



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Grogan

Respondent: The Council of the Borough and County of the town of Poole

Heard at: Southampton On: 30 and 31 July 2018

Before: Employment Judge Gardiner

Representation:

Claimant: In person
Respondent: Mr Daniel Piddington, Counsel

JUDGMENT

The Claimant's unfair dismissal claim is dismissed.

REASONS

1. On 15 November 2017, Mr Mark Grogan resigned his employment as a Senior Grounds Maintenance Operative for the Respondent Council. He had been employed by the Council or by its predecessors since 2005. He contends that his resignation amounts to a constructive dismissal and brings an unfair dismissal claim.
2. He contends that the manner he was treated in October and November 2017 amounts to a breach of the implied term of mutual trust and confidence, and therefore a fundamental breach of his employment contract entitling him to resign. The treatment relied upon is identified in para 3.1 of the Case

management Summary prepared following the Preliminary Hearing on 20 July 2018, heard by Employment Judge O'Rourke. This was as follows :

3.1.1 A breach of confidentiality by Mr Webber, by him informing two members of staff, on or about 26 October 2017, in advance of the Claimant's planned return to work on 14 November 2017 that he would not be returning to his previous place of work at Poole Park, but elsewhere. The Respondent contended that any communication was as limited as possible, to concerned staff only (the misconduct finding against the Claimant being that he had assaulted a colleague), in order to allay any fears that they may have felt and was therefore necessary and appropriate;

3.1.2 Being informed by Mr Webber, at a meeting on 13 November 2017 that he would not be returning to his former role of Senior Grounds Maintenance Operative (effectively a supervisor) at Poole Park, but to a role at Hatch Pond Depot, also in Poole. The Respondent contended that due to the nature of the Claimant's misconduct, it would be 'unsuitable and unsustainable' at least for a period of time, for him to return as supervisor to a member of staff he had assaulted and also others who had acted as witnesses in the disciplinary proceedings. It also contended that the new role involved no diminution in status, pay, grade or change in job description and he would continue to supervise three operatives;

3.1.3 Being threatened with dismissal by Mrs Comper, at the same meeting, if he did not return to work, in his new role, the next day (subsequently extended to 17 November 2017). The Respondent denies that any such threat was made.

3. At the outset of this hearing, the Respondent made an application to strike out the unfair dismissal claim for non-compliance with Employment Judge O'Rourke's directions order. This application had first been raised in correspondence last week, but the Tribunal had deferred consideration of the application until the start of the hearing. The essential basis for the application was that the Claimant's witness statement – whilst provided within the required timescale – was not in the format specified by the Employment Judge; and that certain documents that were ordered by way of specific disclosure were provided outside the required timescale. I refused the application for reasons given at the time.
4. In support of the unfair dismissal claim, I have heard evidence from the Claimant and read witness statements from Mr Whitlock, union representative, and from Mr Marr, General Assistant. No explanation has been given as to why they have not attended the tribunal to give oral evidence. Their absence affects the weight I can give to their evidence, as I have explained to the parties at the start of the hearing.
5. For the Respondent, the following three individuals have given evidence, in this order :

- a. Mr Mike Parkinson;
- b. Mr Michael Webber;
- c. Ms Tracy Comper

Findings of fact

6. Mr Grogan had worked at Poole Park throughout his time working for the Council and its predecessors. Poole Park is the largest public park in Poole. As well as parkland areas of grass and shrubs, there are sports pitches and, in particular, a cricket pitch. Mr Grogan's background was as a greenkeeper on a golf course. He had a particular interest in maintaining sports pitches and had qualifications and training specific to those duties. His evidence was that none of his colleagues had equivalent experience and training in managing sports pitches in general, and cricket pitches in particular.
7. In early 2016 as part of an internal restructure, Mr Grogan had applied for and was appointed to the role of Senior Grounds Maintenance Operative. He was the only candidate who had expressed a preference to work at Poole Park, where he was already based, and so he was allocated the role.
8. Mr Grogan's terms of employment are contained in a document headed "Offer of Employment", found at page 52 of the Bundle. These specify that his job title is that of Senior Grounds Maintenance Operative. Under the heading "Place of Work" on page 69 of the bundle is the following wording :

Although employees are normally appointed to a particular employment base and Service Unit, they may be required to work at any establishments within or under the control of the Borough of Poole.

9. Under the heading "Dignity at Work" the following wording is set out :

All employees have the right to work in an environment where they are treated with dignity and respect. Harassment is a serious infringement of this right and will not be tolerated by the Borough of Poole. The Council will make strenuous efforts to protect all its employees from harassment and intimidation at work.
10. The document cross-references to the Council's Disciplinary Rules and Procedure. The Rules list "unjustified absence from work" and failure to carry out an instruction given by a supervisor as misconduct, although in the latter case the Rules say that in certain circumstances this may be regarded as gross misconduct.
11. Examples of gross misconduct given in the Disciplinary Rules are where an employee, during working hours, physically assaults a supervisor, colleague, subordinate or member of the public. The Rules also refer by way of gross misconduct to conduct which is likely to bring discredit upon or lead to loss of confidence in the service in which they are employed.

12. Under his Job Description, there is a heading "Specific Responsibilities". Then the following wording appears :

Each post will take a lead responsibility for one of the following areas. These may rotate in time and each post holder will be expected to cover other areas during the absence of their colleagues. A post holder will take responsibility for each of the following ...

[Then nine teams are listed, including :

- A) Grass Teams (x4) ...
- D) Poole Park

13. There is no express reference to any required process of consultation before Senior Grounds Maintenance Operatives are rotated to other duties. Clearly this would not be practical or necessary where one such employee was covering another on a temporary basis.

14. From April 2016 to July 2017, Mr Grogan continued working at Poole Park in the same role, managing a team that by July 2017 included Ben O'Neill and Paul Evans. Mr Grogan had a difficult working relationship with Mr Evans, who was more senior than other workers and less willing to accept instructions.

15. On 20 July 2017 there was an argument at Poole Park between Mr Grogan and Mr Paul Evans about the duties that Mr Evans was performing. Mr Evans alleged that Mr Grogan swore at him, grabbed him by the neck and head butted him. He made a formal complaint about Mr Grogan's behaviour.

16. That led to Mr Grogan being suspended and to a disciplinary investigation. The investigation was conducted by Mr Parkinson. He spoke to the Claimant and to Mr Evans. He also spoke to Ben O'Neill and Stacey Dickinson, who were both present at the time of the incident. Ms Dickinson was not employed by the Council but by the Poole Bowls Club, which is based in Poole Park. In addition, Mr Paul Tanner, the Claimant's line manager, was spoken to. Mr Tanner had driven the Claimant home following his suspension and reported that the Claimant had told him that he had grabbed Paul Evans by the throat. Mr Parkinson summed up the evidence gathered in the course of his evidence, in a written report dated 30 August 2017.

17. Based on the findings of the disciplinary investigation, Mr Grogan was invited to a disciplinary hearing. That stated that the allegation that Mr Grogan had to answer was as follows :

Gross misconduct in that contrary to corporate and service specific rules regarding conduct and safe working practices, you have acted aggressively and physically assaulted a member of staff.

18. He was sent the evidence gathered in the course of the investigation. At the disciplinary hearing held on 12 September 2017, chaired by Mr Michael Webber, Mr Grogan denied that he had physically assaulted Mr Evans. His

explanation was that he raised his arms in self-defence. He denied head butting Mr Evans, although he accepted that he had lost his temper.

19. Mr Webber's conclusion was that the Claimant had physically assaulted Mr Evans. He announced his decision at the end of the hearing, namely that the Claimant should be dismissed. In a letter dated 18 September 2017 the dismissal outcome was confirmed. The letter stated that "contrary to corporate and service specific rules regarding conduct and safe working practices, you have acted aggressively and physically assaulted a member of staff on 20 July 2017 in Poole Park".

20. Mr Grogan appealed against the dismissal decision. In accordance with the Council's procedures, the appeal was heard by a panel of three Councillors. The appeal was held on 23 October 2017. Whilst the Panel upheld the factual findings of the disciplinary hearing, they considered that the penalty should be reduced from one of dismissal to that of a final written warning. The decision was announced at the end of the hearing. What was said then was essentially in similar terms to what was written in the appeal outcome letter. This read as follows :

The panel expect that you will conduct yourself appropriately, both when you return to work and in the interim before arrangements are agreed. This means that you must maintain confidentiality. The panel reminded you that you have a responsibility to rebuild relationships with your work colleagues.

You are therefore reinstated with effect from 13th September 2017. The Payroll Manager will make arrangements to reinstate your pay from this date. Mr Webber will contact you to discuss arrangements for your return to work. In the meantime, you will remain on paid leave.

21. Mr Grogan contends that he was specifically told by Councillor Butt that he could return to his role at Poole Park. She had said, he maintained, that she would be seeing him in the Park, which was close to the Council's offices.

22. In my judgment, on the balance of probabilities, he was not specifically promised that he could return to his previous role.

23. Firstly, the deployment of staff to particular teams was an operational matter, as the Claimant himself accepted in evidence. It was for managers not for Councillors to decide where he should be asked to work. All that the appeal did was to reinstate his employment by overturning the summary dismissal. It was then a matter for managers to decide where he should be deployed. Secondly, the wording of the appeal outcome letter makes it clear that arrangements need to be agreed, indicating that his return to duties involved wider considerations than just returning to his previous role at Poole Park.

24. Mr Grogan may well have misunderstood what was said at the conclusion of the appeal hearing to indicate that he was returning to Poole Park. This is because he saw his role at Poole Park as a unique position, particularly suited

to him and his experience with its focus on maintaining the cricket square and cricket ground. He did not see himself as performing a wider role that could be deployed to any one of nine different teams within the Council's employment.

25. In the meantime, Mr Grogan had obtained alternative employment. This was a full-time role working as a Groundsman for the United Church Schools Trust. He started this role on 4 October 2017. It involved looking after the sports pitches of the school where he was based.
26. The effect of reinstating his employment with the Council was that he now had two fulltime roles – his original role at the Council and his new role. On hearing of his reinstatement, he did not inform the Council that he was already engaged in a fulltime role elsewhere. This was only discovered by the Council indirectly and at a later stage.
27. Whilst he had been on suspension, his role as the supervisor at Poole Park had been covered by one of his colleagues, as anticipated in the Job Description. There is no evidence that there were any problems with the manner in which this was carried out by the team with its temporary supervisor, although by this point the cricket season had ended and cricket specific duties would have reduced.
28. His colleagues at Poole Park had asked an Area Officer for an update on the line management situation given that another Senior Grounds Person Operative was covering the Poole Park role as well as their own team. They wanted to know who would be their supervisor going forwards. On 25 October 2017, Mr Webber discussed with Ms Comper, one of the Council's HR Advisors, what to say to the employees. They agreed the following wording :

At the moment, Mr Grogan is not currently returning to Poole Park as Supervisor. You are probably aware of the circumstances surrounding this. These matters are being dealt with and in the meantime the current arrangements will continue as is. Should this situation change we will inform you of any matters relating to you, your workplace and supervision.
29. This was recorded in Mr Webber's notebook. Mr Webber then took his notebook to Poole Park and met with the team based there on about 27 October. He read this prepared statement from the notebook. Although he invited questions and did answer at least one question, he did not depart from the approach reflected in the agreed wording. To the extent that Mr Marr's witness statement suggests that more was said than in the agreed wording, I reject that evidence. Mr Marr has not attended the Tribunal to be cross- examined about his evidence. It is unclear from his statement whether Mr Marr agrees that Webber read a statement from his notebook.
30. There had been a substantial delay in meeting to discuss Mr Grogan's return to work. The first attempt to meet clashed with his father in law's funeral; the next date proposed was a date that his union representative was unable to make; and on a third date suggested, the Claimant was ill.

31. Mr Grogan did eventually meet with Ms Comper and Mr Webber on 13 November 2017. By this point, the appeal had been heard almost three weeks earlier. During this time, the Claimant was on full pay but not working. There was a concern on Ms Comper's part that the Claimant ought to start work immediately given that he was fit and able to work. In advance of the meeting, a decision had been taken, without specifically consulting Mr Grogan or the Poole Park team, that Mr Grogan should be assigned to one of the Grass Teams. A vacancy had arisen because the supervisor on one of the teams had requested a part time role.
32. The meeting was therefore to communicate the decision to the Claimant and discuss the specifics of his return to work. Mr Tanner was also present but took no active role in the meeting. There is a typed note of the meeting in the bundle which I accept broadly reflects what was discussed. This indicates Mr Grogan was told that he would be provided with ongoing support in his role as supervisor, although no details were given as to the nature of the support or of any specific training that would be provided.
33. He was asked to report for duty the following morning at 7.30am as part of a Grass team. Mr Grogan objected, both because he considered he should be returning to the Poole Park team, but also because he had not been given any advance notice of the move to a new team and wanted time to think it over and take advice. He asked if he could have until the following Friday to decide. This was refused. Because Mr Grogan was unwilling to return to work the following morning as part of a grass cutting team, there was a discussion about the consequences of this.
34. Mr Grogan maintains that he was threatened with disciplinary proceedings by Ms Comper and had to point out that disciplinary sanctions would lead to his dismissal as he was already on a final written warning. This version of events is supported in the witness statement of Mr Whitlock, and in an email he sent to Ms Comper on 17 November 2017. However, Mr Whitlock has not given oral evidence and so his version of events has not been tested.
35. Mr Webber and Ms Comper remember the conversation differently. Both deny that disciplinary action was ever threatened. When this allegation that disciplinary action was threatened was first suggested in an email from Mr Grogan on 13 November 2017, Ms Comper responded the next day denying this contention. Their version of events is also supported by an email from Mr Tanner, although he has not been called to give evidence himself.
36. My decision on this point is that there was no threat of disciplinary action. I prefer the evidence of Mr Webber and Ms Comper. Ms Comper did say that if he refused to return to the role to which he was assigned then this may have implications for his pay. She was obviously concerned about the implications of a prolonged absence on full pay, given that this was not a good use of taxpayers' money. I do not consider that there was a threat of disciplinary action, although Mr Grogan may have (correctly) assumed that a continued refusal to return to a role in the Grass cutting team would have lead to

disciplinary action. This would have been his assumption, rather than anything that was expressly said during the meeting.

37. On 15 November 2017, the Claimant resigned with immediate effect. In his resignation letter, he identified a fundamental breach of contract as follows :

You have changed my job significantly from the Senior Grounds Maintenance Operative based in Poole Park, a location I have worked in for 13 years, to one of far less technical demands.

38. He also added a criticism of the grievance process, which was not a matter that was referred to in evidence. Finally, he considered that the last straw was the threat of disciplinary action unless he accepted the new role immediately and returned to work the following day. He did not refer to any breach of confidentiality in terms of what was said to his colleagues about his suspension.

39. Two days later, at Mr Grogan's instigation (and as referred to above), Mr Whitlock emailed Ms Comper alleging that the Claimant had been threatened with disciplinary action.

Relevant law

40. In a case of constructive unfair dismissal, I need to consider whether there has been a fundamental breach of contract, such that the Claimant is entitled to treat the contract as at an end by resigning. Here the relevant term of the contract is the implied term of mutual trust and confidence. That is that the employer must not act without reasonable and proper cause in a manner which is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. This can be established by reference to a single incident, or to a series of incidents which taken together amount to a breach of the implied term. Next, the Tribunal needs to consider whether there is any conduct after the date of any breach of the implied term which amounts to an affirmation of the continued existence of the contract, such that as a matter of law the Claimant is no longer able to rely on the conduct as the basis for his resignation. Finally, the resignation needs to have been in response, at least in part, to a breach of contract.

Conclusions

41. I do not find that there has been a breach of contract here, in the three respects alleged, whether individually or cumulatively.

42. Firstly, I do not find that the Council acted unreasonably or contrary to any express or implied terms of the contract in what was communicated to other members of the team about their ongoing line management at Poole Park. They were read a statement from Mr Webber that was entirely accurate in the factual detail that was provided. It did no more than state that the current arrangements would continue. It did not disclose confidential information about the disciplinary process or about Mr Grogan.

43. Secondly, it was appropriate to ask Mr Grogan to work as a Senior Grounds Maintenance Operative in the Grass Team. This role fell within his Job Description and he could be rotated into such a role at any time and for any reason without any prior consultation. It was a role that was on the same terms and conditions; involved supervising a similar size of team; and would be based no more than 2.5 miles from Poole Park. Whilst it did not involve the challenges of maintaining a cricket ground that were present at Poole Park, there was an need for equivalent experience, qualifications, aptitudes, knowledge, attitude and motivation, as is shown by the document on pages 131 and 132 of the Bundle.
44. I have heard no evidence as to the extent of the qualifications that other Senior Grounds Maintenance Operatives may have had, or as to their experience in maintaining cricket grounds and other sports pitches. It may be that Mr Grogan was better suited to the Poole Park role than others and potentially overqualified, given the job description and what was required as part of his duties. However, the role was not specific to Poole Park and the contract terms and Job description make it clear that he can be rotated to other roles also designated as those of Senior Grounds Maintenance Operatives.
45. However, there was a particular reason why it was potentially reasonable to move the Claimant to another team, namely the need to ensure harmonious working relationships with other team members. Matters had reached a head in terms of the ongoing working relationship between Mr Paul Evans and Mr Grogan. It was reasonable to have regard to the risk that there could have been a further acrimonious dispute between the two in the future unless they were placed in different teams. Given that the incident had been witnessed by Mr O'Neill who also remained in the team and given that Mr Grogan had been proved to have been at fault, it was appropriate for Mr Grogan to be given a fresh start in another team.
46. There was no need to consult with Mr Grogan and the team before he was moved, given that the issues that had led to the incident had been fully explored during the disciplinary process and it was clear that there was a breakdown in the working relationship in which both individuals found it difficult to work with the other.
47. Thirdly, I have found that there was no threat of disciplinary proceedings if Mr Grogan did not obey the management instruction to return to work in the Grass Cutting team. He was merely told that his ongoing pay may have to be reviewed. Even if there had been mention of disciplinary proceedings, this would have been a reasonable warning, given that failure to obey a management instruction is listed as a potential ground of misconduct, and in some cases of gross misconduct.
48. I do not consider that this is a case where the issue of affirmation arises on the facts. Mr Grogan resigned two days after the last two events relied upon as the basis of his constructive dismissal claim. Even if I had found that the first event alone, which occurred on about 27 October 2017 had amounted to a fundamental breach of contract, I would have found that the delay was not

sufficiently significant to amount to an affirmation. During this period the Claimant was absent on suspension, so was not continuing with his work duties.

49. In his evidence Mr Grogan was very dismissive about the prospect of working in the Grass Team, which he regarded as a breach of his contract. By the point of his resignation it had been made clear to him that he would not be returning to Poole Park but instead would have to work as part of the Grass Team. In those circumstances I find that he would have preferred to have continued with his current job, given how understanding he found his new employers and given that he enjoyed maintaining sports pitches than to have returned to a Grass Cutting job even on lower pay.
50. In order to return to work he would have had to give notice to his new employers. The reason for his resignation was that he did not want to work in the Grass Team, rather than because of any breach of confidentiality which he did not mention in the 13 November meeting or in his resignation letter.
51. In these circumstances, I do not need to address the issues of Polkey and contributory fault. The constructive unfair dismissal claim fails and is dismissed.

10 August 2018

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE