EMPLOYMENT TRIBUNALS

Claimant: Mr R Williams

Respondent: University of Leicester

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 16 July 2021

Before: Employment Judge Brewer

Representation

Claimant: Mr M Anastasiades, Solicitor
Respondent: Mr C Kennedy, Counsel

JUDGMENT

1. The claimant's claim of automatic unfair dismissal under s.100(1)(e) Employment Rights Act 1996 is struck out as it has no reasonable prospect of success.
2. The claimant's claim of constructive unfair dismissal is struck out as it has no reasonable prospect of success.

REASONS

Introduction

1. This case came before EJ Ahmed for a case management hearing on 30 March 2021. Having considered the documents provided he concluded that there should be a hearing to determine whether the claim should be struck out or a deposit order made. That hearing was listed before me.

2. At today's hearing the claimant was represented by Mr Anastasiades and the respondent by Mr Kennedy. There was an agreed bundle running to 81 pages and the claimant produced a witness statement. In the event however Mr

Anastasiades decided not to call the claimant to put the statement in as evidence.

3. I heard submissions from both representatives and considered the relevant documents which I refer to below. One point arose during the submissions of Mr Anastasiades. Prior to this hearing he drafted a document headed "Revised details of claim" [page 42 *et seq* of the bundle]. He said that this was the claimant's amended grounds of complaint. I pointed out that it was not. There had been no application to amend and I was not prepared to treat this as an amended grounds of complaint. Mr Anastasiades then said he was making an oral application to amend. The difficulty with that is that the respondent had no notice of that application and was not prepared to deal with it. EJ Ahmed was very clear as to the purpose of this hearing and given that the claimant has been legally represented for some time it is unclear why there had not been an application to amend prior to this hearing. In the circumstances I declined to hear that application but, as set out below, in the event in my judgment nothing turns on what I shall refer to below as the "revised pleading".

Issues

4. The issues I had to deal with were:

    a. whether to strike out the claimant's claim(s) as having no reasonable prospect of success; if not
    b. whether to require the claimant to pay a deposit as a condition of continuing his claim(s).

Law

5. The material parts of the Tribunal Rules are as follows:

> ***"Striking out***
>
> ***37.****—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*
>
> ***Deposit orders***
>
> ***39.****—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument…"*

6. The claimant's claim form states that he is claiming unfair dismissal. As he resigned he is of course claiming constructive unfair dismissal. There is no reference in the claim form to s.100 of the Employment Rights Act 1996 (ERA).

There is a clear reference to a claim under s.100(1)(e) in the revised pleading. For the sake of completeness, I have dealt with both claims.

7. S.100(1)(e) is in the following terms:

> **'100 Health and safety cases.**
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.'

8. The ordinary constructive dismissal case, although not expressly set out in the claim form, was intended to be an allegation that the claimant resigned in response to a breach of trust and confidence by the respondent.

9. The claimant claimed that he had been constructively dismissed. He resigned following, he says, a series of acts, faults and omissions by the respondent which, he says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

10. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

11. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

12. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'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, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'*

13. In order to successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;

    b. the employer's breach caused the employee to resign;

    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

14. The claim is a so-called last straw case (see **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA). It is relevant to my consideration to note that in terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause (see **Wright v North Ayrshire Council** 2014 ICR 77, EAT). This was also explained in **Meikle v Nottinghamshire County Council** [2004] EWCA Civ 859, [2005] ICR 1 in which it was said that where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons.

15. The other matter which is relevant to my consideration is affirmation.

16. In brief, the law states that If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

17. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

18. Tribunals must take a '*reasonably robust*' approach to waiver; a wronged employee cannot ordinarily expect to continue with the contract for very long without losing the option of termination (see, e.g., **Buckland v Bournemouth University Higher Education Corporation [**2010] EWCA Civ 121, [44], per Sedley LJ).

19. I note the guidance on constructive dismissal given by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, which listed

the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

b. has he or she affirmed the contract since that act?

c. if not, was that act (or omission) by itself a repudiatory breach of contract?

d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

e. did the employee resign in response (or partly in response) to that breach?

20. In relation to the question of strike out, the following law has been considered.

21. In **A v B and anor** 2011 ICR D9, CA, the Court of Appeal held that an employment tribunal was wrong to strike out an employee's claims of sex discrimination and unfair dismissal because there was a 'more than fanciful' prospect that the employer would not be able to discharge the 'reverse' burden of proof to show that the employee's dismissal was not sex discriminatory. Accordingly, the EAT had been right to decide that the employer had not succeeded in demonstrating that claims had no reasonable prospect of success.

22. Similarly, in **Short v Birmingham City Council and ors** EAT 0038/13 an employment judge had misdirected herself in law by considering whether 'on the balance of probabilities' the claimant was unlikely to succeed in her claims. Applying the approach taken in *A v B*, the EAT was satisfied that strike-out could not be justified in this case because it could not properly be said that the claims had no reasonable prospect of success.

23. Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success. In **Mbuisa v Cygnet Healthcare Ltd** EAT 0119/18 the EAT overturned an employment tribunal's decision to strike out M's claim of automatically unfair constructive dismissal for raising health and safety concerns under S.100 of the Employment Rights Act 1996 (ERA). The EAT noted that strike-out is a draconian step that should be taken only in exceptional cases.

24. In **Tayside Public Transport Co Ltd v Reilly** 2012 IRLR 755, Ct Sess (Inner House) the correct approach to strike-out applications in unfair dismissal cases was authoritatively summarised. The Court of Session noted that almost all unfair dismissal claims are fact-sensitive and that, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute between the parties, it is not for the tribunal to conduct an impromptu trial of the facts. The Court observed

that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue — such as where the alleged facts are conclusively disproved by the 'productions' (i.e., the disclosed documentation) — but in the normal run of cases, where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out the claim.

25. However, in **Ahir v British Airways plc** 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

26. Finally, in **Kaur v Leeds Teaching Hospitals NHS Trust** (above) Mr Justice Underhill reiterated the sentiment he had previously expressed in **Ahir** when concluding that an employment judge had correctly struck out a constructive dismissal claim based on a final straw incident on the basis that it had no reasonable prospect of success. His Lordship observed: 'Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case no relevant issues of primary fact.

Facts

27. I set out here brief findings of fact.

28. The claimant was employed by the respondent as a maintenance electrician from May 2008 until 8 September 2020.

29. At the beginning of 2020 the Covid 19 pandemic started to impact on the UK. By March 2020 restrictions were in place. The respondent determined that maintenance staff were critical to keeping the respondent running and so they were designated key workers.

30. The claimant seems to have taken exception to this approach. He complained that staff had not been consulted about a lockdown risk assessment, he suggested that he was undertaking routine tasks and he was clearly unhappy about having to attend work. Notwithstanding this, the claimant continued to work throughout this period.

31. On 11 August 2020 the claimant tendered his resignation. His employment terminated on 8 September.

32. Early conciliation took place between 19 November 2020 and 19 December 2020 and the claimant presented his claim on 7 January 2021.

Submissions

33. For the respondent Mr Kennedy's submissions are summarised as follows.

34. There is no pleading in the claim form in relation to s.100 ERA. There is no pleading of a last straw in what is clearly a last straw case as there is no allegation of a single act of repudiation. Taken at its highest the claim form simply does not contain sufficient to establish reasonable prospects of showing that the respondent breached the implied term of trust and confidence.

35. Further, given the timescales involved the claimant waived any breach of contract by continuing to work.

36. The claimant had multiple reasons for resigning as is apparent from his resignation letter and thus he will fail on causation. For those reasons the claim should be struck out or in the alternative the claimant should be required to pay a deposit of £1,000.

37. For the claimant, Mr Anastasiades' submissions can be summarised as follows.

38. In 2020 there was a general pandemic. The claimant felt that the respondent's management failed to manage the pandemic situation in which placed the claimant, his colleagues and his family at risk as a result of which he lost trust in the respondent. This is the nub of the constructive dismissal and s.100(1)(e) claims.

39. As to the question of a strike out, there was an ongoing state of affairs which continued up to the point the claimant left his employment, the respondent should have put the claimant "at ease" but instead he was put at risk. Thus, the claim has reasonable prospects of success.

40. Referring to the claim form, the claimant was at the time a litigant in person, he should not be punished for not producing a pleading which refers to breach of trust and confidence. The overriding objective is key, the case needs to be heard, disclosure will be key to establishing the case and strike out is premature. The same arguments apply to the issue of the making of a deposit order.

Discussion and conclusions

41. I will deal first with the submission made by Mr Anastasiades that the claim should not be struck out as it would not be in accordance with the overriding objective. I consider that this is a misunderstanding of the Tribunal Rules. The overriding objective applies to the procedures of the Tribunal, which includes rules relating to strike out and deposits. It is simply wrong to submit that a claim cannot be struck out under a rule specifically designed for that purpose because of the overriding objective, because if that was the case it would render the strike out rule otiose. I reject that submission.

42. Likewise, I reject the submission that the claims should not be struck out because, as was submitted in this case, there has not yet been disclosure.

43. Strike out can be considered at any stage. In the case of constructive dismissal, at the point the employee resigns, he or she knows the reason. That person therefore has all of the information he or she needs to then present a

cogently pleaded to an employment tribunal, even without any reference to specific cases, legal principles or language, and it is perfectly legitimate for a respondent or the tribunal of its own volition, to ask for consideration of a strike out based on the pleaded case taken at its highest.

44. So, what is the claimant's case taken at its highest?

45. According to the claim form the claimant felt that:

    a. The respondent failed to consult staff over a lockdown risk assessment;
    b. The respondent ignored the claimant's request for a limited staff rota;
    c. There was no plan to protect staff;
    d. Some of the jobs being done were not critical;
    e. Generally, the respondent did not comply with its duty of care under the Health and Safety at Work etc. Act 1974; and
    f. The respondent's priority was to keep the University operating.

46. It is clear from the claim form that the claimant formed this view before or, at the latest, at the end of March 2020.

47. Keeping in mind that the claimant was a litigant in person, and notwithstanding that the revised pleading is not yet a part of the formal pleadings in the case, I went on to consider whether having that document as the new claim form particulars would make any material difference to my conclusions. They would not. Essentially other than referring to one or two emails sent by the claimant at the beginning April 2020, the revised pleading is simply a longer version of the original claim form with the addition of a specific reference to s.100(1)(e) ERA.

48. In relation to the s.100 ERA claim, the revised pleading does not state what the circumstances of danger were, it does not plead as to why the claimant says any circumstance of danger was serious and imminent and it does not say what steps the claimant took to protect himself or others (although it may be inferred that the resignation was the step) and it does not say who the claimant sought to protect by taking the step (although again it may be inferred that he was at least protecting himself).

49. A particular problem in respect of the s.100 ERA claim is the failure to plead why any circumstance of danger was said to be serious and imminent. On the claimant's case, whether the original or revised pleading, it is plain that nothing material occurred after late March/early April 2020. Given that the claimant did not resign until 11 August 2020 and did not leave work until 8 September 2020, I consider that there is no reasonable prospect of a tribunal finding that the teat in s.100(1)(e) ERA is met. If the circumstance of danger existed in March 2020 the delay in the claimant's resignation (that appears to be the step taken) very strongly suggests he did not consider that it was a serious and imminent circumstance of danger.

50. Turning to the ordinary constructive unfair dismissal claim, the claimant relies on the same set of concerns I have set out above paragraph 45.

51. No last straw is pleaded in either the original or revised pleading. All of the straws are in March 2020 (original claim form) or March and very early April

2020 (revised pleading). I accept there is a reference to the circumstances in March continuing until the claimant left his employment, but that does not come close to explaining that there was another straw, a last straw which the claimant relies upon. Merely saying that at some unstated point and for some unstated reason the claimant had 'had enough', which is what the claimant's case really amounts to, is insufficient to establish a last straw beyond late March/early April.

52. That being the case is there any reasonable prospect of the tribunal finding that there was a breach of trust and confidence? I do not consider that there is. Again, taking the claimant's case at its highest, it is that the respondent required maintenance workers to be at work, that some of the work was routine, there was a risk assessment but not sufficient staff consultation, the staff rota was not changed as the claimant had requested and generally staff were not being properly cared for, although this last allegation is not further particularised.

53. The claimant does not rely solely on the failure to look after staff to found his claim, and so I infer that he did not consider that if there was such a failure it, in and of itself, entitled him to resign and claim constructive dismissal. I consider that looking at his stated reasons in the round (and I point out there is no material difference between the original and revised pleading in this regard) there is no reasonable prospect of a tribunal finding that the matters complained on in March 2020 amount to a breach of the implied term of trust and confidence. By his own pleading it is apparent that the respondent did carry out a risk assessment around Covid 19, he simply objects to the level of consultation about it, there was a working staff rota, he simply complains that his proposed revised rota was not accepted, and staff were undertaking some work which could not be described a critical, implying that some work was. In short, it can be inferred from the claim form that the respondent undertook a risk assessment, decided it was safe for staff to work, that those staff were critical to the respondent and some of the work they did was critical. As I have said, in those circumstances there is no reasonable prospect of a tribunal finding that the matters complained on in March 2020 amount to a breach of the implied term of trust and confidence.

54. There are two further matters to consider. The first is causation. The claimant's resignation letter is lengthy. It starts at page 73 of the bundle and is single spaced and closely typed. The first, second and and most of the third pages set out 17 reasons as to why the claimant was resigning. Fourteen of those do not relate to the pleaded matters in this case. Of the last three points on the third page, two are related to pleaded matters (risk assessment and the issue of critical work), the other is about a comment by a manager that staff are safer at work than at home.

55. The fourth page runs to some 11 paragraphs. There is a section on the 1974 Act running to 4 paragraphs and of the rest there is another reference to the rota suggested by the claimant not being accepted, and the general failure to look after staff. One paragraph states that *"the lockdown has magnified many issues within the RM department that have manifested themselves from time to time that have been ignored and not addressed by management".* Given the totality of the pleadings and the resignation letter, I find that there is little

reasonable prospect of a tribunal concluding that the respondent's handling of the Covid 19 situation as characterised by the claimant was a significant or effective cause of his resignation.

56. Even if I am wrong about that, the claimant also faces the problem of affirmation.

57. Given the state of affairs as at late March or early April 2020, the claimant continued to work normally until he tendered his resignation on 8 August 2020. That means from the point he considered that the respondent had breached the implied term of trust and confidence he worked and was paid for some 4 further months. Some delay between the alleged breach and the resignation may be inevitable in a constructive dismissal case, after all it may not be a simple matter for a person to leave a job where they have bills to pay, perhaps a mortgage to meet. But they cannot delay for too long. We know that the claimant started in a new job immediately on leaving the respondent and I conclude that he had no trouble finding replacement work. That being the case I consider that because of the delay there is no reasonable prospect of an employment tribunal finding that there was not affirmation in this case.

58. For those reasons the claimant's claims are struck out.

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Employment Judge Brewer

Date: 16 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE