Be wary of the 'last straw': Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA

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Background

1. The Claimant ("**C**") was a primary school teacher who had worked for Alderman Davies Church in Wales Primary School ("**the School**") for a number of years. The Respondent ("**R**") was the governing body of the School. It was agreed between the parties that from April 2015, C had a disability by reason of a mental impairment, affecting, in particular his reaction to and behaviour in stressful situations.

2. In April 2015, C was suspended from his role for a 'child protection matter', although not given any information as to what this entailed. An investigation and disciplinary process commenced, which lasted over a year (including a significant delay to investigate a grievance). In around September 2015, C was signed off sick with stress and never returned to work.

3. Shortly after he was suspended, C downloaded a large number of documents from the School's system and shared some of these with a fellow teacher and trade union representative, Mrs Sydenham. When the head teacher became aware of this in around February 2016, C was re-suspended for a second disciplinary investigation for a breach of the School's data protection policy. Mrs Sydenham was also subject to a data protection investigation.

4. In around May 2016, C asked for further details of the child protection matter, but this was once again declined. On 13 June 2016 the Claimant wrote a letter complaining of his treatment up to that point and asserting that he had lost all faith in his employer treating him properly. At a similar time, C was informed by his solicitor that the School had informed Mrs Sydenham that she was not allowed to contact him, because the overlap with their allegations. On 16 June 2016, C resigned.

5. C submitted a number of claims to the ET, including constructive dismissal, discriminatory constructive dismissal and a number of complaints of disability discrimination.

Employment Tribunal decision

6. The ET was highly critical of R and its actions, and upheld a number of discrimination claims brought by C. However, it did not find that C had been constructively dismissed. This was because the ET found that the last straw that triggered C's resignation was his discovery that the School's had prohibited Mrs Sydenham from contacting him, which the ET found to be a reasonable act given the ongoing disciplinary proceedings. The ET went from this to a finding that the last straw was therefore sufficiently innocuous that it could not contribute to the ongoing actions of the school, and that therefore C did not resign in response to a breach of the implied term of trust and confidence.

Employment Appeal Tribunal decision (HHJ Auerbach)

7. Five grounds of appeal were heard in the EAT, although they can be summarised into the following three issues:

   (a) Whether the ET erred in finding that C was not constructively dismissed

   (b) Whether the ET erred in finding that a discriminatory constructive dismissal claim was not made out

   (c) Whether the ET erred in finding that withholding certain information from C in connection with disciplinary charges could not amount to a 'practice' for a reasonable adjustment claim

Constructive dismissal

8. The EAT held that by dismissing the claim for constructive unfair dismissal, the ET had erred in three ways:

   (a) First, by focusing on the last straw event and, on finding that it was innocuous, dismissing the claim for constructive unfair dismissal. The correct analysis was that where there had been a course of conduct over time amounting to a fundamental breach of contract, there was no affirmation of the breach, and C resigns at least in part in response to it, this is sufficient. This is the case even where a later innocuous act has also contributed to the decision [34]. (Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1 considered). The ET had therefore erred by not considering that

the earlier conduct itself established a fundamental breach, which had not been affirmed, and which also subsequently contributed to the decision to resign when it came [42].

(b) Second, by looking only at what it identified as the 'last straw event' in identifying the reason for resignation, the ET erred in its approach to the facts in this case [48]. On the evidence before it, there were plainly other reasons [49-52].

(c) Third, by finding that the refusal to permit Mrs Sydenham to contact the Claimant was innocuous. Citing *London Borough of Waltham Forest v Omilaju* [2005] ICR 481, the EAT held by moving from its conclusion that this was reasonable conduct directly to its finding that the conduct was innocuous, was an error of law and/or was not Meek-compliant [57, 62].

9. Having come to the above conclusions, the EAT held that it could substitute a finding that C was constructively dismissed [69]. It also found, given the background findings of the ET, that there was no realistic basis on which the ET could properly find that the sole, or even principal, reason for the dismissal was the Claimant's own conduct or any other substantial fair reason [87]. As such, the EAT substituted its conclusion that there was no fair reason for dismissal [88].

Discriminatory constructive dismissal

10. Given the conclusions set out above, the EAT also had to conclude that the ET's decision that there was not a discriminatory constructive dismissal could not stand (the ET having found discriminatory acts as part of the ongoing conduct) [70]. However, it held that this matter should be remitted, as a finding that the discrimination found sufficiently influenced the overall repudiatory breach could not reasonably be substituted [90].

Whether withholding information is a 'practice'

11. The issue in this ground was whether the ET was correct to find that the failure to disclose information about the child protection allegation could not amount to a 'practice' for the purposes of identifying a PCP. Citing *Nottinghamshire City Transport Limited v Harvey* UKEAT/0032/12 and *Lamb v Business Academy Bexley* UKEAT/0226/15, the EAT noted that although a one-off event is insufficient to amount to a practice, and there must be some element of repetition, that persistence or repetition may be found within the four walls of how the employer is found to have treated the individual complainant

[79]. On this basis it found that the ET had erred by finding that, as the headteacher did not withhold information in all cases of this nature, her actions in this case could not amount to a practice. The EAT held that a general or habitual approach could suffice, even if not universally followed [80]. This point was remitted to the ET [82].

Comment

12. The key part of the EAT's reasoning in this regard can be found at paragraph 34:

> *"…so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and the employee does resign at least partly in response to it, constructive dismissal is made out. That is so, even if other, more recent, conduct has also contributed to the decision to resign. It would be true in such a case that in point of time, it will be the later conduct that has "tipped" the employee into resigning; but as a matter of causation, it is the combination of both the earlier and the later conduct that has together caused the employee to resign."*

13. This is an important reminder that parties and decision makers should always return to first principles when considering a constructive dismissal claim: there must be a fundamental breach of contract, there must be no affirmation of that breach, and resignation must be, at least in part, in response to the breach. While concepts such as a 'last straw' are useful in cases where there has been ongoing conduct, this should not detract from the overall test.

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