



EMPLOYMENT TRIBUNALS

Claimant: Miss A Wilson

Respondent: Retirement Security Ltd

HELD AT: Liverpool

ON: 2 November 2018

BEFORE: Employment Judge Grundy

REPRESENTATION:

Claimant: In person

Respondent: Miss S Murphy Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claim for unfair constructive dismissal succeeds.

The provisional remedy hearing shall remain listed at Liverpool Employment Tribunal at 10am on 4th December 2018.

REASONS

The Issues

1. The claimant makes a claim for constructive unfair dismissal. The issues were identified with the parties at the outset. Firstly, was the respondent in fundamental breach of contract by way of breach of the implied term of trust and confidence, if there was a fundamental breach, was the breach the cause of the claimant's resignation, thirdly was there a delay in the claimant resigning, or on the respondent's case did the claimant resign too soon.

The law

2. So far as the law is concerned the relevant section of the Employment Rights Act 1996 is Section 95(1)(c) which provides that, "there a dismissal when the employee terminates the contract with or without notice in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct". The central authority from which the principles have been taken is the case of Western Excavating ECC Limited -v- Sharpe 1978 ICR 221 in which the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract, going back to Lord Denning who was then the Master of the Rolls. He said "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance, if he does so and he terminates the contract by reason of the employer's conduct, he is constructively dismissed. In order to claim constructive dismissal, the claimant must establish a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal."

3. In **Kaur v. Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978 the Court of Appeal listed five questions to ask in order to determine whether an employee was constructively dismissed:

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 *Waltham Forest v Omilaju* [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

5) If so, did the employee resign in response (or partly in response) to that breach?

The test of whether the employee's trust and confidence has been undermined is objective.

4. To establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. In **Nottinghamshire County Council v. Meikle** [2004] IRLR 703 (applied by the EAT in **Abbycars (West Horndon) Ltd v. Ford** UKEAT/0472/07) the Court of Appeal held that the resignation must be in response to the employer's repudiation. It need not be the sole reason, but it must have "played a part" in their leaving.

The Evidence

4. During the course of the hearing the Tribunal has been referred to two extensive bundles of documents although it is fair to say some of those documents do overlap within the two bundles. The Respondent's bundle is paginated. The claimant's is not. I have heard the evidence of the claimant Andrea(Andi) Wilson. I have also heard from the respondent, their witnesses were Mr Ben Yates - Head of Care Quality and Compliance and Gaynor Davies Seconded Service Manager for Osborne Court. So far as the credibility of those witnesses is concerned I found the claimant to be straightforward and honest. When faced with cross examination about her applying for other posts, prior to her resignation which was potentially a point against her case she did not seek to mislead or deny that she had started to look for other posts. I did not accept that the evidence of Mr Yates, was wholly transparent in reaching this view, it seemed to me that the transcript of the key meeting on 7th February at page 79 of the bundle at page 117 at the end of the meeting seemed to support the claimant's assertion that the respondent was " setting her up" and that there was a further significant discussion which was not recorded but which led the claimant to resign.

I found the evidence of Mrs Davies to be helpful although it was clear she was relatively inexperienced in employment procedures regarding investigation and discipline.

Findings of Fact

5. The claimant commenced employment with the respondent as a " registered court manager" from 4 January 2016 until 8 February 2018. She was in charge of managing "a court" which is a property at a private development of a number of apartments for elderly people for independent living. The management structure of the court is such that the claimant has to report to the Services Manager who at the time was Gaynor Davies. Under the claimant's authority were several Duty Managers who also had roles in catering, book- keeping and the like. Also in staff terms there were a number of House keeping assistants under the report of the Duty Managers.

6. The respondents are a limited company operating as a retirement property ownership and management company based in Warwickshire, but operating a number of 'courts" across the country. Osborne Court has forty two-bedroomed apartments within its court although some apartments are owned and occupied by couples. The Chairperson of the court at the time is Olive Brady who was described without any dissent as a " formidable woman".

7. Prior to the claimant's suspension her work in itself had not it seems given any cause for concern to the respondent. The latest CQC inspection report for Osborne Court Limited summarised an inspection visit on 9th December 2015 which just predated the claimant's employment. That report had given an overall rating of "good".

8. Over Christmas of 2017 all of the staff save the claimant had been given a staff bonus, which was effectively a " tip " from the owners rather than direct remuneration from the respondent. The fact all others received a tip but not her, had upset the claimant and caused her to consider and apply for alternative work.

9. Gaynor Davies- Service manager was seconded to Osborne court in August 2017 and as part of her role she had suggested to the CEO of the respondent that the

relationships with Duty Managers may be improved by the holding of 'Listening to You sessions' which she felt may enhance their role. Arising out of a meeting held on 22 January 2018 she was made aware of concerns about the claimant by 4 of the 5 Duty Managers. The fifth was not in attendance.

10. Miss Davies indicated that on 30th January 2018, three of the duty managers raised " formal " complaints regarding the claimant with regard to care management, and practices, financial management, potential theft of owners furniture and staff feeling unsupported and/ or harassed by the claimant. The notes of in fact two duty managers who spoke directly to Miss Davies who then herself put their issues in writing appear at pages 44- 45 Sandra Rose and 46-49 from Pamela Wharton. An email from Joanne Longmoor was not available to the Tribunal.

11. Whilst the note from the two duty managers were taken orally and written down they read as concerns about the claimant's actions in very particular circumstances regarding certain owners and particular gripes such as how the petty cash was organised rather than " formal complaints". Mrs Rose's at 44 began with the "petty cash" and voiced concern but ended with " it was eventually balanced". It went on to voice a problem with selling things from owners. It said she " gets on well with Andi" and ended with - "owner's collection - questioned why none for her- spoke to chair lady- next day DMs bought Andi something- wine flowers- no thanks- wished it was an envelope they felt it was rude."

12. The note from Pam Wharton at 46-49 detailed grey areas over the petty cash, expressed concern regarding the claimant's actions regarding the transfer to other provision of an owner with early onset dementia and the procedure followed for this and for another owner and what was happening when apartments were cleared. Ms Wharton re- iterated her concern in an email on 31 January 2018. page 57-8.

13. Judith McLeod raised verbal concerns but did not want to put anything in writing and there was no information from Gary Wildman the fifth duty manager. Miss Davies indicated the managers wished to remain anonymous but to discuss the detail of the information with the claimant would require some explanation of the detailed information.

14. On 1st February 2018 the claimant was absent from work due to sickness although the respondent by text from Miss Davies requested her to attend. Mr Yates and Miss Davies discussed the matters raised by the Duty Managers with the CEO Richard Sharples and the Head of Services Kelly Wilshire that day. Miss Davies sought advice, as she had no experience of investigatory procedure per her own evidence. Although it was agreed matters should be explored further the manner of the investigation showed that the respondents were treating the matter as a potential disciplinary matter as the claimant was suspended and was therefore not required to attend work.

15. Mr Yates suspended the claimant by telephone at about 4pm on that date. The letter sent to the claimant dated 2nd February was posted to the wrong address (CL bundle- R66). The claimant received it by email on 6th February, the day before the meeting scheduled on 7th. This meant the claimant had less than 24 hours to prepare for the meeting.

16. The letter set out 9 headings which it suggested were "allegations" - specifically-

- Owner safety

- Illegal deprivation of liberty
 - Confidentiality
 - Alleged theft
 - Not following internal accounting procedures- petty cash
 - Neglect
 - Concerns from Directors
 - Not following direct instructions
 - Improper leadership.
17. Regrettably no further details on such serious head- lines were made available to the claimant before the meeting. She queried in email, "*In regards to the suspension letter I opened this morning, it states that if I want anyone to provide a witness statement in order for you to investigate prior to our meeting that I should let you know, however, the allegations are so unspecific that I am not in a position to respond a in a timely manner and b to know what they pertain to in order for me to give an accurate and fair response. Please advise.*"
18. The reply from Mr Yates was "*That is correct, however tomorrow's meeting is not a disciplinary process, tomorrow is an informal fact finding meeting to share with you the exact detail of the concerns raised and to give you an opportunity to accept or refute each concern and give me any information that may help your case. ie. people to interview, documents to look at etc. You will then be given time to give me this information once I have given you all of the facts following tomorrow's meeting. I hope all of the above makes sense and I will enlighten you tomorrow as to the exact details of the concerns raised."*
19. Document 4 of the claimant's bundle includes the disciplinary procedure, which at para 3 says - "*Every effort will be made to ensure that any action taken under this procedure is fair, with you being given the opportunity to state your case and appeal against any decision that you consider to be unjust.*"
20. The list of 9 items was clearly headlining some potentially very serious matters. The claimant came to the meeting still in the dark as to the exact matters the respondent was alleging against her. It was as described by the respondent an "ambush meeting" I think that is an apt description and thereby not in keeping with the fair treatment of a manager of some seniority with the claimant's responsibilities. The respondent had available the statements referred to in paragraphs 10- 12 which despite a claim for anonymity would in due course reveal the identity of the author. Mr Yates chose not to even in redacted form make those available to the claimant.
21. Further Mr Yates had collated the document at page 76-78 from his investigations and discussion with Miss Davies **before** meeting with the claimant. Mr Yates says he collated it on 31st January. In some areas of the discussion it intimates - "no evidence can be found to prove this allegation. Allegation not substantiated" Mr Yates gave evidence that this was a "standard template" - The evidence / opinions recorded in it were not shared with the claimant at the meeting. It is in some ways a bizarre document.
22. At the conclusion of the paragraph regarding "Alleged theft" it indicates no evidence can be found to prove this allegation. Allegation not substantiated yet

it was an allegation put to the claimant in the meeting. The claimant said she felt the meeting made her feel like she was "under police investigation" and to be treated in this way was shocking and upsetting.

23. If the allegation had not been substantiated on the preliminary investigation by the Mr Yates it was wholly unfair to then continue the investigation of it with the claimant.
24. The investigation document refers to other statements, which it appears Mr Yates had but which he did not disclose to the claimant at the meeting which was also unfair given the seriousness of the allegations and in the face of the email assurance to provide the "exact details".
25. Mr Yates also referred to a document from the 5 Directors of the company which was said to be in existence although it was never produced and has never, significantly been seen by the claimant. If there was such a document the contents would be relevant and disclosable, but they were not disclosed to the claimant at the meeting or since instead she was faced with the fearful knowledge that such a signed document was said to be in existence without seeing the contents or the "exact details". It was said to be in regard to "owners welfare" page 108 so no doubt a matter, which ought properly to have been shared with the claimant if she was to have the opportunity to answer it.
26. The meeting itself was minuted at page 79 of the R Bundle. In the heading Gaynor Davies is described as a companion. The claimant said she told her she was supporting her. The evidence of Ben Yates was that she was there to assist him and she herself said she was there to assist all parties. The role of a companion at a disciplinary hearing is a statutory matter. This was an investigatory meeting given it was after a suspension it must have been part of a formal rather than informal process.
27. Although this was an investigatory meeting it seems odd that a more senior manager should offer herself as a companion to the claimant, it was not at the request of the claimant. The "companion" label attributed to Miss Davies becomes even more questionable when part way through the meeting she becomes the Chair of it. The respondent confused the role of companion at this investigatory meeting to the detriment of the claimant who cannot have felt supported by her Line Manager saying she was there to support her and then to become the Chair of the meeting. It is perhaps even more questionable, that close to the end of the meeting Miss Davies steps out of the meeting "due to a conflict" as there is a discussion regarding a PIP of the claimant actually put in place by a different manager! The role of the Manager chairing a formal investigation should not be skewed if a fair procedure is to be followed.
28. There is a minute of the investigatory meeting, which begins at page 79 and runs to page 118. The meeting took place over 2 hours. On page 79 it is suggested the concerns arose through a "whistle-blowing" process but the respondent have not sought to rely on a procedure relied upon by them in this regard. Mr Yates intimates "he will show you any documents" page 80 although this does not in fact transpire. Even with the very first allegation regarding a Mrs

F which unsurprisingly the claimant can't place, Mr Yates fails to show the claimant the date or the information in the first instance.

29. During the meeting the claimant expresses that she feels that Pam has been looking to secure her position even before this situation arose. Clearly the claimant was worried the respondent had not considered the previous view Pam held of the claimant.
30. The issue of confidentiality was only posed in reference to the claimant applying for alternative employment at the end of the meeting rather than within the list order.
31. The alleged theft is put to the claimant in some detail from page 100 despite the note of Mr Yates saying it is not substantiated. The claimant believed she was being " set up" and told her mother so in a break in a telephone call.
32. At page 106 "alleged fraud" is discussed with Miss Davies in the Chair and the stated concerns of Directors that the claimant has been " delaying the ability of owners to move in " the claimant seems genuinely dumbfounded. page108.
33. Mrs Davies suggests to the claimant, " the quality of the food is often poor especially on Christmas day?" this does not particularly seem to fall within any of the headings the claimant has been given but she seeks to refute it.
34. "Not following direct instructions" which is a further heading relates to a matter 4 months, previously, which the claimant answers without seeing the information the respondent has.
35. Improper leadership is discussed with Miss Davies telling the claimant there are statements but again not showing them in any form to her.
36. There is further discussion regarding the claimant's PIP and the job applications from a work email,
37. The note on page 117 reads *BY " The only other question I have to ask you do you have your work keys on you or are they at your house ? AW " No I havent got them on me" BY " is it possible that I can take those from you as....because then no further allegations could be bought against you? Also is there anybody else that you want me to speak to are there any documents that you want me to take a look at to help your case." AW " Its looking like I've got no case is it really. BY " Well I don't know this is why I'm asking you. So I can do Part 2 of my investigation but if there is nothing particularly you want me to look at I am happy to end the meeting and the recording."*
38. After the tape recording had ended the claimant asked what the next steps would be and Mr Yates indicated he would write his report and send it to Peninsula (they had been advising the respondent, as was their usual procedure). There was a discussion that this would give the claimant 24 hours if she wished to resign and get a reference from the respondent.
39. The claimant believed that the respondent had reached the conclusion that she was guilty of serious misdemeanours having made serious allegations at the meeting but shown her limited information to justify any of the concerns. She

felt the respondent had no confidence in her ability and had not given her any fair opportunity to answer a catalogue of half-baked allegations. She accepted in some respects if she had made mistakes she could learn from them but did not believe the respondent wanted her to continue in their employment. She had not knowingly put any owner at risk. She did not consider she had been given a fair hearing or that there was a will to continue a fair investigation. The five Directors had in effect without her being shown evidence of their concerns sealed her fate. Given the lack of a fair procedure in dealing with her to date, she considered she would face an unjustified dismissal in the circumstances and so if she was to continue working in the sector the only option was to resign. The cause of the resignation was the conduct of the respondent.

40. The claimant resigned by email on the morning of 8th February 2018 page 119 "*Dear Ben, please accept this as my resignation from court manager post at Osborne court effective immediately.*"
41. On the same day the respondent replied at page 121 accepting the resignation not suggesting any cooling off period to consider the outcome of further investigation or otherwise.

Submissions in

brief

42. In submissions Miss Murphy submitted the claimant had resigned in haste with no grievance being brought. She submitted the respondent was not in fundamental breach of contract and had followed the ACAS code of conduct. There was no obligation to offer a companion, nor provide documents. She invited the Tribunal to prefer the evidence of the respondent's witnesses. Further she contended the claimant was already applying for alternative employment and therefore there were other reasons for her resignation.
43. Miss Wilson submitted that the respondent had been in breach of contract by their unfair procedure and the conduct of Mr Yates, which left her feeling her post was untenable. She averred the fact one of the people said to have complained against her was now in her post.

Conclusions

44. Was there a fundamental breach of trust and confidence by the respondent? In my view the respondent's investigative process was so flawed that the claimant could reach no other view than the respondent wanted rid of her. In my judgment the term of mutual trust and confidence was breached by the respondent as a result of its formal processes in suspending and investigating this claimant from late January to 8th February.
45. In particular offering a companion who becomes the Chair of a formal investigatory process is wholly unfair and unsatisfactory. To give the claimant a list of 9 very serious "allegations" which were not allegations but were headlines is to wholly ambush her in the process of an investigatory meeting.
46. This was a business where the safety of owners is clearly of utmost importance but the claimant should have been allowed to fully understand what, when, where, it was said she was at fault. She should not have received a headline

list 24 hours before a significant meeting. She had no proper time to prepare.

47. The meeting itself was very clearly unfair given the skewed roles of the participants. The claimant did not have any fair opportunity to answer the allegations against her. This was because full / anonymised statements were not shared with her at the meeting. The letter before told her not to contact anyone. She was told of Directors views in general terms but the documents were never shared with her despite the assertion she would be given " exact details". The respondent did not live up to its promise.
48. There was no doubt discussion between those in senior posts prior to the meeting on 7 February about the best way forward for the respondent. The undue haste with which the respondent accepted the resignation suggests it was the desired outcome.
49. Did the claimant resign in response to the breach? I have considered whether the reason for the claimant's resignation was the conduct of the respondent and her treatment by their managers on 7th February, and further in the light of the off tape conversation with Mr Yates I am persuaded it was this and the fundamental breaches of contract on the 7th February 2018 which caused her to resign.
50. Was there a delay or did she act prematurely? The claimant did not delay. I do not consider it fatal that she resigned the day after the meeting the respondents had behaved in such a way that the claimant could have no confidence in a proper and fair procedure in the future.
51. In conclusion the claimant succeeds in discharging the burden of proof upon her to show that the respondents have been in breach of the implied term of mutual trust and confidence. I have considered the impact of the employer's behaviour on the claimant and assessed objectively it was so significant that it could give rise to a fundamental breach. The conduct of the alleged investigatory meeting was high handed and ultimately served it's purpose it resulted in the termination of the claimant's employment.
52. Therefore, the claimant's claim succeeds and the matter will proceed to be heard on 4 December in respect of remedy.

Employment Judge Grundy

Date 13 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 November 2018

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FOR THE TRIBUNAL OFFICE

[JE]