Advising in Austerity
Kirwan, Samuel

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The difficulties involved in constructive dismissal claims

Constructive dismissal claims are amongst the most difficult types of cases to take to an Employment Tribunal. Such cases require high levels of knowledge; employment advisers will often argue amongst themselves about constructive dismissal cases. A substantial difficulty with any employment case is being able to secure supporting evidence. It is very rare in ET cases that someone walks in with comprehensive and complete evidence; and how do you get witnesses, people who are willing to stand up and testify against their own employer?

Constructive dismissal cases are also extremely painful for the claimant. We often find people folding at an early stage because of the stress of taking a case. On the Citizens Advice information system
there are big red warning triangles to emphasise the difficulties inherent in advancing a constructive dismissal case.

Firstly, the claimant needs to understand what the term ‘constructive dismissal’ actually means. To successfully argue that s/he has been constructively dismissed, a claimant will have to show a fundamental breach of one of the ‘express’ or ‘implied’ terms in the contract. To effectively proceed, Brian would have needed to understand the written terms of his contract of employment. These would form the basis of the ‘express’ terms of his contract. (Whilst there was an obligation on Brian’s employer to provide a written statement of the main terms and conditions of his employment, we cannot tell from the case study if he ever received these.) This creates a major obstacle for any unrepresented claimant and this obstacle becomes all the more daunting considering that Brian was severely dyslexic. If Brian had not had an experienced solicitor at the CAB to prepare his case I doubt he would have proceeded to a tribunal hearing.

Starting the advice chain

Following his resignation, and with the support of his wife, Brian sought advice from Acas. At this point, the chain of advice began, with Acas suggesting he seek a solicitor’s advice. He attended a free initial appointment with a solicitor. This begs the questions: if Brian had been a single person, and/or had not his wife been aware of the Acas service, and/or if the initial interview with the solicitor had cost him money, and/or if free advice had not been available via legal aid, would he have taken the crucial early steps he managed to take?

Brian is both vulnerable and unlikely to be able to navigate the system on his own. He was extremely lucky: his wife being aware of Acas, the timely intervention by Acas, the fact that the CAB had a solicitor – this was a postcode lottery, but luck should not be involved in providing for legal need. Brian felt a “weight lifting” when he knew he was not fighting his case alone.
Knowing your enemy

When advancing a client’s claim via the Employment Tribunal system, it is often useful to attempt to ascertain the likely mindset of the respondent (the employer), and to attempt to predict the respondent’s likely response to actions taken by the client, or by his or her representative – knowing your enemy, so to speak. Thus, had I been advising Brian on his case, I would have asked detailed questions relating to the personalities involved in the management of his employer’s business. The answers to such questions would influence the tactical direction of the case. Hypothetical scenarios may help to emphasise the point of such questions.

Scenario 1: Brian informs me that his employer has a well-structured business, with a full-time HR presence and clear and effective lines of communication between management and employees. Brian attends monthly staff meetings, and has regular formal supervision, backed up by yearly appraisal. Brian’s employer has a clear and robust anti-bullying policy, and Brian is aware of staff being dismissed for bullying previously.

In this scenario, the existence of coherent structures within the employer’s business would substantially enhance Brian’s chances of resolving his problems at an early stage, thereby serving to preserve as much goodwill as possible. In such a scenario, and time permitting, I would suggest that Brian seek to resolve his problems as informally as the circumstances will allow. If such approaches prove ineffective, I would advise Brian to escalate his approaches to his employer gradually. In this scenario, I believe it likely that the matters complained of could be effectively remedied without the need to issue proceedings.

Scenario 2: Brian informs me that his employer’s business is controlled very tightly by two people, a father and a son. There are no structures or policies in place, so far as Brian is aware. When starting work, and to date, Brian did not receive any paperwork whatsoever, and he does not receive supervision or appraisal. Both father and son are verbally aggressive and confrontational. They do not believe they need to spend time or money on HR advice.
In this scenario, as no effective internal structures exist, it is highly unlikely that Brian’s case would be resolved at an early stage. Any attempt by Brian to do so would likely lead to summary dismissal. In this scenario, therefore, if Brian intends to achieve justice, he would need to be prepared to issue proceedings and advance the case to full hearing.

In my experience, knowledge that an employer will approach any challenge in an aggressive and emotional manner can actually prove to be an advantage to the aggrieved employee. Often, aggrieved employees approach Citizens Advice with stories of mistreatment in the workplace, but with no evidence whatsoever. With the specific intention of generating evidence, we may send a polite letter to the employer. We may then receive, by return, a three-page rant which substantiates our client’s case!

In Brian’s case, it is noted that his immediate manager, and the main actor against him, is the son of the owner of the business. As Brian’s only option was to speak directly to the owner of the business in the hope of rectifying the situation, it seems likely that there was nobody within the organisation who worked in a HR capacity — indeed, most small employers do not have any HR capacity. Where there is no HR presence in a company there could be no dispassionate evaluation of what happened to Brian. At Citizens Advice we have dealt with cases where HR have been able to effectively intervene to resolve problems similar to those experienced by Brian.

The limitations of a company’s internal processes

When Brian informed the owner about what was happening to him, he was informing his employer of unacceptable activity and behaviour in the employer’s workplace. From that point in time, due to his obligations under health and safety law, and due to his obligations towards his employee under employment law, it was incumbent upon the employer to act effectively. This did not happen.

I suggest there may be a number of reasons why Brian’s approach to his employer proved ineffectual. It may be that the employer was
ignorant of his obligations under health and safety and employment law. It may be that, while aware of his obligations in these regards, the employer deliberately chose to ignore such obligations. If the employer chose to deliberately ignore his obligations, it is possible that he understood the value to him of the imbalance in power between himself and Brian, and thus proceeded on the assumption that either Brian would not act, or, if he did, the difficulties inherent in progressing a claim via the Employment Tribunal system would work in his interests, and contrary to Brian’s.

Whatever the truth of the matter, I think it is fair to assume that, as the person complained about was the employer’s son, it was highly unlikely that the employer approached the matter in an objective and neutral matter, as he is required to do. As there was no effective HR presence, there was no opportunity for Brian’s issues to be dispassionately resolved at an early stage.

The emotional damage of abuse and bullying

The manager’s actions towards Brian are described as ‘abuse’ and ‘bullying’. These terms are quite emotive, and describe actions far removed from simple differences of opinion or viewpoint as to how the relationship between Brian and his employer was operating or otherwise. From the case study, it appears that Brian’s manager did not like him.

It is my experience that, where a client is seeking advice on breach of an implied term, such as breach of trust and confidence, the client would often feel that the experience has caused them emotional damage. In the case study, Brian had worked for his employer for more than eight years. I would assume that, over the years of working profitably for the employer, Brian thought that, if a problem arose, the years of loyal service he had given would stand him in good stead. I would suspect, further, that when Brian discovered that his trust and confidence was misplaced, he was devastated.

It is also my experience that, in a significant percentage of cases, the emotional damage sustained by the employee due to mistreatment
in the workplace is often compounded by the stress involved in attempting to access justice via the Employment Tribunal system. It is to Brian’s credit that he managed to endure the stress he was obviously experiencing, and that he was ultimately successful. Unfortunately, I would suggest that Brian’s case is atypical. At Citizens Advice we regularly encounter potential claimants who decline to issue proceedings due to the stress that they anticipate they will experience. In such cases, it is often the personal characteristics of the aggrieved worker which militate against them being able to successfully navigate the Employment Tribunal process.

It is noted that, though he received excellent support from Acas and a Citizens Advice solicitor, ultimately, Brian faced the Employment Tribunal alone as a Litigant in Person. The Employment Disputes research (NSLC, 2016) shows that Litigants in Person face considerable barriers to justice when using the Employment Tribunal system. In my experience as an adviser, these barriers are faced by all unrepresented people, irrespective of their abilities or personal characteristics.

**The impact of the employer as representing himself**

In this case the employer also represented himself. If he had obtained representation, the outcome may well have been different. Indeed, when I read this case study I was amazed that Brian got where he did. He was unable to provide a detailed account of abuse. If the employer had had a legal representative s/he would have torn Brian apart, making him look like a liar. There was no cross-examination of the employer by Brian – here a legal representative would have won or lost the case. As the respondent did not have a lawyer Brain was not subject to threats of the employer’s legal costs been awarded against him – many claimants are put off from pursuing a claim because of such a threat.

The employer did not engage in any of the dispute resolution mechanisms. It is unlikely that this was because he was stupid. More likely he thought that there was nothing that Brain would do, and the chances were that the claim would fall away without the employer doing anything – and statistically he would have been right. But in
this case the CAB paperwork must have been amazing. Reading between the lines, the employer’s aggressive approach probably made the judge realise that Brian’s case was valid – that the employer was abusive and bullying.

**The use of Alternative Dispute Resolution**

Citizens Advices believe it to be imperative, in many cases, to consider Alternative Dispute Resolution (ADR) mechanisms at the earliest opportunity with a view to resolving workplace disputes in a timely fashion. We have found this approach to have a number of advantages. Successful resolution of potential claims via ADR frees the potential claimant from the rigours of the Employment Tribunal system as it currently stands, and saves the Exchequer the expense of funding such litigation. In certain cases, the use of ADR can serve to resolve disputes between employers and employees whilst preserving goodwill, thereby maximising the chances that the employee will remain in employment. Unfortunately, there are cases, such as Brian’s, where ADR attempts may prove fruitless. It is likely that in Brian’s case, any attempt at ADR would likely have been treated with contempt. Should his employer have so dismissed any attempt at ADR, under the current system, he could have done so without any negative consequences to his business. We believe that there is force to the argument that, in such cases, increased statutory regulation should lead to sanctions against errant employers (or employees), if it is adjudged that they acted unreasonably during an ADR process. We believe, further, that resources should be made available to organisations such as Citizens Advice to provide a comprehensive and effective ADR structure on a national basis, working in a timely fashion, and at a grassroots level.