



EMPLOYMENT TRIBUNALS

Claimant: Miss A Roberts

Respondent: Lilian Birch, Stephen Case and Philip Case trading as Rainhill Motors

HELD AT: Liverpool

ON: 31 October 2018
1 November 2018

BEFORE: Employment Judge Grundy

REPRESENTATION:

Claimant: In person

Respondent: Mr B Henry, Counsel

JUDGMENT

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

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, was there a fundamental breach, which caused the claimant's resignation, thirdly (although it was of limited relevance in this case) was there a delay in the claimant resigning.

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 submissions Mr Henry also reminded the Tribunal of the House of Lords decision in Malik which emphasised the objective test in considering the employer's conduct and in particular that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or designed to seriously damage the relationship of trust between employer and employee. I remind myself that the burden of proof in relation to the matters regarding the employer's conduct is on the claimant.

The Evidence

4. During the course of the case I have been referred to two extensive bundles of documents although it is fair to say some of those documents do overlap within the two bundles and I have heard the evidence of the claimant Alison Roberts and I have heard the evidence of her son Mr Scarhill on her behalf. I have also heard from the respondent, his witnesses were himself- Mr Stephen Case and Miss Sharon Caroll. So far as the credibility of those witnesses is concerned it is right to say that Miss Roberts was eager to persuade the Tribunal that she had been wronged by the respondents, I accept that she was a very hard-working lady who had found it incredibly difficult to accept her state of ill health and its impact on her family and home life. The claimant's son Mr Scarhill was adamant that his mother had been wronged by Mr Case but in fact at the time that he was around he wasn't actually living with his mother, he was working long shifts at a care home and then he had another job working at Aldi, so it was only in relation to one telephone call that he was actually able to assist the Tribunal. I accept that he wasn't remunerated when he assisted his mother and that would be unfair but at the root of this claim is the respondent's conduct directed to the claimant herself, so the evidence of Mr Scarhill has limited value.

5. So far as Mr Stephen Case was concerned I found his evidence to be calm and measured, in fact he was a little bit at times like a rabbit in the headlights and that only served to remind me of his genuine shock and concern around the events that had taken place. It also seemed to gel and be consistent with the tone and substance of the conciliatory text messages, which he sent to the claimant rather than a badgering tone as she sought to allege which I will refer to in due course.

6. Miss Carroll's evidence could be said to be influenced by the fact that she is an employee of long service of the respondent, but she accepted in her evidence that she had not asked the claimant to move stock or register stock but nevertheless the claimant had booked in stock and she didn't seem to want to overegg the matter in any way, shape or form and I found her to be a credible witness.

7. The claimant also sought to adduce the statement of Gaynor Prescott, her sister, which I read although I attached less weight to the statement because she wasn't called to give evidence.

Findings of Fact

8. The claimant commenced employment with the respondent as a Petrol Station Cashier/Manager from either February 2012 or June 2013, I don't need to determine that date for the purpose of this judgment although it was an issue on the face of the papers. The respondents are a garage premises with a two to three million pound turnover employing a number of people which includes those that work on the petrol station in relation to cashier and administration tasks and two mechanics. It is very clear that during the course of the claimant's employment there was no issue of ill feeling between the claimant and the respondent. This was a family business going back some years having been run by the father of Mr Case. I don't have the impression that despite the turnover it was a large-scale operation, from time to time Mr Case told me he would call on his brother to assist him in terms of advice, he made clear and I accept that the claimant was a trusted and valued member of staff.

9. Unfortunately, events took a turn for the worst and sadly the claimant who had been suffering from mini strokes found herself on the receiving end of some very unwanted ill health. She was hospitalised for several weeks having attended an outpatient's appointment in February and major heart surgery followed on 2 March, in the meantime which must have been pretty devastating, she was not allowed to leave hospital as between the outpatient's appointment and the surgery in early March and I can understand that that must have been an immense source of worry, distress and frustration to her.

10. It is notable that in these proceedings there was no allegation of inappropriate conduct made by the claimant against the respondent until the date of the operation. The claimant makes complaints that Lilian Case rang the ward to see how the claimant was after her operation. Looking at the text messages as a whole, the claimant does communicate and ask the respondents through Mr Stephen Case to communicate directly with Lilian and it appears that the two women had a warm relationship, Mrs Case having bought perfume in the past for the claimant when she had been on holiday and the claimant had agreed to cover shifts whilst the respondents were away.

11. When the telephone call was reported, by a nurse, to the claimant immediately in the aftermath of her serious operation, it is reported that the claimant had an adverse reaction. I can make no criticism of the respondent for a telephone call to check on the welfare of a person about whom the text messages indicate the

respondents genuinely cared. It would be perverse in my view if it was anything other than genuine concern at that stage. The claimant then alleges that she was bombarded with telephone calls from the respondents.

12. Subject access requests have been made and are evident within the bundle of documents, they cover work telephone, mobile telephone and home phone on the respondent's behalf. Because they were made in July and the twelve-month period would take us only back to July 2017 there is no evidence of calls prior to July of 2017. It is the claimant's assertion that there was a bombardment of calls, that does not seem in my judgment to be consistent with the tone, substance or frequency of the text messages revealed. So far as the subject access requests are concerned the documents in respect of the telephone calls and the subject access request runs from pages 54 to 90 of the bundle and I accept that the respondent has taken reasonable steps to obtain that information and it is consistent with reasonable communication rather than unreasonable communication.

13. To deal directly with the text messages available my findings are that the tone is friendly and concerned, it begins on 16 February:-

"Hi Alison

I arrived back this morning and Lianne told me you have been to hospital for tests or a consultation and they have kept you in. How are you Steve"

The reply from the claimant:

"Yes hi Steve

Went for a scan yesterday and told I couldn't leave, I need open heart surgery to remove a large benign tumour. I am trying to negotiate with them for some home time. So sorry you have to come back to this".

The reply is

"Please don't worry about us Lily and I send our love. Let us know if you are allowed visitors as we would like to visit some time during your stay if you want this and the doctors allow it. Steve"

The reply

"Thanks I'll let you know".

14. The claimant is throughout the text messages courteous and civil herself. The claimant's heart surgery actually occurred at a different hospital and she is transferred. She tells the respondents at page 99,

"Hi Steve

I am being transferred on 28th and my operation is on the 2nd unless anything else changes".

The reply

"I hope you do get out for a bit, please let me know if there is anything I can help with".

15. Again, the responses from the respondent offers of help and reassurance. In my judgment the number and frequency of text messages was not excessive. There were gaps of time post the claimant being released from hospital, which were reasonable, sometimes of several weeks, evidenced at pages 107 to 108 where a gap was between the 23rd March and 26th April. Those gaps of time also coincide with the sick notes expiry, because the claimant perhaps unusually, did not obtain a three-month sick note as you would might have expected for serious surgery, she obtained one month's sick note so to speak or two weeks sick notes. So far as those text messages are concerned I do not find that the text communication was in any way unreasonable or over bearing. I have already mentioned the telephone calls, I do not find that the respondents deliberately failed to provide key evidence. I also take into consideration that the respondents are a relatively small business.

16. So far as the conversations are concerned, of which the claimant was asked to give further and better particulars of the evidence of the conversation in particular that which was given related to the evidence that Mr Scarhill overheard. That was a conversation in which ultimately the claimant and her son agreed to come and cover a few hours of the petrol station being unmanned, the claimant was under no obligation to encourage her son or to come herself to do that, I agree that it is highly regrettable that the respondent did not pay her son but it is more regrettable in my judgment that the claimant felt in any way under sufferance to come in if she was not able to. The claimant had agreed quite willingly in my view to come in to do wages on two occasions in June on 6th and 13th June for which she was ultimately paid albeit latterly. Miss Carroll gave evidence to me of those occasions and certainly on one occasion that the claimant had actually carried out many more tasks than the wages although there was no request for her to do so. The claimant accepted that evidence and didn't challenge it. This in itself seems wholly inconsistent with the claimant having been put upon.

17. One of those tasks included removing cash from the air machine on the forecourt and another included booking in stock. I am unclear why the claimant carried out those tasks but it certainly wasn't because she was put upon to do so, by the respondent. In my judgment at any time in relation to the text messages the claimant could have said, "no, stop sending me texts don't contact me directly". Although there is a suggestion at the outset which the respondents accept that the claimant's sister called to the premises to indicate to Mr Case that the claimant had had her operation and that she didn't want any immediate contact the respondents responded to that by not texting until 8 March, the operation having been on 2nd and in that text reporting that the claimant's wages were ready, a relevant and important matter. I accept that the respondent didn't have numbers for the claimant's relatives and ultimately would have had to some method of communication with the claimant. The gap was respectful in the circumstances and the claimant's sister was not local.

Submissions

18. In submissions as I have indicated Mr Henry reminded the Tribunal of the burden of proof which falls on the claimant and particularly reminded the Tribunal of the objective test to be applied. He also referred to other relevant authorities besides Malik v BCCI SA 1998 AC 20. The Tribunal has been through the written evidence in some depth, which Mr Henry relied upon. It shows a clear chronology of reasonable text messages and no bombardment. Mr Henry also asked the Tribunal to consider that the claimant had been into work on a couple of occasions and had told Miss Carroll she was bored at home and ultimately accepted work in October and also of significance was that she chose to resign at a time when her sick pay had run out.

19. Miss Roberts, the claimant, was effectively asking the Tribunal to reverse the burden of proof. What she said to me was "there is no proof I haven't been bombarded," well unfortunately I can't look at it like that and it would be wrong in law to do so. Many many decisions of many courts up and down the land depend upon the burden of proof being discharged at the standard of a balance of probabilities. On a balance of probabilities has the claimant proved that the respondent bombarded her with phone calls and sent unreasonable texts and pressurised her to come back to work? In my judgment, she hasn't discharged that burden on the evidence that I have. In my view, the subjective view of the claimant is that she was subjected to unreasonable treatment. She in her evidence used the phrase that she herself felt guilty, she said it was difficult to accept her illness. Clearly, this was a very sad state of affairs and I accept that her life was turned upside down but what I don't accept on an objective examination of the respondent's conduct is that that can be placed at the respondent's door.

20. There was not unreasonable communication by text and telephone, she was not pressured to return to work. She accepted travelling with her son in the car for his courier job in August 2017 and she did resign at the time her statutory sick pay expired. She did work in another small shop job in October 2017, albeit I accept that she was probably unfit by reason of her health to do that to any great extent. Whilst those two matters are not relevant to the respondent's conduct they caused me to attach less weight to the claimant's evidence overall.

21. In conclusion the claimant fails to discharge 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 not so significant that it could give rise to a breach or cumulative breaches. It is not necessary for me to determine the reason for the resignation in the circumstances that those terms and conditions were not breached.

22. Therefore, the claimant's claim fails and the claim is dismissed.

Employment Judge Grundy

Date 8 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 November 2018

FOR THE TRIBUNAL OFFICE

[JE]