



EMPLOYMENT TRIBUNALS

Claimant: Mrs M. Barnett

Respondent: Cradley Parish Council

Heard at: Birmingham

On: 01-03 May 2018

Before: Employment Judge Hindmarch

Representation

Claimant: Ms. Roberts (Counsel)

Respondent: Mr England (Counsel)

JUDGMENT

1. The complaint of constructive unfair dismissal is not well-founded and is dismissed.
2. The complaint of wrongful dismissal is not well-founded and is dismissed.
3. The complaint in respect of accrued but unpaid holiday pay is not well-founded and is dismissed.
4. The Respondent's counter-claim is dismissed on withdrawal.

REASONS

1. This case came before me for hearing over three days commencing on the 03 May 2018. I offer thanks to the parties' representatives, Ms. Roberts for the Claimant and Mr England for the Respondent whose considered and sensible approach allowed us to conclude, in fact in 2½ days.
2. By an ET1 filed on the 20 December 2017, the Claimant brought claims of constructive unfair dismissal, wrongful dismissal and unpaid holiday pay,
3. By an ET3 filed on the 01 February 2017 the Respondent indicated its intention to defend those claims and also raised a counterclaim. At the outset, I identified the issues with the respective Counsel. Whilst the Claimant had put her claim in her ET1 as a constructive unfair dismissal, in fact, the Claimant was putting her primary case as that of an actual

dismissal based on an ultimatum she said she received namely “essentially resign or be dismissed”. As an alternative, the Claimant asserted she had been constructively unfairly dismissed based on either a breach of the contractual disciplinary procedure and/or a breach of the implied term of trust and confidence relating to hostilities at a meeting on the 23 August.

4. The Respondent indicated it would challenge the reason for resignation saying that it was not about an act or omission by the Respondent, but rather that the Claimant resigned seeking to avoid a disciplinary procedure. I asked the Respondent whether if I found there had been a dismissal, was it putting forward a reason for dismissal and the Respondent contended the reason would be conduct albeit it could not argue that a fair process was followed. The notice pay claim would flow from the dismissal findings and the holiday pay claim remained in dispute.
5. On the Respondents contract counterclaim, we identified the issues, however at the start of submissions, the Respondent’s Counsel conceded that the counterclaim was no longer being pursued in light of concessions given by the Respondent’s witness Dr. Herriot in his evidence.
6. There was an agreed bundle and the Claimant’s Counsel handed up opening submissions. The Claimant who was employed as a clerk to the Respondent Parish Council, herself gave evidence and had four live witnesses, Kenneth Nason former Councillor and Vice Chair, David Creed-Newton, former Chair and Councillor, Terrance Robshaw, formal Internal Auditor, Christopher Lowder, Councillor and former Chair. The Claimant also tended two witness statements, Frederick Beard and Tania Lloyd-Jones, both former Councillors and those statements were in essence in the style of character references.
7. The Respondent had one live witness, Dr. Herriot, current Chair and also tendered a witness statement of Lynda Wilcox. I heard oral submissions from both Counsel.
8. By way of Case Management as is usual, at the start of the Claimant’s evidence on day one, all of her live witnesses were present. While she was giving evidence, her witnesses were clearly heard by myself and by my Clerk when he joined the room just before the lunchtime recess, to be muttering and making loud observations. Counsel for the Respondent understandably objected and I gave the witnesses two warnings before lunch on day one. After lunch, I saw both Counsel alone to explain the behaviour was inappropriate and could impede justice and that due to my obligation to take a formal note and the lack of resource to allow a clerk to sit in to be my ears as it were, because I was unable to decipher who the culprit was, I would consider removing all of the Claimant’s witnesses if the behaviour continued.
9. Counsel for the Claimant assured me that both herself and her instructing Solicitor had had a firm word with the witnesses and I urged that warning to be repeated. Despite this, the behaviour continued during the cross-examination of the Claimant’s first witness and I asked the witnesses to leave until each were called one by one to give evidence. The Claimant and Dr Herriot remained in the hearing.

10. On day two, after the Claimant's witnesses had all given evidence, the Claimant's Counsel asked if the witnesses that were present on day two could be allowed back into the Hearing. The Respondent's Counsel opposed this on the basis of the warnings given on day one and some clear hostility between the parties as evidenced by the witness statements.
11. On balance, I allowed the Claimant's application with a further warning and I am pleased to say there was no repeat behaviour once the witnesses were allowed back into the Hearing.

Findings of Fact

12. The Claimant provided services to the Respondent as its Parish Clerk and responsible Finance Officer for some 14 years from 2003, initially on a self-employed basis. She largely enjoyed a good relationship with the Councillors and all of her witnesses spoke very highly of her. Her employment was subject to a contract of employment which appears at page 59-69 of the bundle. The relevant section for the purposes of the issues I had to decide was Section 20.2 which appears at page 64 of the bundle and is headed "Disciplinary Rules" and reads as follows: -

"Before any disciplinary action is taken by the Council a notice in writing giving details of the matter signed by the Chairman and authorised by the Council shall be given to you. You together with an advisor if you wish, will have a full opportunity to answer the complaint at a meeting of the Council's disciplinary panel held in the absence of the public and the press."

13. In March 2001, HMRC advised all Parish Councils that they must treat Parish Clerks as employees for PAYE purposes. The Respondent therefore engaged a payroll expert Marion Griffiths to deal with PAYE for the Claimant.
14. The Parish Council had a working group called a Finance Working Group and following the change in PAYE position, it determined that the Claimant should receive all of her then gross salary so that she did not suffer any losses by way of tax and further to reflect her increased workload at the time. In short, it determined that the Parish Council should pay any tax falling due. The Respondent's practice was to hold a finance working group meeting to agree budgeting matters, including the Claimant's salary and then to send a budget document to the Councillors so that they could consider the budgetary position before a later meeting of the full Parish Council where the budget including the Claimant's salary could be voted on.
15. At a Finance Group meeting on the 12 January 2012, the proposed budget was considered including the Claimant's salary. This was then presented to the full Parish Council that met later and agreed it. There was a change to the budget spreadsheet around this time and the Claimant's salary for the first time was broken down to show tax and expenses as well as salary. The word salary did not explain whether it was gross or net, but it is clear that it was net as when added to the figures for tax and for expenses, it came to a total figure given at the end of the relevant column. Whilst it may be curious that these financial matters including those pertaining to

the Claimant's pay, her being the only employee of the Respondent, were not specifically minuted at the full Parish Council meetings, it is clear that the Respondent, as the Claimant's employer, agreed her pay. Somewhat curiously however, the Respondent left it to the Claimant to inform Marion Griffiths of any changes to her pay. The Respondent did not see the payslips generated by Marion Griffiths, these were sent by Marion Griffiths directly to the Claimant. The Claimant told the Tribunal she received them electronically but did not read them. Had she done so, she would surely have noticed that there was an issue with what Marion Griffiths believed to be her gross and her net pay.

16. Dr. Herriot became a Councillor in 2016 and he saw the budget detailing the Claimant's salary in the aforementioned way and accepted he made no objections to it and that it could be interpreted from the breakdown that the figure given as salary was in fact net rather than gross pay. The Claimant's salary payments were made to her by standing order, her tax payments were paid by the Parish Council cheque to HMRC. The monthly Parish Council meetings always carried an agenda item in respect of the HMRC cheque payment. The Claimant herself was a cheque signatory and a signatory to any standing orders, however, two Councillors also had to provide signatures.
17. At a Parish Council meeting on the 08 August 2017, the agenda item regarding the HMRC cheque was missing. The Claimant told the Councillors this was because she missed the payment deadline and there would be two payments the following month. Ten days later on the 18 August, there was a Finance Group meeting, this being the first Finance Group meeting that Dr. Herriot had attended as a member of that group. At that meeting, the Claimant volunteered to the Committee that she had in fact made the last two HMRC payments by personal cheque because she felt uncomfortable that the previous working group had agreed the Parish Council were to pay her tax and she had concerns that the new working group might not wish to do so. This alerted Dr. Herriot to believe that something odd might have occurred with the Claimant's pay. He spoke to Mr Robshaw, internal auditor who confirmed that he had not been aware of the tax treatment and Dr. Herriot sent an email to the Claimant on the evening of the 18 August [page 259] of the bundle confirming that conversation and asking her questions about her pay and concluding "I am sure that we can sort it out".
18. On the following day, the 19 August Dr. Herriot emailed his fellow finance working group members noting "the worrying detail I think is how Mary has dealt with the last two months, she has paid the PAYE as a personal cheque". He recommended they seek advice from Lynda at HALC, that being a reference to Lynda Wilcox who works for Herefordshire Association of Local Councils (hence HALC) that being a membership organisation, providing advice on Parish Council matters – his email is at page 260.
19. On the 19 August, the Claimant emailed Marion Griffiths [page 261] to inform her of the situation which had arisen and copying in Dr. Herriot and the then Chair, Councillor Fielding. Marion Griffiths replied by email the same day. That email is at page 262 of the bundle and records: -

“Dear Mary,

Unfortunately, I should have been made aware of this arrangement as the Parish Council have now underpaid tax and employer’s National Insurance on all your earnings. There is an implication on earlier years, I very much doubt that you would get a PAYE inspection, but if you do, they could quite correctly ask for the back tax. The other problem is that I am dutybound to inform HMRC of this error. The implication for the Parish Council is that they could be liable for penalties for each year that this has happened and the underpayment of tax plus interest.”

20. On the 19 August the Claimant emailed Dr. Herriot [page 264] stating that the situation had arisen as a total error of judgment by persons previously dealing with the Finance Committee. Dr. Herriot prepared a report of his thoughts and findings to-date and emailed it to the other members of the Finance Working Group on the 21 August and that is at page 268 for the email and pages 269-270 for the Report. He set out the history as detailed above. He stated his concerns that the Claimant’s explanation was “disingenuous”.
21. Dr. Herriot and Councillor Fielding met with Lynda Wilcox, no notes were taken. Lynda Wilcox then invited the Claimant to a meeting with the three of them by email dated 22 August [page 275A]. In her invitation she stated: “some serious financial issues have been raised by Councillors which have wide ranging implications for the Council and for you as clerk”. In the email she requests an “informal discussion” on the way forward.
22. The Claimant agreed to attend a meeting on the 23 August at 2pm. Lynda Wilcox emailed Dr. Herriot and Councillor Fielding to confirm this on the 23 August at page 276. In her email she again referred to the meeting as an “informal meeting”.
23. The Respondent produced no notes of the meeting. The Claimant accepts she took no notes of the meeting at the time, but said that she typed up her recollection the following day. Her notes are at page 274. The Claimant’s notes record “I was given the opportunity to outline my side of the story to Lynda Wilcox. After some discussion, she stated it would be far better for me to resign for the following reasons: -
 - a. If the Council had sacked me, I would not get another job elsewhere in the parish.
 - b. It would be all over the local papers that I had incorrectly received these payments.
 - c. The Parishioners need to know that the Council spent the money correctly and legally.
 - d. My good name in the parish would be gone.
 - e. They could deal with the matter within the Finance Group without advising full Council as to what had gone on.

24. She added that if I did not resign: -

- a. The Parish Council would sack me with GF, (Councillor Fielding) adding definitely as all trust had gone.
- b. The Parish Council could seek payment from me of the funds which I had illegally received.

In the light of the bullying and overpowering threats to me, I felt forced to resign”.

25. Dr. Herriot disagreed with the Claimant’s account, he said there was no resign or be sacked ultimatum and that in fact the Claimant volunteered to resign and that he and Councillor Fielding had urged her to take time to consider that decision. He told the Tribunal as per the aforementioned emails that Lynda Wilcox had told the Claimant the meeting was an informal meeting essentially to get to the bottom of matters and that after the meeting the Parish Council would decide the best way forward. He accepts the Claimant was told one outcome could be the commencement of disciplinary action. He further accepts the seriousness of matters were spelled out to the Claimant.

26. It was only after the Claimant had resigned, that Dr. Herriot said Miss Wilcox suggested that to protect the Claimant’s reputation, details of her pay should not go the full Council.

27. The Claimant’s notes record the meeting ending at 2.45pm. At 4pm the Claimant sent an email of resignation to Councillor Fielding and that is at page 277. She states, “it is with regret that I today render my resignation on health grounds as Clerk to Cradley Parish Council with immediate effect.” On the 24 August the Claimant emailed Marion Griffiths [page 283] to inform her that she had resigned with immediate effect. On the 25 August she emailed Marion Griffiths again [page 282] stating “it is indeed a shame that 14 years’ service came to an end simply because of incorrect information received by a previous Councillor” and referring later in the day in an email to a “duff piece of advice”. When I asked the Claimant about this, she said she was referring to a previous Finance Committee and the apparent advice at the time was that the Parish Council could pay her tax for her.

28. The Claimant and some of her witnesses suggested that the Respondent had a campaign to remove her because of a dispute between some Parish Councillors and another group called Heart of the Village. These allegations referred, taking this from Mr Nason’s witness statement, “to the Claimant being the victim and casualty of a prolonged and malicious campaign”. They were never pleaded in the Claimant’s ET1 or raised by the Claimant at the time of her resignation and frankly, I think the raising of these matters was a red herring and to support perhaps the agendas of persons other than the Claimant and to attack the reputation of Dr. Herriot and current members of the Parish Council. I note that some of the Councillors who gave evidence in support of the Claimant, for example Miss Lloyd-Jones and Mr Beard were still in office at the time of the Claimant’s resignation.

Submissions and Conclusions

29. On the issue of holiday pay firstly, Mr England argued “I should firstly determine whether any holiday pay was in fact due”. He reminded me that the Claimant had offered no evidence whatsoever in respect of this claim, despite having the burden of proof. Miss Roberts accepted there was no direct evidence but invited me to make an award. I am unable to find the Claimant has discharged the burden of proof. Whilst the Claimant has had the benefit of legal advice throughout these proceedings, she did not set out her claim properly in either her ET1 nor at all in her witness statement in which it does not feature whatsoever.
30. On the subject of a dismissal, Counsel agreed that I needed to determine whether the Claimant was effectively told to resign or he sacked and that if I did so, this could amount to a dismissal. The Claimant and Dr. Herriot both gave evidence about the meeting on the 23 August. There were no notes apparently taken by either party at the meeting itself. I preferred the Respondent’s evidence for a number of reasons. Firstly, whilst the Claimant says her notes were made the day after the meeting, I have no evidence before me that she shared her account with anyone at the relevant time. Given she had called Councillors to support her, one might have thought, if she had concluded very shortly after the meeting that her resignation was not freely given and was in fact forced, she might have enlisted the assistance of one such Councillor. Indeed, she said in cross-examination she never thought she would be sacked “with the support I had from the Parish Council”. She never mentioned matters to Marion Griffiths in her emails only a few days later. She did not seek to retract her resignation having slept on it as it were. Her email (resignation) sent just one hour after the meeting concluded, makes no mention of what she says occurred. I preferred Dr. Herriot’s account. In his evidence he made a number of measured concessions and indeed that resulted in the Respondent withdrawing its counterclaim, yet it remained clear that no ultimatum had been given to the Claimant and that he and Councillor Fielding had asked her to take time to consider. In contrast the Claimant in her evidence was often hesitant and reluctant to make any concessions, in particular when Mr England was taking her through her payslip history.
31. Turning to whether the Claimant was constructively unfairly dismissed, firstly the Claimant relies upon the Respondent breaching the express term in her contract regarding disciplinary procedures. Miss Roberts suggested the email at page 275A from Lynda Wilcox to the Claimant inviting her to the meeting on the 23 August was very telling and suggested formality. Mr England argued the clause in the contract was not engaged because the meeting on the 23 August was not disciplinary action.
32. I find there was no breach of any express term. It is clear that whilst Lynda Wilcox’s email at page 275A does alert the Claimant that there are serious matters to discuss, the purpose of the meeting is stated to be an informal discussion and indeed the email from Lynda Wilcox to Dr. Herriot and Councillor Fielding the following morning repeats just this. The contractual term was simply not engaged.

33. I now turn to whether there was such hostility on the part of the Respondent at the 23 August meeting, that I can find a fundamental breach of contract in respect of the implied term of trust and confidence. I have already concluded that I prefer Dr. Herriot's account of what occurred. I fully accept Dr. Herriot had some very real concerns about a fraud on the Revenue and the financial implications for the Parish Council. No doubt the Claimant would have been asked about this, indeed she was notified by Lynda Wilcox that this would be discussed. I accept this must have been uncomfortable for her. I also accept the discussions around the possibility of adverse publicity, reputation and/or possible disciplinary proceedings would have been difficult. I accept that the Claimant was in her own words emotional, unnerved, upset and couldn't think straight. I do not however accept that the Respondent at that meeting acted in anyway other than a reasonable employer would act in seeking to establish the truth and to find a way forward. I therefore do not find the meeting was hostile, thus there was no breach of contract on the part of the Respondent entitling the Claimant to resign and treat herself as constructively and unfairly dismissed. For those reasons, the unfair dismissal claim must fail as must the wrongful dismissal claim, given the Claimant resigned with immediate effect.

Employment Judge Hindmarch

10 May 2018