



Constructive Dismissal

A constructive dismissal may be prompted by a single breach of contract by an employer or by a series of incidents that, taken together, amount to a fundamental breach. When that happens the 'last straw' incident that prompts the employee's resignation need not be a breach of contract in its own right – it is the employer's overall conduct that matters.

In *Kaur v Leeds Teaching Hospital NHS Trust* the Court of Appeal had to consider whether that last straw could reactivate complaints made by the employee that the employer thought had been resolved long ago.

The employee had struggled from the outset with her performance and had been subjected to formal capability procedures over a two year period. She also felt that she was being bullied by a number of her colleagues leading her to make a formal complaint against one of them in 2012. In April 2013 there was an altercation between the two of them in which each alleged they were assaulted by the other. That led to an investigation which concluded in July that disciplinary action should be taken. A hearing then took place in October which found that both employees were guilty of 'inappropriate behaviour' but there was no finding made on the issue of assault. The decision to issue them with final written warnings was based on them shouting at each other in an area of the hospital close to where patients were being treated. The employee's dignity at work complaint about the incident was 'folded in' to the overall investigation and rejected.

Soon after receiving the warning, Ms Kaur went on maternity leave. This meant that her appeal against the final written warning was not heard until July 2014. When it was rejected, she resigned and claimed constructive dismissal relying not just on the rejection of the appeal but also the events of April 2013 more than a year earlier.

The Tribunal struck out her claim as having no reasonable prospect of success.

The Tribunal judge found that it was clear that the employer had reasonable grounds for initiating the disciplinary procedure following the 2013 incident and that it was 'quite proper' of the employer to deal with Ms Kaur's dignity at work complaint about that incident in the same procedure as the disciplinary allegation. It was also clear that Ms Kaur had indeed 'raised her voice' near a hospital ward and there was no reasonable prospect of her establishing that the decision to give her a final written warning was unreasonable.

The Judge accepted that a 'last straw' in a constructive dismissal claim did not in itself have to amount to a breach of contract. However, he held that it could not have the effect of reviving earlier breaches of contract that had been waived when the employee chose to remain in post. Ms Kaur could not therefore argue that the incident in which she alleged that she was assaulted – or any of the preceding allegations about the employer's treatment of her – were part of an overall course of conduct that undermined mutual trust and confidence.

The issue that reached the Court of Appeal was whether a 'last straw' in a constructive dismissal claim could effectively revive issues that had previously been resolved. The Court held that it could.

It was true that the normal rule in constructive dismissal is that an employee who chooses to remain following the employer's fundamental breach of contract (what is called 'affirming the contract'), loses the right to resign and claim a constructive dismissal based on that breach. However the Court held that it was possible for the last straw to 'revive' earlier breaches of contract even after the contract had been affirmed. The question was whether, taken as a whole, the employer's conduct should be regarded as amounting to a fundamental breach of the implied term of mutual trust and confidence.

The spectre this raises is of an employee raising a grievance and the employer dealing with it and considering the matter closed, only for it to be brought up again following a relatively innocuous incident months or even years later. That is an obvious concern for employers, but what has got lost in some of the commentary on this case is that the employee still lost. Despite holding that, in theory, a 'last straw' can revive a previously resolved issue, the Court held that the Tribunal judge had been entitled to strike out the case as having no reasonable prospect of success. There was nothing in the handling of the disciplinary process that could be said to have contributed to a fundamental breach of contract.

It may in theory be possible for an employee to reopen previously resolved issues in a constructive dismissal case but only if, overall, the employer's conduct amounts to a fundamental breach of trust and confidence. It is difficult to think of situations in which that would be the case. Constructive dismissal cases are hard cases for employees to win anyway - and the more time has passed the harder it will be for the employee to argue that the 'last straw' should be seen as part of the same overall course of conduct as the earlier incidents. In practice I don't think this is a case that employers need to worry about too much.

The other point to make about the case is that there was never a full hearing of the merits. The Employment Judge struck out the claim without hearing all the evidence because the claims being made had no reasonable prospect of success. That advantage of striking out a claim is supposed to be that it deals with the case quickly and efficiently. But that certainly hasn't been the result here. Three years later and the employee is still challenging the decision and trying to get permission to go to the Supreme Court.

This might be one of those cases that was always going to last years and go all the way – but I suspect that what has really egged the employee on is that her case was never properly heard. Ironically, given all of the hearings that have taken place, she has never really had her day in court. It is just possible that if the Tribunal had listened to her evidence, rather than dismiss it 'on the papers' she might have had some sense of closure despite ultimately losing.

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