



EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Levin
Respondent: Andros UK Ltd

HELD AT: Leeds
ON: Tuesday 13 June
2017, Wednesday
14 June 2017 and
Thursday 15 June
2017

BEFORE: Employment Judge Rogerson
Members: Mr Q Shah
Mr W G Appleyard

REPRESENTATION:

Claimant: Mr S Pallo of Counsel
Respondent: Mrs C Moolenschot Consultant

JUDGMENT

1. The complaint of constructive unfair dismissal fails and is dismissed.
2. The complaint of direct sex discrimination made pursuant to section 13 of the Equality Act 2010 fails and is dismissed.
3. The complaint of breach of contract (failure to pay notice pay) fails and is dismissed.

REASONS

The Issues

1. The issues were clarified and agreed between the parties at the beginning of the case.
2. For the complaint of constructive unfair dismissal the claimant relies on a breach by the employer of the implied term of trust and confidence as a result of which she resigned from her employment on 5 August 2016. The acts/failures to act

relied upon are: weekend working; the advertisement of her role; the manner in which the Respondent dealt with her illness and sick pay.

3. The Tribunal would determine the facts in relation to those matters and decide whether the Respondent had reasonable and proper cause for its conduct in relation to those acts/failures. If not, was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence? If the Claimant has shown a fundamental breach of the implied term did she affirm the breach and if not did she resign as a result of the breach or for some other reason (the causation question). The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it any longer. The claim for notice pay overlaps with the constructive dismissal because if respondents had fundamentally breached her contract any loss from the date of her resignation was recoverable in the compensatory award.
4. In relation to the direct sex discrimination complaint the alleged act of less favourable treatment relied upon is particularised as "holding a joint meeting with Paul Dickerson and Dan Shaw on 10 June 2016 from which they emerged with contracts of employment confirming their rights to claim their travel costs in full from the Respondent which also suggested prior consideration of their circumstances in contrast to the Claimant". The burden of proof provisions apply to that complaint (section 136 of the Equality Act 2010) and it is for the Claimant to provide evidence of facts from which the Tribunal could conclude that the alleged less favourable treatment took place. It is only if a prima facie case is established that we look to the Respondent to provide a non discriminatory explanation for its treatment. Alternatively put the Tribunal would have to decide whether there was any alleged less favourable treatment. If there was, what was the reason for that treatment, was it the Claimant's sex?
5. In relation to the findings of fact we heard evidence for the Claimant from the Claimant and from her husband Rick Leven. For the Respondent we heard evidence from Jill Philpott the HR manager, Mr Cedric Amadiou who is the Operations Manager and Claimant's line manager and Mr Jean Louet, Managing Director. We also saw documents from an agreed bundle of documents. The facts that were not in dispute were as follows:
 - 4.1. The Claimant commenced her employment with the Respondent on 15 June 2009 initially in the role of sales administrator. She was promoted on 1 September 2013 into the role of Customer Services Manager. The Claimant was considered to be a 'key' individual in the Respondent's organisation.
 - 4.2. The Respondent is a wholly own subsidiary of a French company which manufactures fruit and dairy products and employs approximately 200 employees in the UK. It has a dedicated human resource function to support managers, as confirmed by the evidence of Miss Phillpot. She as a HR officer also has access to legal support services when required.
 - 4.3. Prior to the resignation which results in this complaint, the Claimant had resigned on three occasions previously. In August 2014 she resigned because she was re-locating to Doncaster because of her husband's move to that area. He had been an employee of the

Respondent prior to the move. For that resignation the Claimant was persuaded by Mr Amadiou (her line manager) not to resign and she was offered a home working agreement. There was no formal agreement made with her at the time but the arrangement was that she would work four days at home and then spend one day travelling to St Ives where the head office was located. That involved her driving a distance of 212 miles from her home which involved a two hour car journey which was manageable.

- 4.4. Importantly in the chronology of previous events and resignations the Claimant states at paragraph 23 of her witness statement that none of her previous resignations were because she believed the Respondent had fundamentally breached her contract of employment.
5. In relation to the chronology of events that is relevant to the resignation in August 2016, our findings are as follows.
 - 5.1. The head office of the Respondent was based at St Ives in Cambridgeshire and in May 2016 the Respondent announced its plan to move the head office to Hammersmith in London.
 - 5.2. The Claimant was informed of this fact by Mr Louet on 10 May 2016. He told her about the company's plans to re-locate. In contrast to other employees the impact of this move on the Claimant was less significant because since 2014 she had been home-working for the majority of her working time.
 - 5.3. The Claimant received a letter dated 13 May 2016 confirming the discussion and that the move was planned for September 2016. The business rationale for the move was not challenged and it was made clear to her that "*as you are already home based this does not have a significant impact on you*". However, the Respondent wanted to take the opportunity of formalising the home working agreement which would now have a much wider impact and would affect more individuals in the commercial team because of the relocation.
 - 5.4. A draft home working agreement was sent to the Claimant with the intention that she would review and consider it before the next meeting planned on 19 May 2016. The Claimant said she took some advice about the agreement from the Citizens Advice Bureau.
 - 5.5. In her witness statement she describes it as a 'new contract of employment'. Her concern was that previously there had been no formalised agreement and now there was one and she felt that the new agreement didn't make things clear regarding her expenses following the move.
 - 5.6. A meeting did take place on 19 May between the Claimant, Cedric Amadiou and Jill Philpott. The meeting summarised the issues that the Claimant was concerned about and confirmed to her that travel costs would be paid up front, that performance was not an issue as far as either Mrs Philpott or Mr Amadiou were concerned. Mrs Philpott reassured the Claimant that where the agreement talked about 'termination' an example of the sought of circumstances where it might apply was given to reassure her. That example was "an employee who is found to be out socialising with friends when they should have been

working". That situation may result in disciplinary action and the home working arrangement being terminated. That example however is preceded by Mrs Philpott explaining to the Claimant that the company would not be using this as a way of dismissing her from the business and states that "was certainly not the case". She tells the Claimant that the company valued her position as a customer services manager.

- 5.7. Additionally Mr Amadiou told the Claimant that he had no issues with her performance and she should not be concerned. The Claimant was therefore reassured at the meeting on 19 May that the clause was not referring to any issues that might relate to her or should concern her. There was also a discussion about weekend working which the Claimant did as part of a rota as part of her role. She is told that the plan was that new people would be recruited who would as part of their job description have responsibility for weekend cover which would reduce the frequency of the Claimant and others having to do so. Once those recruits were in place an agreement about weekend working would be formalised and the Claimant would have confirmation in writing sent to her.
- 5.8. The meeting provided the Claimant with an opportunity to discuss those concerns and her concerns were properly addressed.
- 5.9. On 9 June 2016, a letter was sent to the Claimant confirming the points discussed at the meetings on 19 May and 25 May to provide further reassurance. The letter confirms that the Claimant is only required to be at the London Hammersmith office once every fortnight (compared to her previous requirement to travel once a week). She is told that the travel costs would be paid 'up front' by the company. She is told that there would be expenses paid of £216 paid at £18 per month. She is provided with a copy of the company handbook and she is told that the opportunity of formalising the weekend cover is in hand and arrangements would be confirmed. She is also told that there was no requirement to inform her house insurers that she was home based. The Claimant is also provided with a new copy of the home working agreement to review, sign and return.
- 5.10. Changes were made to the Claimant's home working agreement to address her concerns. For example in relation to travel. The agreement is amended to confirm that the company will pay for parking and all train travel and that this will be paid up front. She is told that the allowance of £216 is per annum and will be reviewed annually. The termination provisions are unchanged but the Claimant has now had the reassurance that there was no intention to use this to get rid of her and is told expressly there were no concerns about her performance. The Claimant had been given all the reassurance possible by this point in time.
- 5.11. The Claimant alleges that on 10 June there was a joint meeting that took place between Dan Shaw and Paul Dickerson and Jill Philpott and Cedric Amadiou. She believes they had a joint meeting because a third party had told her that was the case. We had in contrast the direct evidence of Jill Philpott and Cedric Amadiou the attendees at that meeting and we preferred and accepted their evidence that the

meetings were individual meetings. There was no reason to have a joint meeting when the meetings were all about consulting with individuals about their individual circumstances following the relocation. The outcomes of those consultations would differ depending on what their consequences/concerns were because of the head office relocation.

- 5.12. The Claimant in cross examination used the apt phrase to describe what happened was they were “not comparing apples with apples”. That reflects the fact that the circumstances of each individual would be different and therefore the consequences of their consultations would be different.
- 5.13. Dan Shaw was re-locating to Hammersmith and the Respondent was interested in making sure that he had an equivalent package if he moved in terms of finding equivalent accommodation to rent. This meant he was not put into any more favourable or less favourable position as a result of relocating. The Claimant was not relocating to London and her circumstances were materially different to Dan Shaw.
- 5.14. Mr Dickerson was interested in a home working arrangement of working three days from home and two days in the office. In contrast the Claimant was only attending the office once a fortnight. She also had the right as he did to claim upfront travel costs. The documents we saw show that no final agreement was signed by him until 2 August 2016. Therefore it wasn't possible that “he emerged out of the meeting on 10 June with a contract of employment finalising his arrangement”.
- 5.15. We do not find there was any less favourable treatment of the Claimant because there was no joint meeting or because of outcomes of those meetings. Her complaint of less favourable treatment by “holding a joint meeting with Paul Dickerson and Dan Shaw on 10 June 2016 from which they emerged with contracts of employment confirming their rights to claim their travel costs in full from the Respondent which also suggested prior consideration of their circumstances in contrast to the Claimant” is not made out on the facts. The Claimant has failed to establish less favourable treatment and has not made a no prima facie case of sex discrimination, therefore that complaint fails and is dismissed.
- 5.16. The next event the Claimant relies upon as an alleged breach of the implied term of trust and confidence is that her role was advertised. She refers in her witness statement to the fact that on 4 June 2016 she came across an advert which she thought was advertising her role. The job role advertised was ‘Assistant Supply Manager’. That is a different role to the Claimant's role. It involved deputising for Mr Amadiou when he was absent and therefore involved significantly more responsibility than the Claimant held. Unfortunately with that role and in error, the recruitment agency had attached the Claimant's job description. It clearly didn't match the responsibilities of that role advertised which would have been apparent to the Claimant. Even if it wasn't apparent on that date as soon as she questioned this, Mrs Philpott identified the error that had been made. She was expressly told that it was not her role it was a different role that was being

advertised. Mr Amadiou also confirmed this to the Claimant. Any suspicion based on the incorrect job description being provided was cleared up. Why would the Respondent want to lose the Claimant who was critical to the team and advertise her role? They were having meetings to try and reassure her and were telling her there were no issues or performance concerns. It was clear to us that the Claimant was a valued and vital part of the company. She had seven years knowledge and experience. There was no evidence to suggest that the Respondent wanted to replace her in fact the opposite, they did not want to lose her.

- 5.17. On 17 June 2016 the Claimant was absent from work. She did make contact at that time with Mr Louet's PA who was told the Claimant was suffering with headaches, pain in the neck and back.
- 5.18. The Claimant had a copy of the handbook which made it clear exactly what the notification requirements were for any sickness absence. Where the sickness is medically certified employees should contact the manager weekly. Employees are warned of the consequence. "Failure to comply may result in sickness benefit being withheld or not paid". The company sick pay is at page 65. It is paid "at the company's absolute discretion" and is a payment if made in addition to statutory sick pay. The Claimant accepted in cross-examination that she understood and knew what the procedures and policies expected of her in relation to the reporting her sickness absence. She knew of the consequence of a failure to contact her manager. This requirement had been explained to her by the Mrs Philpott on more than one occasion.
- 5.19. The Claimant then provided a fit note covering the two week period 20 June to 4 July 2016 which refers to "stress at work".
- 5.20. On 22 June 2016 (page 190) Mrs Philpott sent a letter to the Claimant. The Claimant at paragraph 44 of her witness statement complains that the tone of the letter sent suggested that Mrs Philpott didn't believe her and this left her with no option but to raise a grievance.
- 5.21. Mrs Philpott denies that her letter was intended to be sceptical or show disdain for the Claimant's sickness absence and we read that letter in the context of the surrounding circumstances and the discussions the Claimant had prior to this that we have referred to. The letter says "*I was sorry to hear you are unwell due to stress at work*". "*I was surprised to receive the doctor's certificate and the reason why you were unfit for work in the context that we had not picked up any indication that you were stressed or unhappy at work for any reason*". "*We are keen to understand the reason why work is causing you stress and to support and help you both in returning to work and once you are back at work*". "*We might be able to help you to speed your recovery and facilitate a successful return work*".
- 5.22. In the letter Mrs Philpott explains the purpose of an occupational health referral. She reassures the Claimant that the occupational health individual is not employed by the Respondent but is self employed and any discussion would be confidential. Mrs Philpott whilst sympathetic to the Claimant's condition stresses in her letter the importance of the

Claimant understanding her obligations as an employee by “following the company procedure by making personal contact by phone rather than via text or email”. She reminds the Claimant that the requirement is to contact her manager weekly. At the end of the letter says “as a valued member of the team I am therefore asking you to contact Cedric as soon as possible by phone. This doesn’t need to be a long conversation but we feel it is important to keep in touch and talk to you about your absence. If Cedric is not immediately available when you ring please ring and leave a voicemail and he will call you back as soon as he can. Alternatively if you prefer you can in this instance contact me instead”. She provides the Claimant her contact number.

- 5.23. The words used and the tone of the letter is not sceptical or treating the Claimant’s absence with disdain. As a HR manager with responsibility for managing the company’s sickness absence procedure Mrs Philpott was doing exactly what she was expected to do. She was reminding the Claimant what she was expected to do to comply with the policy. In doing so she was acting in a reasonable and proper manner. We did not find that there was the tone or language used was improper.
- 5.24. In relation to the ‘length of the call’ that the Claimant was expected to make Mrs Philpott said the purpose of the call was just to inform the manager of the absence and have some direct contact. It could be two minutes or even less and if the Claimant had made the attempt but found it difficult that would have been taken on board by the company in making its decisions. The Claimant didn’t make any attempt to contact Mr Amadiou or to contact Mrs Philpott although these alternatives were offered outside of the company policy.
- 5.25. On 22 June 2016, a draft letter was prepared by Mrs Philpott to explain what was happening in relation to weekend cover. It is accepted that letter was not sent to the Claimant but it confirms what the company was trying to do in relation to weekend cover as had been discussed with the Claimant. The Respondent was trying to recruit two individuals and it was making an offer of an annual payment of £600 and one day off in lieu, to those individuals who were on call at weekends.
- 5.26. On 27 June 2016 Occupational Health attempted to contact the Claimant and left her a message. Mrs Philpott had planned for the Claimant to speak to occupational health on 29 June 2016. Instead on that day the Claimant put in her grievance.
- 5.27. The Claimant raises six points of grievances which are at page 198. Those points of grievance were acknowledged by Mr Louet in his letter to the Claimant on 4 July 2016. At that stage and before any meeting he decides to reassure the Claimant about two of the points that she has made. He writes

“I hope I will reduce your stress by addressing two of the main points in your letter.

(1) It has always been the expressed intention for the company to pay for your travel cost to the London office. As you actually mention in your letter the plan is for these costs to be paid upfront by

Andros so that you do not have to be out of pocket while waiting to claim these travel costs as expenses. The £216 mentioned is in respect of you working at home so it is an additional payment we are offering as part of formalising the company's working from home arrangements. This has nothing to do with travel expenses.

(2) There is absolutely no intention to replace you or make you redundant. Our view is that the head office move has very little impact on your job which will continue as it was before. I hope this goes some way to reassuring you and hope that you will be better soon so that we can meet to go through all your points fully. I am confident that we can resolve them”.

- 5.28. The second letter that the Claimant receives from Mrs Philpott on 13 July reminds the Claimant of the need to follow the sickness reporting procedures because she had failed to do so. It also reminds her of the consequences and the importance of contacting occupational health. In this letter the Claimant is told she can speak to Mrs Philpott, Cedric or to Mr Louet regarding the absence. There are now three clear options for the Claimant which widens the scope of the policy and gives the Claimant a way of avoiding the consequences of failure.
- 5.29. On 22 July a grievance meeting took place between the Claimant and Jean Louet. We accepted the evidence of Mr Louet that this was a positive meeting. He left with the impression that matters had been resolved and the Claimant would return back to work and he told her at the end of the meeting that if she was unhappy she could appeal to an independent officer within five days of that grievance meeting.
- 5.30. The Claimant says that at the end of the meeting he instructed her to have the following week off which was the week commencing 25 July as paid leave and to return to work after that if she was well enough. He denied saying that and we had the minutes of that meeting which do not say that the Claimant was entitled to one week's unpaid absence leave following 25 June. We do not accept the suggestion that the minutes can be interpreted in that way. The minutes state *“I'll write to you with the outcome week commencing 25th and hope/ wish that you'll be back at work”*. They do not put the case in the way the Claimant puts *“of a week's paid leave offered on 22 July”*. The expectation was that when the Claimant's fit note expired on 24th that she would either attend work on the 25th or provide a further fit note. The Claimant did not attend work or contact anyone at the company on 25 or 26 July 2016.
- 5.31. As a consequence on 26 July 2016 Mrs Philpott wrote to the Claimant suspending the company sick pay. That action is relied upon by the Claimant as the 'last straw' which led to her resignation.
- 5.32. In her letter Mrs Philpott refers to the previous letters that she had written on 22 June and 13 July. She points out that the Claimant's sick note had expired. She had already advised the Claimant that if she felt unable to speak to Cedric she could speak to others and points out that that during the five weeks of the Claimant's absence she had failed to engage with the company and had not spoken to either Cedric, Jean or

Mrs Philpott regarding the absence. That was true. The Claimant had not spoken to any of those individuals and the consequences of the failure to comply with the company policy had already been drawn to her attention, she understood what was required and the requirements were reasonable. The company policy and procedure entitles the company to suspend the company sick pay. Mrs Philpott and Mr Louet made the decision to suspend the company sick pay from 1 July 2016.

- 5.33. The Claimant would continue to receive statutory sick pay. Importantly Mrs Philpott makes it clear in her letter that *“we will review the situation once we have received the occupational health report and you have spoken to either Jean or Cedric regarding your absence”*. She ends the letter: *“whilst we’re sympathetic to your condition we must stress the importance of you understanding your obligations as an employee and following the standards set out in the company procedures”*.
- 5.34. The letter should not have come as a surprise to the Claimant given the warnings that she had previously been given. It was reasonable and proper for the Respondent to write in those terms having attempted to draw to the Claimant’s attention her failure and offering her alternative people to contact to report her absence.
- 5.35. On 5 August 2016, in response to that letter the Claimant resigned without notice. Her resignation letter is at page 222 in the bundle. The first substantive paragraph giving any details of the reason why she has resigned refers to the £216 a year ‘not being enough’ to cover her expense for working from home. That issue had not been raised in the Claimant’s grievance letter.
- 5.36. Another area of her letter which does not accurately reflect the discussions that had taken place is where the Claimant states *“I was shot down with threats of unsubstantiated allegations of gross misconduct”*. She was referring to the example given by Mrs Philpott at the meeting on 19 May which was not the Claimant being shot down with threats of unsubstantiated allegations of gross misconduct. We have already set out the context in which the example was given. It was not an allegation of gross misconduct directed at the Claimant. In fact it was the opposite because the Claimant was told that there were no issues regarding her performance.
- 5.37. Similarly, the Claimant’s perception that the role of occupational health was *“a tool suggesting her illness was disingenuous”* was not supported by the evidence of the explanations given at the time. The Claimant has described events in a way unsupported by the evidence. Her perception of the facts was not based on the reality of what happened at the time.
- 5.38. Mr Louet wrote to the Claimant after her resignation and asked her to reconsider her decision, a measure of how highly he valued her. In his letter he states *“with over 7 years experience at Andros during which you have gained considerable knowledge and skills you have been a valued member of staff and it has always been our intention to support you back to work. I am still happy to meet to see if we can resolve your concerns if you are happy to do so. If so please let me know and we will make the necessary arrangements”*.

- 5.39. The Claimant still had the opportunity at that stage after resigning to reconsider her position but she had made up her mind for her own personal reasons to end the employment relationship.
- 5.40. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it any longer. Based on our findings of fact we did not find that the Respondent had breached the implied term of mutual trust and confidence. They had reasonable and proper cause in relation to the weekend working arrangement they were making; the advertisement of a different role; and the manner in which the Respondent dealt with her illness and sick pay. The claimant was not resigning in circumstances where she was entitled to resign by reason of the employers conduct and treat herself as dismissed in accordance with section 95(c) of the Employment Rights Act 1996. She was not dismissed and her complaint of unfair dismissal fails and is dismissed.
- 5.41. She was not entitled to claim (notice pay) damages for breach of contract because she voluntarily resigned and there was no breach of contract by the employer. That complaint also fails and is dismissed.
- 5.42. Her complaint of direct discrimination also fails and is dismissed for the reasons explained earlier in the judgement.

Employment Judge Rogerson
Date: 06 July 2017