

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms D Jones

AND

Variety Club Children's Charity

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 27th to 30th September 2010

EMPLOYMENT JUDGE: Ms H Norris **MEMBERS:** Ms R Emblin, Mr V Brazkiewicz

Appearances

For the Claimant:

Mr A McGuiness, Barrister

For the Respondent:

Mr Baker, Employment Lawyer

JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant's claims for unfair and wrongful dismissal are well-founded and succeed.



EMPLOYMENT JUDGE

16/3/2011

JUDGMENT SENT TO THE PARTIES ON

March 16 2011

AND ENTERED IN THE REGISTER



FOR SECRETARY OF THE TRIBUNALS

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Date of Hearing: 27-30 September 2010

REASONS OF THE EMPLOYMENT TRIBUNAL

Issues

1. The Claimant's claims are for constructive unfair and wrongful dismissal. The claim of holiday pay which was originally pleaded was withdrawn on the first day of the hearing as having been settled.
2. The Respondent for its part had originally pleaded that if, which is denied, the Tribunal finds it did constructively dismiss the Claimant, the dismissal was for "some other substantial reason" under section 98(1)(b) of the Employment Rights Act 1996 and was fair in all the circumstances. This part of the defence was withdrawn by the Respondent's representative on day one of this hearing, and accordingly the only issues before the Tribunal were whether the Claimant resigned in response to a repudiatory breach on the part of the Respondent and if so whether that breach was without just cause.

Law

3. The law in relation to this area is set out at section 95 of the Employment Rights Act 1996, and states:

For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) ... only if) –

...

- c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Evidence

4. We heard evidence from Mrs Marilyn Griffin Halstead (a former colleague of the Claimant who continues to work for the Respondent) and the Claimant, and for the Respondent, from Mrs Claire Horton, formerly the Chief Operating Officer of the Respondent and Mr Steve Briscoe, who was at material times the Claimant's line manager. We also had regard to a large bundle of documentary evidence which included emails and reports between the main protagonists in the matter, the Claimant's grievance and complaints about the Claimant by other members of staff, the investigation into the Claimant's grievance and the outcome letter drafted by Mrs Horton and the subsequent communications.
5. The Respondent is a well-known charity whose work raises funds for sick and disadvantaged children. The Claimant was employed by the Respondent with effect from 8th October 2007 as the Community Fundraising Manager. We heard that this was a time of considerable flux in the Respondent organisation. Certain members of staff had been dismissed for redundancy and new employees came into the business, which in common with others was finding it hard to cope with the effects of the recession. The Claimant was initially managed by a Nikki Page, who later dropped to part-time hours and was replaced as the Claimant's line manager by Mr Briscoe when he joined in February 2009.
6. Up to that point, the Claimant appears to have had some dissatisfaction with the reduction in staffing support as a result of the Respondent's headcount reduction and although she accepted that everyone in the charity was taking additional work, she considered that she was the only one who did so at a time when their support was reduced.
7. Her appraisal in February 2008, four months after she had joined the Respondent, found that the Claimant was "calm under pressure, conscientious to a fault, committed and extremely organised". She was described as a "team player" and "always available to her colleagues". Reference is made in the appraisal to her support for a particular colleague, Wayde, who we heard from the Claimant left within months and was not replaced directly, although the Claimant was informed that he would be. The Claimant therefore took on his work which also required her to put right a number of the issues that his uncorrected poor performance had created over a number of years.
8. The Claimant's line manager Ms Page also noted in the appraisal however that the Claimant had "found some of the reporting procedures and membership issues a little hard to deal with" and was "direct in her approach".

At this stage, these traits of the Claimant were not, it appears, seen as a problem which needed more hands-on management by the Respondent.

9. This was to change when Mr Briscoe joined. He freely admitted to the Tribunal that he did not carry out any annual appraisals for his team of nine staff and that his priority was to concentrate on the fundraising review which he considered necessary to assure himself and the trustees how money was to be brought into the charity. However, by 23rd March 2009, Mrs Horton had sent a confidential email to Mr Briscoe and Ms Hogarth (executive assistant to the CEO and the only person in the Respondent with any responsibility for HR matters), which referred to the Claimant's "communication style" as "something of a growing problem". Mrs Horton concluded in her report that the Respondent "needed to do something that firmly plants a shot across her bows".
10. Mr Briscoe responded by email later the same day to add detail in relation to one particular incident, and concluded that the Respondent needed to identify training issues and address them or give training. He accepted in evidence that this did not in fact occur. He also concluded that the Respondent must be prepared to invest in the Claimant and that if no change was then forthcoming the Respondent might have to consider disciplinary action.
11. By June however it is clear that no training or development needs had been discussed with the Claimant and that the relationship with Mr Briscoe had deteriorated to the point where the Claimant had a discussion with Ms Hogarth on 2nd June to the effect that she was contemplating a formal grievance. Ms Hogarth persuaded the Claimant to have an informal discussion with Mr Briscoe, with her in attendance to "take notes/mediate". This was also not arranged. It is clear that the atmosphere generally in the Respondent's offices was unpleasant and there was friction between those who had been with the charity for a long time and those who had more recently joined. Against this background, individual grievances began to be raised, including those both by and about the Claimant and Mr Briscoe.
12. As a result of what the Claimant perceived to be an unreasonable delay in dealing with her grievance, originally submitted on 12th June, the outcome of which she did not receive until 10th August, and in light of the cumulative effect of all the incidents to which she considered she had been subject, the Claimant emailed the Respondent on 10th August and stated that she had been constructively dismissed.

Facts

13. The Tribunal makes the following findings of fact:

- 13.1 We find that the Claimant resigned on 10th August 2009. Her pleaded case in the claim form and her evidence to the Tribunal was to that effect. Further, although the Claimant states that she was not resigning, it is clear that she was accepting what she saw as a repudiatory breach on the part of the Respondent and was not leaving voluntarily in that context. Accordingly, her acceptance of the breach and the communication of that fact were, we find, such as to amount to a resignation.
- 13.2 We then turn to consider whether there are any acts or failures to act by the Respondent that could on a reasonable analysis be termed a repudiatory breach or breaches. If so, we ask ourselves whether there was what is known as a “last straw” and we have regard to the case law on this point (*London Borough of Waltham Forest v Omilaju* [2005] IRLR 35) in which the Court of Appeal held that the final straw need not be unreasonable or blameworthy viewed in isolation but must contribute, however slightly, to the breach of the implied term of trust and confidence.
- 13.3 We find that the delay in sending the response to the Claimant’s grievance falls into exactly this category. The Respondent sent an email on 8th July 2009 to the Claimant to say that it would evaluate the paperwork and come back to her. The Claimant chased on 17th July, prompting, it appears, a flurry of activity by the Respondent, and another email was sent to the Claimant on 31st July to say that the Respondent would revert “hopefully” early the following week, i.e. 3-5th August. In fact the Respondent did not send its response until Friday 7th August, and then did so by post, despite there being a postal strike, so that the Claimant did not receive it until midday on 10th August, by when she had resigned.
- 13.4 Viewed in isolation, the delay in dealing with the grievance would not be fatal to the Respondent. It is a small organisation, the issues were complex, there was no dedicated HR function and the target of ten days for dealing with grievances was aspirational and not contractual. However, we have viewed this in the context of the whole matter and we find that it was the culmination of a large number of management failings on the Respondent’s part which in their totality did go to the heart of the contract and constituted an irretrievable breakdown in the implied term of mutual trust and confidence.
- 13.5 We accept to some extent the Respondent’s contention that some of the Claimant’s evidence and pleaded case is either exaggerated or misinterpreted or both. For example, the Claimant was sent an email on 20th March 2009 by Juliet Stallard in which Ms Stallard asks the Claimant “Do you have a case for support...?” The Claimant interpreted this in her claim form as Ms Stallard asking her to prepare a case for support and an encroachment on her range of responsibilities and having an adverse effect on her ability to achieve her fundraising target. We accept the evidence of Mrs Horton that

she had told the Claimant on many occasions that she did not need to worry about her target provided the work overall for the charity did not suffer. It was part of the Claimant's job description to assist others.

13.6 A second instance of exaggeration is in the allegation of an offensive working environment, on the grounds of racism against the Claimant. This related to a conversation reported to the Claimant in June of a discussion in April where Ms Stallard had referred to a donor as "coloured". When challenged by colleagues, it appears she said that she knew she should not use the word "nigger" but also believed she could not say "black" and did not know the correct term. The Claimant did not use the formal grievance procedure to report this and she was off sick from very shortly after it came to her attention in June. The Respondent dealt with the matter promptly using its disciplinary procedure. However the Claimant has pleaded that she found out about it in April and that "nothing was done". This is clearly incorrect.

13.7 A further instance came when the Claimant was answering a question from the Employment Judge as to why she felt scared to go on away day on 9th June with her team which was scheduled to be spent, she said, on a boat on a lake. The Claimant responded that she was afraid her line manager Mr Briscoe or others might push her overboard. We find this assertion astonishing given that there was never any threat of physical violence towards the Claimant.

13.8 However, we find that the Respondent had identified at an early stage that there were potential issues with the Claimant that needed to be addressed. In mid- and late March 2009, there were email exchanges in which Steve Briscoe as the Claimant's line manager and Claire Horton as COO agreed that the Claimant's attitude and demeanour was below what they expected and that she needed training in the first instance. Mr Briscoe suggested that if that was not successful, disciplinary action might be the next stage after coaching/training. The Respondent did nothing to progress that coaching/training.

13.9 At around the same time, Caroline Hogarth met the Claimant to discuss the Claimant's apparent unhappiness and stress in the office. The Claimant had sent an email to Ms Hogarth suggesting that she was "most unhappy with the work environment" and was considering looking for another job. At the meeting on 1st April, the Claimant raised issues around a perceived lack of support for her from Mr Briscoe, and her work being diverted to others. Ms Hogarth suggested that the Claimant raise this direct with Mr Briscoe and did not take any action herself. The Claimant did email Mr Briscoe the following day, copying in Ms Hogarth and setting out her concerns at his attitude towards her. Despite knowing that there were now mutual concerns, Mr Briscoe did not arrange for the training which he had previously identified as a

need of the Claimant. Nor did the Respondent treat the Claimant's email as a grievance.

- 13.10 On 2nd June the Claimant had a further meeting with Ms Hogarth in which she again detailed her concerns. We have referred to this meeting earlier in these Reasons. We find that by the end of that meeting it was or should have been perfectly clear to the Respondent that Mr Briscoe and the Claimant were on a collision course. The Claimant said that she thought "he doesn't want me here", referring to Mr Briscoe. At least one person had said to the Claimant that the intention had been to bring in a completely new team, and certainly the "old guard" appeared to be leaving and being replaced with new staff. Coupled with the Claimant's acknowledged difficulties and her perceived attitude, it was inevitable that she would feel vulnerable and, further that unless the Respondent took matters into its hands, she would not change. However, the Respondent did not act as a reasonable and responsible employer should have done, and instead left the Claimant without support or adequate management.
- 13.11 Even by 8th June, when a complaint was received by Mr Briscoe from Ms Stallard regarding the Claimant, nothing was put in the diary or arranged to mediate between the various factions in the office nor was any coaching or training even proposed to the Claimant. On 9th June the Claimant sent yet another email to Mr Briscoe and copied in Ms Hogarth once more, complaining that he humiliated and shouted at her, and that the work environment was hostile. We saw no evidence that he ever responded to that email. Indeed, the Tribunal finds that notwithstanding many discussions, some lengthy, between Mr Briscoe and Mrs Horton, identifying the Claimant's shortcomings, neither of them managed the Claimant at all, and Mrs Horton appears to have failed to support and manage Mr Briscoe.
- 13.12 The Respondent appears to have had no regard to the suggestion in the ACAS Code of Practice which states that outside help such as an independent mediator can help resolve problems, "especially those involving working relationships". If it did have regard to it, the Respondent signally failed to implement it. It is also strongly arguable, given Mrs Horton's prior involvement and clearly expressed views of the Claimant, that she should not have dealt with the grievance. Despite both the Claimant and Mr Briscoe wanting to have a meeting mediated by Ms Hogarth, it appears (inexplicably to the Tribunal) that they received advice to the effect that such a meeting should not take place and therefore Ms Hogarth was not present in any meeting between them. Instead, on 10th June the Claimant met Mr Briscoe alone and thereafter went off sick.
- 13.13 This is all the more incomprehensible when one takes into account the report dated 7th June from Mr Briscoe sent to Ms Horton and Ms Hogarth.

This is a document of more than five pages setting out the Claimant's shortcomings and although Mr Briscoe did not accept the Claimant's Counsel's suggestion that it demonstrated a failure in his relationship with her that could be characterised as a breakdown in mutual trust and confidence, we find that it very clearly does.

Conclusion

14. In summary then, we have found that a problem identified by the Respondent in March 2009, with a solution identified by them at the same time, was left to fester for three months until it inevitably led to the Claimant going off sick and a number of allegations and counter-allegations being made. We do not consider that we need to decide on the rights and wrongs of each of those allegations, some of which as we have said, we find to be an exaggeration or mistake on the part of the Claimant in any event. What we do decide however is that the blame for the lack of action to put the situation right can be laid squarely at the door of the Respondent. We find in the circumstances that this was sufficient to constitute a fundamental breach of contract that entitled the Claimant to resign and claim constructive dismissal and accordingly the claims succeed.

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Appearances

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For the Respondent:

Mr Baker, Employment Lawyer

JUDGMENT AS TO REMEDY

1. The Tribunal heard evidence from the Claimant and considered a quantity of paperwork which was supplemented on the morning of the hearing by additional documents from the Claimant.
2. The Claimant gave evidence that although there were no documents in support of her efforts to mitigate between the date of her dismissal and 18th November 2009, she had in fact applied for several jobs and registered with agencies, which she listed. The Tribunal accepted that evidence. It did not appear to the Tribunal that the Claimant had failed to mitigate her losses, and accordingly the Respondent's suggestion in this regard is rejected.
3. It appeared to the Tribunal likely that the Claimant would have more success in finding a job in the New Year once she had completed her Open University course. The Tribunal accordingly awarded compensation up to the date of the hearing and for a further 19 weeks, including loss of pension, based on the figures supplied by the Claimant in her Schedules of Loss, which were not disputed.

4. The Tribunal also considered failures on the part of both sides to complete the ACAS Code of Practice procedures. It was our view that neither outweighed the other, and accordingly we declined to make either an increase or a decrease as a result of those failures.
5. In the circumstances, the Tribunal awards the following:
- a. Basic award £525.00
 - b. Losses to hearing £29,585.55
 - c. Pension losses to hearing £1,974.14
 - d. Future losses £9,527.55
 - e. Future pension loss £635.74
 - f. Loss of statutory rights £380.00

being a total of £42,627.98.

6. The Recoupment Regulations apply to this award. At the hearing, their operation was explained to the parties and for the sake of regularity, the details are set out in the Annexure hereto.



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16/3/2011

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FOR SECRETARY OF THE TRIBUNAL