EMPLOYMENT TRIBUNALS

Claimant: Mrs J K Heald

Respondent: Fogg, Whittingham and Casserley, Dental Surgeons

Heard at: Manchester **On:** 5 March 2019

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr J Searle, Counsel
Respondent: Mr Y Lunat, Solicitor

JUDGMENT having been sent to the parties 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

1. Starting with a minor issue, the respondents have applied to amend their amended grounds of resistance in paragraph 21 by including the word “not” before the words “calculated” in line 2 and “sufficiently” in line 4, thus making it read how anyone reading the document would normally expect it to read consistent with the way in which the respondents put their case. That application is allowed and the amended grounds of resistance will be further amended accordingly.

2. We now move on to the respondents’ application under rule 37 to strike out the claimant's claim on the basis that it has no reasonable prospect of success or under rule 39 for a deposit order if I find that it has little reasonable prospect of success.

3. The claimant after 25 years of employment has brought a constructive dismissal claim. Her pleadings refer to a number of actions which the claimant says, taken cumulatively, entitled her to resign, with the last act being the partners in the respondent Dental Practice ignoring the claimant’s 25th work anniversary when a colleague who recently reached the same milestone was celebrated with a party and a valuable gift from the partners.

4. The claimant resigned on 18 September 2017 giving notice to expire on 19 October 2017. Her letter of resignation was very general:

> "It is with reluctance that I submit this letter. Although my time with Fogg Whittingham and Casserley has previously been satisfying and productive, for quite a while now I have become less and less satisfied with the work situation, therefore it is with regret that I feel I have no alternative but to ask you to accept this letter as notice of my resignation on 19 October 2017."

5. The 21 matters leading to the claimant giving notice were set out in Annex B to Employment Judge Franey's case management order made on 9 July 2018 when provision was also made for amended grounds of resistance to address the claimant's claim as clarified in the preliminary hearing.

6. The respondents wrote to the claimant on 10 October telling her that it was with regret, following discussions and an inability to reach a mutually satisfactory agreement on terms of employment, that they reluctantly accepted her notice to terminate her employment. They thanked her for her valuable contribution over the years. They had enjoyed working with her. They would pay her to the end of October and on an ex gratia basis they would also pay an additional month's salary.

7. The respondents in their amended pleading at paragraphs 19, 20, 21 and 22 set out why they seek to make the application today for a strike out or deposit order. The document, as amended today, reads:

> "19. In the light of the foregoing it is denied that the respondents were in breach of the claimant's contract of employment thereby entitling her to terminate her contract.
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> 20. If, which is denied, the respondents were in breach of the contract as alleged the respondents maintain that:
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> (i) the breach or any breaches were not a repudiatory breach; and
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> (ii) the claimant accepted any alleged breaches by continuing to work.
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> 21. Further, the respondents maintain that the last straw event described by the claimant in paragraph 33 of her particulars of claim was not calculated to destroy the mutual trust and confidence between the parties to amount to a fundamental breach, and even if it did, it was not sufficiently serious to revive any earlier breaches which, for the avoidance of doubt, are denied.
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> 22. In the circumstances, the respondents maintain that the claimant's claim should be struck out for having no reasonable prospect of success. In the alternative the claimant should be ordered to pay a deposit as the claims have little or no reasonable prospect of success."

8. The case for the respondents advanced in written and oral submissions by Mr Lunat is basically that set out in paragraphs 19, 20 and 21.

9. Mr Searle for the claimant submits that this is a case where the facts are disputed and where a Tribunal at this stage is not able to say that there are either no or little reasonable prospects of success.

10. Mr Searle has referred to **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833**, a case before the Court of Appeal constituted by Lord Justice Underhill and Lord Justice Singh. Lord Justice Underhill gave the judgment of the Court in a constructive dismissal case and states that the Tribunal is advised to continue to draw from the pure well of Dyson LJ's judgment in **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35** in which paragraph 19 states:

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant."

11. Taking that as a statement of the law in relation to final straw cases, it seems to me that what has been pleaded, the ignoring on the claimant's part or the forgetting on the respondent's part, of the claimant's 25th anniversary of employment, (subject to the evidence that has yet to be heard) has the potential to be an act which taken in conjunction with the earlier acts on which the claimant relies could amount to a breach of the implied term of trust and confidence; it may contribute something to that breach although it may of itself be relatively insignificant.

12. That finding will be a matter for the Tribunal hearing the evidence, but on the matters before me, on the submissions, on the documents and on the law it seems to me that I am not able to find that the claim has no prospect of success. I am not able to find it has little prospect of success. In my judgment it is not appropriate either to strike out the claim or to order a deposit.

13. The claimant has applied for an order for costs under rule 76 on the basis that the respondents acted unreasonably in making their applications to strike out the claim or for a deposit. In the submission of Mr Searle they were unreasonable to have persisted in the light of communications from the Tribunal.

14. On 22 October 2018, after the respondent had reminded the Tribunal that it had made an application for strike out/deposit in the amended ET3 (but without referring to it separately in the covering email sent on 19 July) Employment Judge Ross noted that this was a claim for constructive dismissal where there appeared to be a dispute of fact between the parties, and if the respondent wished to pursue the application it should identify in writing the basis of the application and whether it wished it to be heard on paper or in person. The Tribunal's letter was not responded to and a reminder was sent on 8 November resulting in a letter from Mr Lunat saying that the 22 October letter had not been received. On receipt of a copy of that letter Mr Lunat responded, stating that the application was based on paragraphs 17-19 of the amended Grounds of Resistance and whilst there may be a factual dispute regarding some of the earlier incidents, the respondents would argue that the last straw relied upon was not capable of amounting to a breach let alone a calculated and fundamental breach, and following it the claimant actively negotiated an increased salary with a view to retracting her resignation which would fatally undermine the claim of constructive dismissal such that it ought to be struck out as

having no reasonable prospect of success or in default a deposit order should be made. He was content for the application to be determined on paper.

15. The claimant was consulted and objected to the application for strike out being considered on paper and required the opportunity to make oral representations.

16. The preliminary hearing was listed for 8 February 2019.

17. The claimant applied to postpone that hearing on the basis that she had a pre-booked holiday from 3-10 February 2019, and this prompted a response from Regional Employment Judge Parkin who wrote:

> "Whilst noting the claimant's concerns and acknowledging that the respondents' application to strike out the claim (or for a deposit to be paid) was made late in the proceedings, the preliminary hearing in public is not postponed or advanced from 8 February 2019. It is highly unlikely that any oral evidence from any party or witness would affect the outcome in a case where the bundle of documents must have been agreed long ago and witness statements exchanged. By definition a last straw triggering a resignation need not itself be a repudiatory breach to complete the basis for a constructive dismissal."

18. Unfortunately the preliminary hearing on 8 February was postponed due to lack of judicial resource and it was re-listed on the first day when the claim would otherwise have been heard.

19. In the submission of Mr Searle the respondents were unreasonable to have persisted in the application given those two judicial comments.

20. Further, he submitted, there was a clear misunderstanding on the part of the respondents of the nature of the last straw which may be an innocuous act, with particular reference to **Omilaju**. On this basis the respondents were unreasonable persisting with their application. Further, the final trial had been adjourned.

21. He accepted that costs were the exception not the rule but, given the chronology, in his submission the respondents should have taken a sensible and pragmatic view and withdrawn the application and proceeded to the full hearing.

22. He limited his claim to a brief fee of £1,000 plus VAT.

23. For the respondents Mr Lunat reminded me that costs were the exception. The fact that the application would have been dealt with on 8 February but for the lack of judicial resource should put a stop to the claimant's arguments entirely. The Tribunal did not invite him to consider the option of the four day hearing being postponed or withdrawing the application. Had this option been put then an informed decision could have been taken, and they would have carried on with the full hearing. Delays arising from the Administration should not be put on to a party.

24. The respondents proposed that the application was capable of being dealt with on paper. It was the claimant who insisted on an oral hearing.

25. In his submission the respondents had not acted unreasonably in making the application, which would have been dealt with on paper had the claimant not insisted on a hearing. The application was not made unreasonably. The respondents had not acted sufficiently unreasonably to cross the costs threshold. The normal no costs rules should be followed.

26. In my judgment in these circumstances, particularly in the light of the comment from the Regional Employment Judge, the respondents have acted unreasonably in persisting with this application and therefore the respondents should pay costs incurred by the claimant.

27. Mr Lunat submitted that such costs should be limited to the costs of preparing a written submission such as would have allowed for a hearing on paper only. Any order should be based on one hour's time which was equivalent to the time he had taken in preparing his written submission.

28. Mr Searle submitted in response that the claimant had to be given the opportunity to make oral submissions and that there had to be a proper public hearing of a strike out application.

29. Notwithstanding this both parties agreed that there could have been a public hearing based on written representations on both sides.

30. Having considered these further submissions it seems to me that the claimant was not acting unreasonably in not agreeing to the application being dealt with on paper by means of written submissions when her whole claim could have been struck out or a deposit order could have been made.

31. I therefore conclude that the respondents have acted unreasonably and order them to pay the sum of £1,000 plus VAT of £200 to the claimant in respect of the costs incurred by her while legally represented.

Employment Judge Sherratt

19 March 2019

REASONS SENT TO THE PARTIES ON

25 March 2019

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FOR THE TRIBUNAL OFFICE