Case Number: 3323911/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Fleming	**v**	**Loans Warehouse Limited**

Heard at: Watford **On**: 24 & 25 July 2017

Before: Employment Judge R Lewis

Appearances

For the Claimant: Ms M Lee, FRU
For the Respondent: Mr J Demenza, Consultant

JUDGMENT

1. The claimant was not dismissed by the respondent and her complaint of unfair constructive dismissal fails.

2. The claimant's claims for breach of contract and unlawful deductions, whether in relation to notice pay or her training agreement, fail and are dismissed.

3. By consent, the claimant's claim for holiday pay is upheld and the respondent is ordered to pay to her the agreed net sum of £95.53.

4. No order is made under Rule 76(4) of the Employment Tribunal Rules of Procedure 2013 for the respondent to pay any part of the fee incurred in bringing these claims. The claimant is entitled to a refund from HMCTS of any fees incurred following the Supreme Court's judgment dated 26 July 2017 in R (Unison) v. Lord Chancellor [2017] UKSC 51. Details of how this refund will be paid will be confirmed by HMCTS in due course.

REASONS

1. This was the hearing of a claim which the claimant presented on 3 April 2017. The claim was primarily for unfair dismissal and breach of contract, and there was also a claim for holiday pay. Day A was 29 December 2016 and Day B was 10 February 2017.

2. The case was listed to be heard for one day when originally served, and by letter of 21 June 2017 the tribunal extended the listing to three days.

3. There was an agreed bundle of some 150 pages, to which the parties made late additions.

4. There was a lengthy witness statement from the claimant, and in addition to giving evidence, she called her former colleague, Ms Clare Cook. The claimant also produced statements from other former colleagues who did not attend, Mr Martin Woolhead and Mr Daniel Elliott, which I read in the absence of the witnesses. I was not prepared to accept as witness evidence screenshots of WhatsApp or text messages. The respondent called two witnesses, who were the two directors and each 50% owner of the respondent, Mr Sam Busfield and Mr Matt Tristram.

5. I was most grateful to both representatives for a focused hearing, as a result of which I was able to give judgment on the second listed day.

6. I preface my findings of fact with the general observation that as is not unusual in the work of the tribunal, I heard evidence about a much wider range of issues than I decided, some of it in much greater depth than I decided. Where I heard about a matter which is not referred to in this judgment, or where I discuss an issue, but not to the depth of which I heard, that should not be taken as oversight or omission but is a reflection of the extent to which the matter was of assistance.

. **Findings of fact**

7. I find as follows:-

    7.1 The respondent, a company owned 50/50 by the two directors, is in the business broadly of arranging mortgages and has operated since 2006.

    7.2 The claimant, who was born in 1962, had worked in the same industry before about 2008, when she had been made redundant. She joined the respondent in 2014. She was an able and proficient worker.

    7.3 By 2015/2016 the respondent employed about 40 people. All except Mr Tristram and Mr Busfield shared a single open plan office space, and in the course of a working day large number of them used the telephone. Mr Tristram and Mr Busfield worked in glass fronted closed offices, from which they could see the open plan space. It was in its nature a noisy workplace, to which was added occasionally the background noise of a radio (the claimant mentioned that her desk was close to one of the speakers).

7.4 The parties were aware that the industry was about to undergo significant change, through in February 2016 becoming subject to the regulation of the FCA, which would lead to operational changes, including the requirement, to be imposed within a further 30 months (ie August 2018) that all mortgage advisors hold an independent professional accreditation/qualification.

7.5 The bundle contained three items of email correspondence between March and May 2015. I find that these showed that the claimant made mistakes on points which the directors regarded as important. They were no more than indicators of the importance which the respondent applied to standards of work. The respondent did not apply the same professional standards to the language used in such email by, in particular, Mr Tristram.

7.6 In October 2015 the claimant, along with every other member of the sales team, was the subject of disciplinary action, and received a written warning [86-88] for failure to follow a required sales script and failure to give regulatory information.

7.7 I take these items, from March to October 2015, as indications of the seriousness which the respondent applied to the wider industry standards, and of the concern in particular about the arrival of the regulatory framework.

7.8 In preparation for the regulatory framework, the members of the sales team who did not have the appropriate professional qualification agreed to be trained, and each signed an agreement (85) to reimburse the respondent for the costs of training fees. The claimant underwent training in the mandatory professional topics, and did exams in November 2015, which she failed, and then re-sat.

7.9 Mr Tristram made what sounded like a well made comment about this in evidence. He said that as the claimant had much longer experience in the industry, she struggled with change, and had more to “unlearn” (his word) than her less experienced colleagues. That was a thoughtful piece of evidence, describing one of the difficulties which the claimant came to face.

7.10 The position by March 2016 was that the claimant was in an inherently stressful environment. I say that for a number of reasons. First, the work which she undertook was in part repetitive and formulaic. Secondly, it was driven by money targets, which were inherently open and competitive. Thirdly, she was working in an open plan office, which allowed for no personal privacy. Fourthly, a large amount of her work was telephone work, which was recorded, and was liable to be listened to either in real time or later by management; and finally the workplace was noisy. In addition to all of those factors came the awareness of the importance of external regulation and compliance with its requirements, knowledge of having sat and failed

the professional exams, and possibly the concern that in the medium term, ie by August 2018 failure to pass the exams could have an impact both on the security of her job, and on employability within the wider industry.

7.11 These stress factors were increased by aspects of Mr Tristram's ways of working. Mr Tristram's evidence was that the sales floor was within his line of vision, so staff worked with the knowledge of a form of open surveillance by their employer. He had the opportunity, as staff knew, to listen to their telephone conversations, either in real time or by playing back recordings. Another of his techniques was to walk the sales floor, and if he overheard a live conversation of which he disapproved, or from which something was missing, he might intervene in the conversation. If he needed to attract the attention of an individual employee, it was often necessary for him to raise his voice, and sometimes to shout. As Ms Lee very fairly put it, there was no objection on the claimant's side as such to Mr Tristram raising his voice or even shouting if work required it.

7.12 The claimant was experienced and she was a strong personality. Mr Tristram gave evidence that she was "a character" and that he liked working with people whom he described as a character. When asked to give an illustration of what he meant, he found it difficult, but commented that the claimant referred to everyone else or spoke to everyone else as "baby doll". He also said that the claimant did not like to be criticised in any respect.

7.13 The claimant had no complaint of any matter before May 2016. She complained, in a grievance after leaving her employment, and in her claim form and again in her witness statement of events in the period after May 2016. She asserted that her working relationship with Mr Tristram had deteriorated after then, a matter which she attributed to an event at an office outing in about spring 2016, when, it was said, a female colleague had complained that the claimant was a bully who did not like her. The sting of her argument was that Mr Tristram wished to retaliate against the claimant for the harm or hurt apparently visited on the female colleague.

7.14 I accept that there was an incident at an office social event in about April 2016 between the claimant and a female colleague who had had too much to drink. On her own account, the claimant's response to the colleague was less than sympathetic.

7.15 I do not accept that Mr Tristram's view of the claimant was tainted or influenced against her by this event. Mr Tristram did not seem to me likely to take sides in a dispute between two colleagues, or likely to take the risk of antagonising a good performer such as the claimant by doing so.

7.16 The claimant's case, as set out in her grievance, claim form and witness statement, referred to events between May and November 2016 in language which was generalised. She complained of daily bullying and harassment; she complained that Mr Tristram repeatedly shouted at her, did so in a humiliating manner on a daily basis, singled her out and such like. Her complaint was that he criticised her unfairly or inappropriately when she had done nothing wrong, and that his tone was intended to add to her stress and humiliation. She also said that at times he simply ignored her.

7.17 I reject that evidence in the generalised form in which it was given, precisely because it was generalised. The evidence consisted of generalities and assertions, to which Mr Tristram could not fairly reply, save by general denial. However, that is in part a legalistic response.

7.18 The real difficulty of the claimant's case was that if the events took place as described, and making every allowance for the claimant's inexperience in the tribunal, I would expect there to be, in the evidence, something which would link an allegation with a specific, such as a customer, date, event or other distinguishing characteristic. Save for the matter to which I now turn, there was no such evidence.

7.19 The one specific exception was what came to be known in this hearing as the teacher incident. This took place in September 2016. The claimant gave robust evidence which I accept in part. Mr Tristram's and Mr Busfield's evidence was that they had no real recollection of the incident and had not known of the incident until after Christmas 2016 when they received the claimant's grievance. I accept the truth of that evidence and I find as follows.

7.20 On the day in September 2016 Mr Tristram overheard the claimant tell a customer, a schoolteacher, that a diary slot had become available for the customer to have an appointment the next day. The claimant said this because in previous conversations with the teacher, attempts had been made to fix an appointment, which had been unsuccessful, and they had left matters on the understanding that they would speak again if there was a cancellation, which there was. The claimant's purpose in the conversation therefore was to tell the teacher that there had been a cancellation.

7.21 Mr Tristram did not know about the previous conversation. What he heard was the claimant telling a customer that the respondent would see the customer when it suited the respondent, whereas the rule in the business was the other way round: customers would be seen when suited them. He intervened in the conversation, at volume, for that reason.

7.22 I accept that there was such a conversation and such an intervention. I cannot fault Mr Tristram for the intervention, because he thought

(wrongly on the claimant's account) that he had overheard a clear breach of the respondent's rules and systems. (In fairness to the respondent I should add that my understanding is that even if the claimant's account had been accepted, it would still have constituted a breach of the respondent's procedures).

7.23 The second stage on the same day was a meeting between the claimant and Mr Tristram which I accept took place. I find that Mr Tristram put to the claimant what he had heard and what he thought was wrong. In reply, the claimant rolled her eyes. (There was some disagreement as to whether she had in fact raised her eyebrows, or indeed done both. The detail does not matter: what matters is that by a form of clear body language, the claimant made clear her rejection of what was being said to her). Mr Tristram's general evidence was that when given criticism that she did not want or like, the claimant sometimes rolled her eyes and looked away, and that he had in the past asked her not to do so. I accept that the claimant had done so in the past and that she did so on this occasion.

7.24 The claimant's version was that when she had done so, Mr Tristram raised his voice and in a threatening tone told her that if she ever did that again he would "march her out" of the office whatever the consequences. Mr Tristram denied this, saying that that was not a phrase that he would use. I accept his denial. I accept that in general Mr Tristram was aware of the potential impact of his interventions in the claimant's work and the work of other colleagues, and that he sought to deal with them as discrete incidents without blowing them up out of all proportion.

7.25 Again, it is impossible to fault how Mr Tristram managed the situation. He gave the claimant appropriate criticism as he understood it, and used professional language to do so. I do not accept that he used the phrase "march out".

7.26 The third stage of the same incident was that the claimant has said that she had a further meeting with Mr Tristram later in the day, which she set out at paragraphs 27 and 28 of her witness statement, in which she stated that she asked Mr Tristram why it had all gone wrong for them, and he had referred back to the incident the previous April. I reject that account because I do not accept that the incident with the crying colleague was in fact a material factor in working relations between the claimant and Mr Tristram. I accept that there was discussion of "drawing a line" or some such phrase because I accept Mr Tristram's evidence that that was a phrase he often used. He used that phrase to indicate that a particular issue was closed and need not be taken any further and I accept that he did so on that occasion. It is, again, impossible to fault him for that response.

7.27 It follows that I can attach no weight in the claim of constructive dismissal to the teacher incident, which, I repeat, was the sole

specific, identifiable factual event relied on by the claimant in support of her claim of constructive dismissal.

7.28 The claimant gave evidence that in late September or early October 2016 Mr Tristram made sarcastic reference to their being friends again. Mr Tristram agreed that he had used the phrase, that he used it more than on those occasions and that it referred in part to the moodiness of the claimant (a characteristic which she shared with other colleagues). While it might have been an imprudent phrase to use, I can, in the context of my other findings, attach no more weight to it than that. I accept that the claimant had heard Mr Tristram use the same or similar form of words in other contexts to other people. She therefore knew that she was not, in that respect, being singled out.

7.29 The claimant's evidence written evidence was that she began looking for another job in response to the events set out above, ie in late September or early October. Her oral evidence was that she began looking in July. There was no documentary evidence either way. In the event, she remained in employment until she had found a new job (at slightly less pay, in a recruitment company), and resigned by letter dated 16 November, giving four weeks notice. She worked until 29 November, for which she was paid in full, and was then on sick leave until expire of her notice on 16 December, for which period she was paid SSP. The responded withheld from her final payments a sum in respect of the training fees which had been incurred in September 2015.

Repayment

8. In preparation for the new regulatory framework, referred to above, the claimant and her sales team colleagues required to undergo training. On 17 September 2015 the claimant signed an agreement [85] to reimburse the training fees incurred by the respondent, on a sliding scale if she left the respondent within two years of completing the training. The claimant in evidence stated that she had no time to read or consider what she signed. I do not find that her free will was overborne. At the time of signing she had no expectation of leaving the respondent and on the contrary she understood that completing the training successfully was a pre-condition of remaining in employment.

9. I do not accept Ms Lee's submission that there was no evidence of the actual training costs. I accept that the training cost invoice, at [115] and [116], showed training costs attributable to the claimant at £1807.00, of which her repayable amount was £1800.00. In so saying, I notice that when the claimant signed the agreement in September, it could not have been foreseen that she would fail the exams in November and thereby incur the costs of a re-sit.

10. Ms Lee invited me to set aside the agreement on the grounds that the respondent had repudiated its contractual relationship. I disagree that it had and the matter does not arise. I also disagree that the repayment provision was unenforceable through being penal and disproportionate. On the contrary, it was an agreement for staged reimbursement, of a type which is commonplace in the employment setting.

11. The claimant claimed that the respondent made an unlawful deduction, alternatively was in breach of contract, by deducting a proportion of the training costs from her final pay. That claim fails because in my judgment the deduction from the claimant's final pay in respect of training fees was properly made for the purposes of s.13 of the Employment Rights Act, ie in accordance with prior written consent. As a claim for breach of contract it must fail because I find that the contract was properly in place and enforceable.

Holiday pay

12. It is of no credit to the respondent that on the first day of hearing it conceded that there was an undisclosed spreadsheet showing the claimant's holiday entitlement for 2016. That was disclosed overnight, such that the representatives were able to agree the outstanding amount of holiday, and the sum payable, on the second morning of the hearing. This was a purely mathematical exercise, on which the respondent had always had all the information needed, and which could have been resolved long ago.

Notice pay

13. The claimant put forward an ingenious submission. The claimant had written on 16 November 2016 [101] as follows:

> "I would like you to take this letter as laid down in my contract, my formal one month's notice to terminate my employment… My last working day will be Friday 16 December."

14. The claimant worked and was paid as normal to 29 November [102] and was then signed off sick.

15. According to s.86(2) ERA 1996 the claimant was required to give one week's notice of termination of the contract. S.87(2) provides that the claimant had the protection of ss.88-91. S.88(1)(b) provides that: "If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal hours the employee is incapable of work because of sickness or injury, the employer is liable to pay the employee" in effect the normal pay for that period.

16. The question which therefore presented was this. As the claimant gave notice on 16 November she was after that working her contractual notice. Mr Demenza submitted that she had been paid in full for the first two weeks

of her notice period, and therefore the statutory obligation had been satisfied. Ms Lee submitted that the correct approach was to look at the last week of employment, for which the claimant was paid sick pay only.

17. My initial view that Ms Lee was correct, because a fair approach and the correct approach was to move from the maximum notice period (the contractual) to the minimum (the statutory) particularly as the provision to which I have referred is protective.

18. In the event, however, I have preferred the alternative approach, because I accept that by giving notice on 16 November, the claimant gave notice of her intention to terminate her employment. I find that the statutory notice was triggered by the act of giving notice, not by the fixing of the final date, both of which were done in the resignation letter.

19. I confirm that, as I said in giving judgment, this appears to me an entirely new point, and that I cannot be wholly confident of the correctness of my approach and interpretation.

Fees

20. Having given judgment, I invited submissions on fees, telling the parties that I was minded to award fees in full for the claim which had succeeded, ie the holiday pay claim, and no more. In the event, the following morning, the Supreme Court gave the above Judgment, and accordingly, I have, without inviting submissions, amended the Judgment which I gave orally, which was for a payment of fees by the respondent of £390.00.

Constructive dismissal

21. I now turn to the claim of constructive dismissal. The claim arises under s.95(1)(c) of the Employment Rights Act which provides that a dismissal occurs if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

22. I adopt the familiar approach in Western Excavating ECC v Sharp [1978] ICR 221, and Malik v BCCI [1997] IRLR 462. I must consider whether the respondent has, without proper cause, engaged in conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence, leading the claimant to terminate employment as a result, responding promptly to the events.

23. In dealing with the evidence on this point, I bear in mind that it is the duty of a tribunal to adjudicate on cases, not on those who appear before it, and that the tribunal should not make personal judgments about parties or witnesses. Where a case requires consideration of the conduct at work of those who appear before it, the tribunal should not impose an unrealistic standard, and should have proper regard to the variability and diversity of workplaces and of conduct at work.

23.1 Considering whether there had been repudiatory conduct, Ms Lee referred to the statements of colleagues. Ms Cook had left the respondent in February 2016 so could give no evidence about the material events. The written statement from Mr Woolhead made no mention of the claimant (it dealt exclusively with Mr Woolhead's own experience) so could not assist me. A statement from Mr Elliott seemed to sit on the fence between both sides, but it assisted me no further. I declined Ms Lee's suggestion to attach any weight to screenshots from texts or WhatsApp which were in the bundle, on the basis that I could not attach to them any weight comparable to that of signed, let alone sworn, evidence.

23.2 I accept that it has been shown that the workplace was at times robust, and that Mr Tristram at times used unprofessional language towards the claimant and colleagues. I do not find that the course of conduct on which the claimant relied in this case has on balance of probabilities been proved to have happened. There was, in my judgment, no cogent evidence of what lay at the heart of her case, namely a course of conduct, without reason, directed at her, which was not relevant to job performance and was at times spiteful. When I have examined the specific events on which the claimant relied, I can find no fault in the respondent's management of the teacher episode, and I do not find that Mr Tristram's remark about 'friends' meets the standard of conduct required.

23.3 I add also that I can make no findings as to why the claimant left her employment, save one piece of speculation. The claimant gave oral evidence that she began looking for other employment in July. Her witness statement stated that she began doing so in early October. She did not disclose documents relating to her dealings with the employment agency, and I can therefore make no finding on the point, save this. I have found well made Mr Tristram's observation that the claimant struggled to 'unlearn' her past experience. It may be significant that despite her experience, the claimant left the mortgage industry altogether, which may in turn reflect a more general concern about the impact on her of the imminent regulatory framework.

23.4 Mr Demenza submitted that by delaying between the teacher incident and 16 November when she resigned the claimant had affirmed any breaches. I disagree. The claimant should not be faulted for delaying for the period necessary to find new employment.

Employment Judge R Lewis

Date: ……25/08/17……..

Sent to the parties on: ..25/08/17.....

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For the Tribunal Office