



CS

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr A Senesie

and

Respondent

Cygnnet Healthcare Limited

Held at Ashford on 18 January 2017

Representation

Claimant:

In person

Respondent:

Mr K Chaudhuri, Consultant

Employment Judge Wallis (sitting alone)

JUDGMENT

The judgment of the Tribunal is that:

1. The Respondent acted in breach of the implied term of trust and confidence in respect of its handling of the grievance procedure;
2. The Respondent is ordered to pay the Claimant £94.90 compensation (damages) for breach of contract, calculated as set out below.

REASONS

Oral reasons were given at the end of the hearing. The Claimant requested written reasons.

ISSUES

1. By a claim form presented 29 May 2016 the Claimant claimed unfair constructive dismissal. The claim was rejected initially as it contained no details. It was re-presented but it was then found that he did not have two year's service so his claim was dismissed. Employment Judge Kurrein considered that the Claimant

also referred to a breach of contract claim in the body of the claim form. That claim was therefore listed for hearing.

2. The issues were agreed at the start of the hearing. The Respondent had prepared a list of issues, but these were predicated on a claim of constructive dismissal. We discussed that this was a different type of claim and it was agreed that the issues would be as follows:-
 - a. Whether the Respondent had failed to follow its grievance procedure when the grievance was presented on 29 June 2015 and for a disproportionate time thereafter;
 - b. Whether the Respondent had failed to deal with the Claimant's written grievance on 15 November 2015 and delayed responding to that grievance;
 - c. Whether the Respondent's failure to notify the Claimant of any steps and/or procedures being followed against his work colleague SC in accordance with their grievance procedure;
 - d. If any of those amounted to a breach was it a breach of an express term (ie was the grievance procedure a contractual procedure) or was it a breach of the implied term of trust and confidence;
 - e. If there was such a breach, did it cause the Claimant's illness and did that illness amount to a psychiatric injury;
 - f. If so, was that illness reasonably foreseeable;
 - g. If so what is the loss (damages);
 - h. Alternatively, if the Respondent was found to be acting in breach of contract, but did not cause psychiatric injury and/or any such injury was not reasonably foreseeable, what was the amount of damages in respect of the notice period that the Claimant would have worked but for the breach.

DOCUMENTS AND EVIDENCE

3. The Claimant had prepared his own indexed bundle of documents. There was an agreed bundle prepared by the Respondent. I had a witness statement from the Claimant and heard evidence from him. I also had a witness statement from the Respondent's witness Mr Danmore Padare, the hospital manager for the Respondent's Godden Green Hospital. There was also a witness statement from Mr Thomas Ware, interim hospital manager for the Respondent's hospital in Woking. He did not attend the hearing. The Claimant had no objections to me reading that statement.
4. In addition, the Claimant produced a copy of a letter from the parents of an in-patient dated 15 August 2015. This was not relevant to the issues and I did not read it.

FINDINGS OF FACT

5. There was no dispute that the Claimant was employed by the Respondent as a healthcare support worker from 7 August 2014 until he resigned without notice on 25 May 2016.
6. There was no dispute that some time in June 2015 he was sent what he described as “an unwelcome graphic video clip depicting sexual child abuse” from a work colleague SC. He reported this to his manager. He also put a complaint in writing on 29 June 2015. There was no dispute that on that date the Claimant was invited to a meeting with management and he was told that they would take action. They suspended SC and she was subsequently dismissed. The Respondent did not treat the Claimant’s letter as a grievance. The Claimant himself used the words “a formal complaint” in his letter. I was satisfied that it could have been treated as a grievance, but it was not at that stage. However, I did not consider that this amounted to a breach.
7. The Respondent also alerted the Safeguarding Agencies and the Police. SC was interviewed by the Police. In August 2015 she made an allegation against the Claimant which was subsequently dropped. I found that the receipt of the unpleasant material and then the false allegation caused upset to the Claimant. I noted that his claim form and his GP in a letter dated 28 September 2016 referred to the Claimant suffering stress “since an incident at work”. The GP letter referred to the material sent to the Claimant by SC and also referred to the allegations against the Claimant made by SC as causes of stress.
8. The Claimant wrote again to the Respondent on 15 November 2015 and in that letter he set out his concerns about what SC had done, explained how he had been interviewed by the Police, and asked the Respondent to note that he had not been contacted by them since presenting his grievance. He referred to the grievance procedure and the timescales.
9. The Respondent acknowledged receipt of that letter, but in fact did not follow their procedure. The Respondent has a grievance procedure. It was their case that they could not follow it until the police involvement with SC had been completed and then internal disciplinary proceedings in respect of SC had been completed. I considered that that was not an unreasonable position, but the problem was that they did not tell the Claimant about that. They simply failed to let him know what was happening. I found that this failure to keep him informed eventually amounted to a fundamental breach of trust and confidence given the context of such a serious matter.
10. Mr Ware invited the Claimant for a meeting towards the end of December 2015. He was unable to attend as he was unwell. He in fact went on sick leave on 17 December 2015 and never returned to work. Mr Ware moved to another hospital and he passed the case to Mr Padare. On 26 January 2016 Mr Padare wrote to the Claimant to say that the police involvement had ended and that he would now investigate SC through the internal procedures. A statement was taken from the Claimant by Dr Salmond then, once again, the Claimant heard nothing. I found

that the failure to communicate with the Claimant after that point, coupled with the previous delay in contacting him to discuss his grievance, amounted to a breach of trust and confidence. The Claimant chased the matter on 24 March 2016. Dr Salmond told him that the matter was now with Mr Padare. Still the Claimant heard nothing. I found that it was important to keep the Claimant informed, particularly when he was not at work. In his evidence, Mr Padare was unable to explain the delay in contacting the Claimant. He said that SC had been dismissed and then she had appealed the dismissal and the appeal was dealt with by March or early April. Nevertheless, the Claimant was still not informed of any of that.

11. He finally resigned on 26 May 2016 without notice.

SUBMISSIONS

12. On behalf of the Respondent, Mr Chaudhuri referred to the evidence about the facts of the matter. He submitted that there had been no breach of either an express term or an implied term. He submitted that if there had been a breach there was no psychiatric injury. He submitted that even if there had been it was not reasonably foreseeable; the evidence was that the Claimant had had no time off previously for any psychiatric matters.

13. There was no dispute that the Claimant had a contract of employment that provided that he should give four weeks notice of termination.

14. On his behalf, the Claimant referred to the ACAS Code in respect of grievances and referred me to the overriding objective.

THE LAW

15. The Claimant's breach of contract claim comes to the Tribunal under the Extension of Jurisdiction Order 1994. The losses in such a claim are generally limited to the sum that would have been payable to a Claimant had the employment been lawfully terminated under the contract. It is irrelevant to consider what might have happened if the breach itself was a failure to follow a particular procedure.

16. Where psychiatric injury is claimed, a Claimant must prove that there was a psychiatric injury and that it was caused by the breach of contract and not by the dismissal itself. Actual injury, as opposed to mere distress, must also be reasonably foreseeable.

17. In the case of ***Fraser-v-The State Hospitals Board for Scotland [2001] SCLR357*** the Court of Session ruled that the employee could not recover damages for clinical depression resulting from disciplinary action taken against him. It was reasonably foreseeable that such action would cause him anger, resentment, stress or anxiety involving no "injury" at all, but employers are not under any duty to prevent such emotions. In that case the psychiatric injury itself was not foreseeable and therefore no damages could be recovered for it.

18. In the case of ***Gogay-v-Hertfordshire County Council [2000] IRLR 703*** the employee was able to recover damages for psychiatric injury resulting from a breach of the implied term of trust and confidence, given the circumstances. In ***Johnson-v-UNISYS Limited [2001] ICR 482***, the House of Lords held that the implied term of trust and confidence was concerned with preserving the ongoing relationship between the parties and did not apply to the manner of dismissal.
19. It seems reasonably clear therefore that a claim for damages arising out of the way an employer handles a disciplinary (or other) process, rather than the way the employer dismissed an employee, could be recovered.
20. However, psychiatric illness or injury must be reasonably foreseeable, as set out in the case of ***Walker-v-Northumberland County Council [1995] ICR 7202***.

CONCLUSIONS

21. I turned firstly to the question of whether there had been a breach of contract by the Respondent. I noted that there was no express term incorporating the grievance procedure into the contract of the employment. Any breach of the procedure could not therefore amount to a breach of an express term.
22. However, I considered that the failure to follow the timescales in the procedure and more particularly the failure to keep the Claimant informed of what the Respondent was doing or indeed why the Respondent was not taking action at a particular time because of other circumstances, amounted to a breach of trust and confidence given the length of time over which the Respondent failed to communicate with the Claimant once he was on sick leave. The Claimant had made a legitimate complaint and he should have been kept informed. The Respondent could have done that without breaching any confidential details. I concluded that by the time the Claimant resigned, the failure to contact him was inexplicable and amounted to a breach of trust and confidence by the Respondent in the circumstances in which the Claimant's complaint arose; it was a repudiatory breach and it entitled the Claimant to terminate the contract.
23. I then had to decide what damages flowed from that breach. The Claimant seemed to suggest that he had suffered psychiatric injury or illness because of the breach. I noted that, according to the GP, the Claimant had suffered from stress. I concluded that the medical evidence was insufficient to show that this condition amounted to a psychiatric injury. His medical certificates refer mostly to stress; it was only early on in his absence that anxiety and depression were mentioned, later certificates referred to stress at work. The letter from his GP written in September 2016 referred only to stress. The letter suggested that the stress was caused by the actions of SC. It does not refer to the actions of the Respondent. The Claimant's own evidence also suggested that he was caused stress by SC. He did not specifically say that he was caused stress by the Respondent. Clearly, he decided to resign because of the failure by the Respondent to contact him about his grievance, but that was some months after his sick leave began. I concluded that he was not ill because of the breach itself.

He was already suffering from stress by the time the cumulative effect of the Respondent's failure amounted to a breach.

24. In any event, I concluded that even if the stress suffered by the Claimant – and there is no doubt that he was unwell – was a psychiatric illness and was caused by the breach, it could not have been reasonably foreseen. He had no sickness record that would indicate that he was vulnerable to stress or to psychiatric injury because of any stressful situations.
25. I concluded therefore that there were no grounds for any damages for psychiatric injury.
26. I concluded that the Claimant was owed damages for the notice period that he would have served had the Respondent not acted in breach of the implied term.
27. With the help of the parties I calculated that the Claimant was entitled to SSP for the four weeks after the date of his resignation which amounted to £371.49. He had immediately claimed ESA from the date of resignation and that was paid at £73.10 per week, according to the documentary evidence. He therefore received £292.40 in that four week period. He had a duty to mitigate his loss. His net loss was therefore £79.09.
28. I decided to apply a 20% uplift in respect of the breach of the ACAS Code. The Respondent had taken some initial steps to look at the Claimant's grievance and had tried to arrange a meeting with him. They had then taken no other action and the matter had dragged on until he resigned. I considered therefore that 20% was the appropriate uplift. This increased the damages to £94.90.
29. The Claimant told me that he had been granted remission in respect of the Tribunal fees and so no reimbursement was necessary.

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Employment Judge Wallis
24 February 2017