email of 11 March 2019 (paragraphs 87 and 88) what was factually wrong.

    25.3. Mr Taylor also insisted on mediation and refused to progress Dr Leaney's "appeal" against the grievance outcome (as I noted strictly this was converting the informal grievance that resulted in Mr Euden's report to a formal grievance). This is in breach of the clear ordinances and procedures. Eventually Ms MacKinlay (who was familiar with the proper procedures under the Ordinances and policies – paragraph 89) set up an investigation in response to the formal grievance.

    25.4. Mr Taylor and Ms MacKinlay did not allow Dr Leaney appeal against the outcome of the formal grievance to proceed. Mr Taylor in particular acted outside his authority in a wholly

inappropriate manner to thwart the appeal. The following demonstrates this.

25.4.1. Ms MacKinlay told Dr Leaney can decide whether to appeal once he received Mr Taylor's response to the outcome of the formal grievance, though she knew Dr Leaney wanted to appeal and in effect and appealed already. Her stance was contrary to the ordinances but did not flag up their departure from procedure to Mr Taylor or Dr Allison (paragraphs 100-106);

25.4.2. Mr Taylor dictated which parts of Mr Ahlawat's report could and could not stand, even though he had no power to dictate such a thing (paragraphs 107-122) and so he sought to restrict the issues on the appeal without either justification or the power;

25.4.3. Mr Taylor also ignored the ordinances when he insisted there must be a mediation between Dr Alonso and Dr Leaney when he had no power to do so;

25.4.4. Mr Taylor repeated his refusal to allow the appeal to proceed in what a reasonable person would see as an aggressive tone on 21 May 2019 (paragraph 116). He again however had no regard to the ordinances and had no power to adopt the position he did.

25.4.5. Mr Taylor threaten of disciplinary sanction against Dr Leaney for refusing to mediate (paragraph 118). This was plainly contrary to ordinances. It was unjustified and aggressive. I conclude its purpose was to stop the appeal.

25.4.6. Neither Professor Allison nor Ms MacKinlay took steps to convene an appeal panel despite it being apparent that they had to do so.

25.4.7. Ms MacKinlay wrote to Dr Leaney on 28 January 2020 that

"your time to discuss your role as warden has passed", and

"I hope we may be able to draw a line",

and on 27 April 2020 that

"I confirm the University has no desire to reopen a dialogue into the matters… I would encourage you to draw a line…".

These sentences in the circumstances of this case can only be read as saying that the University is not going to progress his properly lodged appeal.

Thus When Dr Leaney did withdraw his appeal, it was a recognition that the university was not going to allow it to proceed (paragraph 159-160).

25.5. Professor Conway refused to engage with the grievance appeal because he said it was beyond his competence (paragraph 166). However it only served to emphasise the University was not going to allow any appeal to proceed.

25.6. At no point was there a reasonable or proper cause not to follow the prescribed procedure. Mediation may have been a desirable or sensible suggestion. The way it was suggested was not reasonable. It was also not something that can be insisted on or forced as was as the statutes and ordinances made clear. Dr Leaney had properly presented an appeal and the University had to adjudicate on it.

26. Furthermore, Ms MacKinlay wrote a letter to Dr Leaney when he resigned as warden. It was a copy of a letter Professor Allison had written. Both letters contained several untrue and inaccurate allegations. As I noted they plainly do not stand up to scrutiny against the facts of the case and it was wrong to write it (see paragraph 133-138). This is aggravated by the fact the letter would be on Dr Leaney's HR record (and it may still be there).

27. Bringing the above together shows that by 29 June 2020, the University had at the very least conducted itself in a matter likely to destroy or seriously damage the trust and confidence. In short it had not only ignored its own procedures on grievances but refused to progress a legitimate and permitted appeal. Mr Taylor had made decisions about the grievance outcome he had no power to make, insisted on mediation he had no power to insist on and threated disciplinary proceedings for Dr Leaney not following the instruction he had now power to give. Ms MacKinlay had refused to progress the appeal and put her name to a letter whose contents were factually inaccurate about Dr Leaney and which should never have been written. In effect they forced Dr Leaney to withdraw his appeal. Professor Conway could not help. There is no reasonable or proper cause for any of this because it is plainly contrary to the university's won ordinances and there is no other reason to go outside them on this occasion.

If yes, did the employee resign in response to that breach?

28. Yes. Such a conclusion is consistent with the conduct and events following the final straw on 29 June 2020 and that Dr Leaney would not have retired when he did but for the breaches (see paragraph 186 of the first judgment). It is consistent with his evidence about why he resigned too, which I accepted.

29. The University points to his note of 29 June 2020 as evidence he had already intended to resign as a step in bringing forward his retirement that would have occurred in September 2021 in any event. I found he did not bring his retirement forward and use these events as a cover (paragraph 189). Therefore I must reject this argument. However even if I assume without deciding that part of his reasons were the opportunity to retire, albeit

a year earlier than planned, that does not assist the University's case. The fundamental breach need only be a reason that led to resignation – it does not need to be the sole or principle (or main) reason provided that, like here, it was a reason.

Remedy

30. Because the claim succeeds, I must now consider remedy.

31. The parties agree that the basic award is £16,140. I agree too. I award that accordingly.

32. Dr Leaney sought the sum of £18,583.87 for past loss of earnings and £3,921.20 for loss of employer's pension contributions. The University did not object. Their sum is agreed to be within the statutory cap applicable in this case. It represents the lost earnings until when he would have retired in any event, which appears reasonable approach. In the absence of objection and given the logic for the amount claimed, I award those sums too.

33. By agreement, those sums were to be paid within 14 days of 26 September 2024 (last day of the hearing). Under **rule 66** I accordingly set 10 October 2024 as the last date by when payment must be made.

Employment Judge Adkinson

Date: 30 September 2024

JUDGMENT SENT TO THE PARTIES ON

....03 October 2024...

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FOR THE TRIBUNAL OFFICE

Notes

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