



EMPLOYMENT TRIBUNALS

Claimant

Mrs Yvonne Mitchell

v

Respondent

London North West University
Healthcare NHS Trust

Heard at: Watford

On: 19 February 2020

Before: Employment Judge Jack

Appearances

For the Claimant: In person with Mr Tavernier

For the Respondent: Mr S Nicholls, Counsel

JUDGMENT

1. The claim for unlawful deduction of wages is dismissed on withdrawal.
2. The claim for unfair dismissal fails.

REASONS

1. By an ET1 dated 15 November 2018, the claimant claims unfair dismissal. Originally the ET1 also claimed that she had been subject to unauthorised deductions of wages, but it is common ground that that was an error. There were no unauthorised deductions of wages and that claim stands to be dismissed on withdrawal.
2. The claimant appeared represented by Mr J Tavernier, a friend but also a skilled advocate. Mr Sam Nicholls of counsel appeared for the respondent. The claimant gave evidence for herself. The respondent called two witnesses, Sheila Cummings, the claimant's immediate line manager, and Ahmed Abdi, Ms Cummings' line manager. Each witness gave a witness statement on which they were cross-examined. There was an agreed bundle of documents. No authorities were cited.

The issues

3. The issues were discussed at a case management preliminary hearing on 29 September 2019. This set out an ordinary claim for unfair dismissal, a claim for constructive unfair dismissal and the claim for unauthorised deductions. It is common ground that the claim for ordinary unfair dismissal, in other words an express dismissal by the respondent, was not

anything on which the claimant relied. She relied on constructive unfair dismissal, the claim where the employer had behaved in such a way that she was entitled to treat the contract as repudiated. The unauthorised deductions, as I have said, has gone.

4. The way in which the constructive unfair dismissal claim was discussed was, was the claimant dismissed? ie:
 - (a) was there a fundamental breach of the contract of employment and/or did the respondent breach the so-called trust and confidence term, ie he did it without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?
 - (b) if so, did the claimant affirm the contract of employment before resigning?
 - (c) if not, did the claimant resign in response to the respondent's conduct? To put it another way, was it a reason for the claimant's resignation, it need not be the reason for the resignation.
5. The conduct the claimant relies on in breaching the trust and confidence term was explored and discussed in detail at the preliminary hearing and the particulars were to be agreed within 14 days. It then says: "If the claimant was dismissed, what was the principal reason for dismissal, and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996, and if so was the dismissal fair or unfair in accordance with ERA section 98(4). In particular, did the respondent in all respects act within the so-called band of reasonable responses?"
6. It was common ground that if there was a constructive dismissal of the claimant, then the respondent was liable. Although in theory there is a possibility of a respondent showing that a constructive dismissal was a fair dismissal, it was not suggested in this case that the respondent can put forward such a case.
7. Pursuant to the directions which were given by the Judge on that occasion the claimant provided on the 26 June 2019, a schedule of the matters on which she relied. These cover a number of dates commencing with 11 April 2018 then proceeding with 4 May 2018, 5 May 2018, 9 May 2018, 23 May 2018 and 6 June 2018. I shall not read out all of those because I will come to them when I deal with the issues.

The law

8. The law on constructive dismissal is well established. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In each case, the breach must be sufficiently serious to justify the employee resigning or else it must be the last in a

series of incidents which justify her leaving. Possibly, a genuine albeit erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

9. The employee must leave in response to the breach and not for some other unconnected reason. She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may be deemed to have waived the breach and agree to vary the contract.

The facts

10. The claimant was born on 3 November 1957. She started working for the respondent in 1999. She worked in the recruitment department of the respondent. On 11 September 2017, the department she was working in was moving offices from Sudbury to the Northwick Hospital. She in fact, went on sick leave that day with a problem of muscular skeletal pain. On 25 October 2017 Ms Cummings referred the matter to occupational health where the matter was dealt with by a Dr Pattani. On 5 January 2018, there was to have been a meeting between the claimant and Ms Cummings but that had to be cancelled at short notice because, sadly, Ms Cummings had to attend a funeral in Ireland. It was rescheduled for 17 January 2018 and at that meeting, the claimant and Ms Cummings agreed a return date of 5 March 2018. However, Dr Pattani said that that was not appropriate and as a result it was agreed that she would have to continue on sick leave. On 5 March 2018, Anasuya Patel, a senior human resources advisor with the respondent, considered that the case might have to go to stage three of the respondent's sickness policy. As is normal, stage two is where steps can be taken in order to get the employee back to work, stage three is where the sickness is such that the employer has to consider dismissal. That is the only occasion on which the question of stage three was raised.
11. On 19 March 2018, the claimant came in for a consultation with Dr Pattani. After that, she had an informal meeting with Ms Cummings where she was introduced for the first time to Mr Abdi. It may be that they had briefly seen each other at some earlier time but this was the first formal introduction of the claimant to Mr Abdi. The following day, 20 March, Dr Pattani advised that the claimant could return to work and she suggested that in the first two weeks the claimant should only work 25%, in the next two weeks 50% and in the third fortnight, 75% before going to 100% working.
12. There was a meeting which was held on 23 May 2018. It was held with Mr Abdi, Ms Patel, Samantha Banton (who was the claimant's union representative from UNISON) and the claimant, and that was a discussion of how matters would proceed. At the end of March, the claimant's sick leave entitlement on full pay ended and the claimant decided that, rather than return to work immediately, she would take her annual leave. So, from 1 April 2018 she was annual leave. On 10 April 2018 Ms Cummings asked Dr Pattani for an update on the claimant's situation and that was provided.
13. On 13 April 2018, the respondent sent a letter by e-mail inviting the claimant to a meeting on 30 April. That was sent again on 15 April with the addition of saying that Anasuya Patel would be in attendance. It is right to say that the tone of the letters was not very appropriate for somebody who was on

sick leave. It was a form of letter more appropriate if a question of conduct or capability arose. The claimant was aware that the respondent was short-staffed, that appears from a transcript at bundle B346.

14. The claimant did not attend the meeting on 30 April. She took the view that she was on annual leave and therefore was not obliged to attend and the respondent accepted that she was within her rights to refuse. Following her non-appearance at the meetings, Ms Cummings sent her a WhatsApp message, postponing the meeting and then there was a telephone call. Ms Cummings was upset by the manner in which the claimant expressed herself. The claimant felt strongly that it was wholly inappropriate for the respondent to be contacting her during her annual leave and she said that she would attend a return to work meeting on 23 May 2018 which was the first day on which she would return to work after the expiry of her annual leave. On 2 May, Ms Cummings e-mailed Dr Pattani for a further update.
15. On 3 May 2018, Mr Abdi wrote to invite the claimant to a meeting on 15 May. That letter was sent first of all by recorded delivery, secondly by first class post, both of those letters were received on 4 May by the claimant. It was re-sent on 9 May 2018 as an e-mail attachment. On 5 May 2018, the claimant raised a formal grievance complaining that she had been contacted on her annual leave and that she was required to attend a meeting on annual leave. The 15 May meeting was adjourned following an e-mail from Samantha Banton, she said in an e-mail to the claimant which was copied to various people at the healthcare trust, including Mr Abdi. The e-mail says:

“Dear Yvonne

Thank you for copying me in on this e-mail as I was not aware of what appears to be a matter going on for a while. Firstly, the trust should ensure that they are only using one policy at a time when they are instructing staff on processes. It appears that there is some error on the policy that can be administered and when this was done. If your period of sickness absence is completed and you enter into authorised annual leave under accrued annual leave following long term sickness absence, you cannot be compelled to attend any meetings until your return. Secondly, any letters sent to you to attend meetings during this time are merely a request and cannot be enforced during annual leave as that is confirmed time off work to use as you so wish.

Lastly, I am concerned at the tone of the e-mail that has been sent to you after a period of sickness absence, as this language should only be used either through performance and conduct matters or when an agreement has been made with you and you have failed to follow this through on your side. This clearly appears to not be any of these issues and so it is not doing you and the trust any favours by continuing to write in this manner. I see that you will be returning back from annual leave next week and will catch up with you then on your complaint/grievance sent below.”

16. Following that e-mail on 16 May 2018, Mr Abdi sent an emolient letter apologising for the tone of the earlier letters and fixing the 23 May for the return to work meeting. On 23 May the claimant returned from leave. She actually attended the hospital at 8 or 8:30 in the morning which would be her normal start time but nobody was expecting her until 1 o'clock which was the time of the meeting. She complains that two members of staff seemed to be discussing her. I do not accept that there was anything

improper about the arrival time that morning. There was merely a misunderstanding as to the time at which he would arrive. Nor do I find there was any improper discussions between employees.

17. After the return from leave meeting, the claimant continued to work and seems to have settled in well. Relations between her and Ms Cummings improved. On 12 June 2018, Dr Pattani said that the claimant was medically fit to continue working but that it would be desirable to obtain a standing desk for her. That in fact was never dealt with because the claimant resigned before the desk could be organised.
18. On 25 June 2018, the claimant resigned with effect from 31 August 2018. That was in order that she could take her annual leave. She had consulted the pension specialist at the respondent and he had explained that if she took her annual leave and only resigned at the end of that period of leave, she would maximise her NHS pension. That is what she did. The ET1 was issued on 15 November 2018.

Conclusions of fact

19. I do not accept that it is always a breach of contract for an employer to contact an employee whilst she is on holiday. There may admittedly be cases where employer's contact with an employee is so intrusive and extensive that the employee is not in reality able to enjoy her break from work. This is not, in my judgment, such a case. Ms Cummings got on well with the claimant until her telephone conversation. The claimant was at home rather than abroad. Ms Cummings simply wanted to arrange dates for a return to work meeting. Sending the letter of 3 May by recorded delivery and first class is not, in my judgment, unreasonable, nor is sending a further copy by e-mail. The tone of the letter is inappropriate but that does not, in my judgment, amount to a breach of contract. Even if I were wrong about the question of breach of contract, any breach would have been a minor breach which would not justify resignation.
20. There were a number of un-pleaded allegations which the claimant made in the course of the hearing. I find as a fact that there was no conspiracy to get rid of the claimant. On the contrary, all of the managers at the respondent including in particular Ms Cummings and Mr Abdi wanted her back because they were short-staffed. Another un-pleaded issue was about some of her materials going missing during the move from one office to another. She had placed various items in a crate with her name on it but the crate went missing during the move of office. As an un-pleaded allegation, I cannot take it into account but in any event it would not be such a serious breach as to justify resignation.
21. The attendance on 23 May in the morning was unfortunate but I do not accept there was any breach of her contract and in any event, any breach would have been minor. Likewise, as I have said, I do not accept that the details of her conditions were told to other members of staff. So far as the grievance is concerned, again, this failure to deal with the grievance was not a pleaded issue, although its date is mentioned in the dates which I have outlined not allegation of substance was made. In any event, after she returned to work on 23 May 2018, the parties were getting on well and I

find that the respondent reasonably felt that unless the claimant was actively pushing for the grievance to be formally dealt with, the letter of apology which Mr Abdi had sent on 16 April would be the closure of the matter. Even if the grievance should have been formally dealt with, the failure to do so would have been minor and would not justify the claimant resigning. In any event, in my judgment, the claimant affirmed the contract by continuing to work until 31 August. That is not a resignation within a reasonable time. She only resigned on 25 June, over a month after her return to work on 23 May and over a month after the last incident relied upon. In those circumstances, any claim for constructive dismissal would have been waived.

Resolution of the issues

22. I turn then to the issues. (a) Was there a fundamental breach of the contract of employment and/or did the respondent breach the so-called trust and confidence term. No.
23. (b) If so, did the claimant affirm the contract of employment before resigning? If I am wrong in my determination of the first issue, the answer to this is Yes. I do not need to determine (c).
24. So far as the particular dates relied on are concerned:

24.1 On 11 April 2018 Yvonne Mitchell received a telephone call from her line manager, Sheila Cummings, informing that HR had held a meeting in relation to Yvonne Mitchell's sickness absence and as a result of their meeting, decided that they would call in Yvonne Mitchell for a stage two review meeting. Yvonne Mitchell reminded Sheila Cummings that she was off work on annual leave as Yvonne Mitchell's sickness absence had already ended some 11 days prior, notably 31 March 2018. Sheila Cummings informed Yvonne Mitchell that Anasuya Patel insisted that she, Sheila Cummings, sent a letter to Yvonne Mitchell even though Anasuya Patel was aware Yvonne Mitchell was off work on annual leave. **Resolution:** Both matters are factually made out but do not amount to a breach of contract even if they did amount to a breach of contract, the breach would have been minor.

24.2 Despite Yvonne Mitchell being off work on annual leave, Sheila Cummings telephoned Yvonne Mitchell on 11 April 2018, informing she had just come out of a sickness review meeting and she will be sending Yvonne Mitchell an invitation letter. After the telephone call of 11 April 2018, Yvonne Mitchell was sent two identical e-mail letters dated 13 April 2018 and 16 April 2018 respectively, the only difference was the second e-mail letter stated that Anasuya Patel would be present upon Yvonne Mitchell receiving the e-mail of 16 April 2018, she contacted fit for work and ACAS and acting on their advice, Yvonne Mitchell did not attend the meeting of 30 April 2018. **Resolution:** That is factually true but the matters complained of are not a breach of contract and even if they were, are minor, not justifying resignation.

- 24.3 On 30 April 2018, Yvonne Mitchell received a telephone voicemail followed up by a WhatsApp text message from Sheila Cummings where she left a message informing Yvonne Mitchell that she will be sending a further meeting invitation letter. Yvonne Mitchell telephoned Sheila Cummings informing her that she had acted upon the advice given her by fit for work on ACAS but she would not attend any return to work meetings until she returned to work which would be 23 May 2018, at which point she would be willing to attend any meetings. **Resolution:** This is factually made out but the matters alleged do not amount to a breach of contract and even if they did, would be a minor matter which would not justify resignation.
- 24.4 “On 4 May 2018, upon returning home I noticed there were two letters dated 3 May 2018 which had been sent to me, both of which were identical, one had been sent recorded delivery, the other by first class post”. **Resolution:** This is factually true but it is not a breach of contract and even if it were a breach of contract would be minor, not justifying resignation.
- 24.5 “The two letters requested that I attend a newly arranged stage two review meeting on 15 May 2018. The sender, Ahmed Abdi, completely disregarded that I was on annual leave despite being on notice of this, further the tone and content to the letter was threatening and intimidating. The letters completely disregarded my earlier instructions that I would be returning to work on 23 May 2018 and that I would be willing to attend the stage two review meeting.” The letter was inappropriate but it was not threatening and intimidating. **Resolution:** Again, there is no breach of contract and even if there were it would be a minor breach not entitling the claimant to resign.
- 24.6 **5 May 2018** “Upon receiving the two letters from Ahmed Abdi, Yvonne Mitchell e-mailed a formal grievance to Clare Gore Etal. **Resolution:** That is factually true, it does not allege that the grievance wasn’t dealt with but even if that is impliedly a claim made, it was a matter where the claimant had waived the grievance and even if she hadn’t it would be a minor breach of contract, not entitling the claimant to resign.
- 24.7 **9 May 2018** “On 9 May 2018, Ahmed Abdi sent Yvonne Mitchell a further copy of the 3 May 2018 e-mail informing Yvonne Mitchell that she was requested to attend a stage two sickness absence review meeting on 15 May 2018.” **Resolution:** That is factually true but does not amount to a breach of contract and even if it were a breach of contract it was minor which wouldn’t entitle her to resign.
- 24.8 Upon Yvonne Mitchell receiving Ahmed Abdi’s e-mail of 9 May 2018, she sent a further e-mail addressed to Dame Docherty Etal, highlighting her concern and worry in respect of Ahmed Abdi’s e-mail. **Resolution:** This was not a matter relied on at the hearing but it in any event it would not be a breach of contract and if it were a breach of contract, Dame Docherty’s failure to respond would be

a minor breach which, in any event, was waived after she returned to work on 23 May 2018.

- 24.9 **23 May 2018** Upon Yvonne Mitchell returning to work from her sickness absence which ended on 31 March 2018 and her annual leave commenced from 1 April 2018 until 22 May 2018 inclusive, Yvonne Mitchell's return to work on 23 May 2018 at 8:30 at approximately 1pm a meeting was held where Ahmed Abdi, Anasuya Patel, Samantha Banton and Yvonne Mitchell were all present. During the meeting it was accepted by Ahmed Abdi that he had not conducted the process in line with the respondent's trust policy and other mistakes had been committed in the process prior and during the meeting itself. Mr Abdi accepted that matters could have been dealt with better. **Resolution:** I do not accept that Mr Abdi went quite as far as alleged in this paragraph. In any event there is no breach of contract and even if there were a breach of contract it would be minor, not entitling the claimant to resign.
- 24.10 The meeting of 23 May 2018 was conducted by one middle-managed namely Ahmed Abdi, head of recruitment and HR administration and Anasuya Patel, senior HR adviser which is not the normal procedure. **Resolution:** I do not accept that. It is a matter for the respondent how they conduct their stage two interviews. There is no breach of contract and in any event any breach would have been minor which would have not entitled the claimant to resign.
- 24.11 During the meeting Ahmed Abdi and Anasuya Patel had to be reminded of the way they were conducting the meeting was more in line with matters of conduct and performance, as opposed to that of a stage two sickness absence review meeting. **Resolution:** It is true that Ms Banton said they were doing that, but in truth this was a stage two sickness absence review meeting. There was no breach of contract and even if there were a breach of contract, it would be minor, not entitling the claimant to resign.
- 24.12 "During the course of the meeting, Ahmed Abdi nominated himself as my line manager and he requested that I should report to him instead of my appointed line manager, Sheila Cummings which is not in accordance with the trust's policy". **Resolution:** Mr Abdi did decide to supervise her reintegration but the question of which line manager the claimant reports to is a matter for the respondent. There is no breach of contract. Even if there were a breach of contract it would be so minor that it would not have entitled the claimant to resign.
- 24.13 On **6 June 2018** Yvonne Mitchell sent a further e-mail addressed to Dame Docherty Etal in follow up to her earlier e-mail of 8 May 2018. **Resolution:** I repeat what I say under issue 8.
- 24.14 Lastly, even if there were minor breaches, the cumulative effect of the minor breaches is not such as to entitle the claimant to resign.

24.15 Accordingly the claim fails.

Employment Judge Jack

Date: ...21 February 20.....

Judgment sent to the parties on

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For the Tribunal office