Repeated extensions to a notice period do not automatically defeat a constructive dismissal claim

In *Kinch v Compassion in World Farming*, the Employment Appeal Tribunal (EAT) overturned an Employment Tribunal's decision to strike out a constructive dismissal claim. The Tribunal had said the employee "affirmed" her contract by extending her notice period several times – essentially meaning she had accepted the employer's breach of contract. However, the EAT said the Tribunal had not considered the full context of those extensions. It ruled that evidence needed to be heard before deciding whether the contract had been affirmed.

What happened in this case?

The Claimant was employed by the Respondent as its UK Financial Controller. In June 2022 she submitted a flexible working request asking to work from home due to personal circumstances. The request was rejected. On 26 August 2022, during a phone call with the Global HR Manager, she was told to return to the office for two days per week or face *"a sticky end".*

Four days later, on 30 August 2022, the Claimant resigned and agreed to serve three months' notice from home. This was more than her contractual notice period of one month and was agreed in order to support the team and allow a smooth handover. After this, two further extensions to the notice period were

agreed. During this extended notice period, the Claimant asked the Respondent to exercise its discretion to pay her occupational sick pay and also raised a grievance about the rejection of her flexible working request.

The Claimant's employment eventually terminated on 28 April 2023, some eight months after her resignation. She brought a constructive unfair dismissal claim in the Employment Tribunal, alleging there had been a repudiatory breach of the implied duty of trust and confidence, consisting of the refusal of her flexible working request and culminating in the "sticky end" comment by the Global HR Manager. She asserted that the extensions to her one-month notice period had been sought by the Respondent, save for the final extension which was at her request.

The Respondent denied that it had committed any repudiatory breach of contract but, if it had, the Claimant had accepted such breach and affirmed the contract by:

- continuing to work for them for eight months after her resignation;
- asking them to exercise their discretion to pay additional occupational sick pay to her;
- pursuing a grievance about the flexible working request after she had resigned; and
- seeking two extensions to the notice period for her own

benefit (namely, that her planned relocation overseas had been delayed).

The Respondent applied to have the claim struck out as having no reasonable prospect of success.

The Employment Tribunal considered the strike out application without a hearing. It found that the Claimant had affirmed the contract by requesting extensions to the notice period for her own benefit. It struck out the claim. The Claimant appealed to the EAT.

What was decided?

The Claimant argued that the Tribunal had been wrong to proceed on the basis that it was an agreed fact that she had sought the extensions, when this was, in fact, disputed. The Respondent resisted the appeal, arguing that the Tribunal may still strike out a claim where facts are disputed and, in any event, the core facts were not in dispute – she had worked for eight months after her resignation and had sought at least one of the extensions to the notice period.

The EAT held that the Tribunal had erred in striking out the claim. The Tribunal had proceeded on the basis that it was an undisputed fact that the Claimant had sought each of the extensions to the notice period for her own benefit. However, this was neither party's position and there was nothing before the Tribunal to justify the conclusion that the

whole of the additional seven months' notice had been requested by the Claimant and for her benefit.

In order to determine whether the Claimant had affirmed the contract it was first necessary to determine who had sought the various extensions. The Tribunal needed to hold a full hearing of the evidence on this issue, but it had not done so.

Accordingly, the strike out decision could not stand, and the case was remitted to a different Tribunal to hear evidence about the circumstances of the notice extensions.

What does this mean for employers?

This decision underlines a number of learning points for employers:

- **Don't assume giving notice rather than resigning with immediate effect means an employee cannot claim constructive dismissal**: the law is clear that employees who give notice remain entitled to claim constructive unfair dismissal, the logic being that an employee who is considerate enough to give notice should not be left worse off than one who leaves without notice.

- **Extending a notice period will not automatically mean that the departing employee has waived the repudiatory breach and affirmed the contract**:affirmation is highly fact sensitive and context dependent and requires an examination of all the circumstances of the case. Where a notice period has been extended, it will be relevant who sought the extension and why.

- **Where an extension to a notice period is agreed, keep clear and contemporaneous records**:keep accurate records detailing who sought the notice extension and why (and ask the employee to agree such records are accurate). If an employee later disputes the facts surrounding a notice extension these contemporaneous documents will undermine their position and improve the chances of succeeding in an application to strike out a constructive unfair dismissal claim.

Kinch v Compassion in World Farming

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.