EMPLOYMENT TRIBUNALS

Claimant: Mrs M Golden

Respondent: Morris Homes (North) Limited

HELD AT: Liverpool **ON:** 12, 13 and 14 September 2017

BEFORE: Employment Judge Robinson
Ms F Crane
Mr P C Northam

REPRESENTATION:

Claimant: Miss N Twine of Counsel
Respondent: Mr A Moore, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claimant's claims for constructive unfair dismissal, automatic unfair dismissal relating to whistle-blowing and detriments relating to whistle-blowing all fail and are consequently dismissed.

REASONS

1. We had to deal with three claims for the claimant against the respondent. Firstly various detriments due to whistle-blowing. There are five set out in Employment Judge Ryan's minute of 4 April 2017, dismissal due to whistle-blowing (automatic unfair dismissal) and a constructive unfair dismissal claim. The detriments that we dealt with were as follows:

(1) Unjustified disciplinary action.

(2) Redeployment or relocation to a site 47 miles from the site at which the claimant.

(3) The respondent reported a complaint against the claimant which the claimant says was a false report.

(4) The claimant was subject to undue criticism which was unfair in relation to a minor error she made over a postcode for one of the properties on the site.

(5) That the respondent ignored the grievances the claimant raised.

The Facts

2. The claimant worked for the respondent as a sales executive. During the relevant period the claimant worked at the Oakwood site near Middlewich not far from her home in Aston, Cheshire. She resigned from that post with effect from 9 October 2016. By that time she had actually started a new job for another building organisation one day before the expiry of her notice period. The claimant worked one day at a different site before she resigned. I will come to that later. The claimant worked at Middlewich from 2014.

3. The terms and conditions of a sales executive allow the respondent company to move those executives to any site for business reasons. However, they cannot move them around the country. The geographical area within which the sales persons can be moved is North West England between North Staffordshire and North Lancashire. Sales executives can be moved anywhere within that region.

4. The claimant did make a qualifying protected disclosure at the end of June 2016 concerning the defective footpath on her site at Oakwood. It was in the public interest for her to do so. She felt that it was a disclosure under the provisions of section 43B(1)(d) of the Act. That provision relates to the health and safety of any individual being endangered.

5. The defective footpath was repaired swiftly by the construction arm of the respondent. No detriment flowed from that disclosure and we will return to that issue more fully later in this judgment. The slight defect was repaired by the respondent placing some cement on the footpath to level it out.

6. The second disclosure made by Mrs Golden on 1 August 2016 concerned plot 54 on the Oakwood site. Completion was due on Friday 29 July 2016. A “guardian angel” visit made by a director of the company to look over the property had taken place. The director did not pick up that the hob was not connected to the gas supply. The QMS paperwork was not completed as it should have been. That is an internal respondent document. It is not a document that is required to be completed for the NHBC regulations or any regulator or by law.

7. When the purchasers of that property, Mr Ellis and Miss Spencer, were given the keys on that Friday by the claimant the gas hob was not connected. The Construction Department knew it had to be connected. A subcontractor had already been organised to carry out the work. The subcontractor attended and completed the work later that afternoon on the Friday of completion.

8. The connection made by that plumber was faulty and ultimately the plumber was sacked by the subcontractor. That was a few weeks later. An investigation found that it was that plumber's fault.

9. On Saturday morning after completion (30 July 2016) someone smelt gas in the property. It may have been the clients of the respondent who went back to the property that morning to look at their new house. They had not moved in. A forklift truck driver who was on site turned off the gas for the customers at approximately 8.30am.

10. The leak was repaired on the Saturday. The clients of the respondent were not surprisingly irate. They complained in a long email of 30 July 2016. They had a list of complaints over and above the gas leak, but it was the gas leak which caused them the most concern. They wanted compensation. However, they praised the claimant and her services to them in that email.

11. The claimant compiled a snag list on 29 July 2016 on that plot. She did not mention, however, a gas leak because that had yet to occur. The concern was simply that the hob had not been connected to the gas supply and therefore was unusable.

12. Those snags were dealt with by the construction arm of the respondent for Mr Ellis and Miss Spencer over the weekend of 30 and 31 July 2016.

13. On 1 August 2016 the claimant said that she made another protected disclosure. That was not a qualifying disclosure. It simply reported to the respondent facts that they already knew and complained about paperwork not being completed properly. That was an internal issue and not made in the public interest. The lack of proper paperwork was not the cause of the gas leak nor did it contribute to it. The gas leak was caused by poor workmanship on the afternoon of 29 July 2016 by the subcontractor's plumber.

14. Sales at the Oakwood site had for some period not been going well for a variety of reasons, including the lack of footfall on the site and the pricing of the properties. The prices of the properties had been raised by Morris Homes. Mrs Golden felt that that was a reason why she could not sell as many properties as she normally would have done. Morris Homes were of the view that the price hikes were normal and that the prices of their properties reflected the quality of the product.

15. It was common practice for sales executives to be moved. Rachel McCutcheon (the Sales Director) decided to move a number of sales executives and communicated that decision at a meeting on 11 August 2016 attended by Sam Williams (the claimant's line manager) and other sales persons. Ms McCutcheon decided that the claimant should move to Astbury Place in Congleton via a short period at College Place in Newton-le-Willows.

16. At about that same time the claimant went with Mr Spragg, who was the site manager, at his request to see the owners of Plot 54 in order to try to defuse their upset in relation to their complaint. The claimant said to Mr Ellis and Miss Spencer that there was no compensation to be had and they should speak to their solicitors. Miss Williams had told her, over the phone, that Morris Homes did not offer

compensation and that she should go and tell the clients at Plot 54 that that was the case. Mr Spragg at the same meeting, offered to carry out some work internally on the property and also to extend the patio in order to placate Mr Ellis and Miss Spencer.

17. However, the comment that the claimant made about contacting their solicitors upset the plot owners and they complained to Mr Crabtree about that comment. He passed that complaint on to his direct line manager, a director of the company, who in turn passed it to Ms McCutcheon. Ms McCutcheon then asked Sam Williams to speak to the claimant. There was no need to investigate that issue. The claimant was simply being asked for her version of events. The claimant was not disciplined. Once the matter had been discussed between Mrs Golden and Ms Williams that was the end of the issue as far as Ms Williams was concerned. This was not a fabricated complaint. We find that that complaint was made to Mr Crabtree.

18. The claimant contends her grievances were not dealt with. She is of the view that her emails of 12 August and 15 August were grievances. They are not and could never be read as such. If the claimant had, at the time, thought they were grievances she would have followed them up and asked why her grievances had not been dealt with. If a grievance had been put in to Ms Williams or to Ms McCutcheon the grievance process would have been gone through. The claimant never complained at the time that the move to College Place was upsetting her or that it was connected to any whistle-blowing.

19. When Ms Williams and the claimant spoke on 11 August the claimant knew she was not to be disciplined. She was, however, upset about the complaint that had been made by the owners of Plot 54. It hurt her pride. The claimant may have been praised by Mr Ellis and Miss Spencer in the email of 30 July 2016, but when she met them later on 1 August 2016 she upset them. By 11 August 2016, however, the matter was closed as far as the respondent company was concerned. It was the claimant who would not let it go and contacted the clients at Plot 54 about it. They denied making a complaint about the claimant. That is why the claimant thinks that the complaint was fabricated.

20. At that meeting on 11 August 2016 it was the claimant who raised with Ms Williams her desire to move from Oakwood. She had had enough of working there. She was thinking of moving to Stuart Milne, another building company. She eventually joined that company on 8 September 2016 at the point where her notice period with the respondent ran out. Ms Williams did not want to lose the claimant and she recognised that moving her to the Congleton site would have been a new start for the claimant.

21. Overall the claimant would not have lost out on commission if she had moved site. She would still have received 75% of her commission on sales at Oakwood where there had been an exchange of contracts. She would not have received the 25% extra commission on completion. However, she had the opportunity of selling already built properties at College Place in Newton-le-Willows. She would also have had good opportunities, ultimately, at the Congleton site to earn commission. She

herself described (at page 230 of the bundle) the Congleton site as a "lovely location".

22. By 14 August 2016 the claimant was making overtures to Stuart Milne about a move to that company, and consequently we find that she had decided to move in any event and leave the respondent company.

23. The rota for all the sites had been set up some time and that was normal practice. There was nothing sinister about the claimant being still rota'd for Oakwood when she was told that she was moving to College Place. Indeed the claimant, in an email of 12 August 2016, asked Sam Williams why she was still on the rota for Oakwood because "of their discussion about the move the day before". Sam Williams told the claimant that the rota was incorrect and in an email she explains to the claimant how the mix up had occurred. At no point during that period in mid August 2016 did the claimant object to her move to College Place or suggest it was because of her whistle-blowing. All the emails refer to the complaint from the owners of Plot 54. The claimant sought to justify and explain her position because she was so upset about a complaint being made.

24. In any event the claimant went to College Place on 18 August but only stayed there for a matter of hours. The next day she reported in sick never to return to work with the respondent. She resigned on 9 September 2016 giving one month's notice. Her complaints in the resignation letter make interesting reading (page 158 of the bundle). She suggests that the product quality on handover and management support had deteriorated with Morris Homes. She believed that Mr Crabtree had fabricated a complaint and suggested that she had been penalised for raising health and safety issues. She does not say that being moved to another site is a detriment to her in the resignation letter. She does say that the treatment of her has destroyed all trust and confidence she has in the respondent.

25. The respondent investigated some of the issues raised by the claimant but because she had left the employment no conclusion was reached by the respondent. Mr Hesson, who investigated, did not complete a written report.

26. The claimant did have a spat with Mr Mike Kennedy over the mistake she made over the postcode at Plot 54. We accept that she had corrected it by the time she had spoken to Mr Kennedy. During that telephone call the claimant gave as good as she got saying to Mike Kennedy, the covering site manager in Mr Spragg's absence, that "she'll get the postcode right if you [Mr Kennedy] hand over a safe property".

27. Those are the facts.

The Law

28. The law in relation to these issues which we have applied is as follows.

29. Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate without notice by reason of

the employer's conduct. This is commonly referred to as constructive unfair dismissal.

30. The employer's conduct which gives rise to the constructive dismissal must involve a repudiatory breach of the contract. In other words if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more the essential terms of the contract then the employee is entitled to treat himself or herself as discharged from any further performance.

31. Consequently there are three elements to a constructive dismissal, namely that there must be a fundamental breach of contract, not just a breach of contract, the employer's breach must cause the employee to resign and the employee must not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.

32. If there is a series of events which together lead to the employee leaving then there must be a final straw which in itself need not be a breach of contract but must in some way contribute to the employee leaving the employment of the respondent.

33. With regard to public interest disclosure we had to consider whether the claimant reasonably believed that the disclosure tended to show one or more of the following, namely a criminal offence, a breach of a legal obligation, a miscarriage of justice, health and safety endangered or environmental damage, or a cover up of any of those issues.

34. We must consider whether the disclosure was protected and to whom the disclosure was made. Was it made to the employer? Did the claimant reasonably believe that the disclosure was in the public interest? Was it made for personal gain?

35. Section 43B of the Act defines a qualifying disclosure as any disclosure of information. A disclosure therefore must convey facts.

36. With regard to detriments under section 47B of the Employment Rights Act 1996, the employee has the right not to be subject to any detriment by any act or deliberate failure to act by the employer on the grounds that the worker had made a protected disclosure.

37. The meaning of "detriment" is not defined in the Act but it has a broad ambit. We applied the principles in **Ministry of Defence v Jeremiah [1980] ICR 13** CA where a detriment was described by Lord Justice Brandon as "putting someone under a disadvantage".

38. We noted that section 47B provides protection from any detriment and there is no test of seriousness or severity.

39. With regard to dismissal, section 103A of the Employment Rights Act 1996 provides that:

> "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure."

40. Where there is a constructive unfair dismissal the treatment of the claimant by the respondent that led to the resignation can be regarded as the reason for the dismissal.

Conclusion

41. Applying that law to the facts of this case the overall impression that we had of the claimant's actions in bringing the issues on site to the attention of her employer was that she was simply doing her job. She raised snagging issues as any other sales representative dealing directly with the customers would do. When required to do so, as any employee of the respondent on site would do so, she raised those issues appropriately with other elements of the respondent organisation. Whether documentation was or was not completed correctly had no bearing on the gas leak. That was simply down to poor workmanship by the subcontractor. The claimant did make a qualifying protected disclosure with regard to the footpath because that related to health and safety and it was in the public interest and qualified under section 43B in that it endangered the health and safety of those members of the public going about the site. We accepted that the claimant made it to her employer and it was not made for any personal gain. The question with regard to that was, were any of the detriments that the claimant said she suffered connected to that disclosure?

42. We did not, however, find that the discussions with regard to the gas leak were protected disclosures. They were not made in the public interest. We accept that they concerned health and safety issue and were made to her employer, but all the claimant was doing was passing on information which the respondent already knew.

43. However, even if we are wrong in relation to that the information given to the respondent, on 1 August 2016 in relation to the gas leak, the actions of the respondent did not lead to the claimant resigning or cause her a detriment which was linked to the information she had given. Neither did the claimant suffer any detriment for raising the issue of the footpath.

44. The respondent, as we have set out above, already knew the issues relating to Plot 54 and what needed to be done.

45. We considered each detriment allegation and decided in turn the following:

(1) With regard to the disciplinary action alleged to have been made, there was no disciplinary action whether justified or unjustified. At no time was the claimant placed under any disciplinary process.

(2) The relocation to College Place was within her contract. The claimant would not suffer a detriment by going there. It was only short-term. The decision had been made before the claimant's issues with regard to

Plot 54. Her proposed move to Congleton was something that the claimant accepted. She felt that she would enjoy her time there.

(3) The complaint that Mr Crabtree brought to the attention of the directors was not a fabricated or false complaint. However upsetting to the claimant, it had to be dealt with by the respondent. One director passed the complaint on to another director and that director, Mrs McCutcheon, passed it on to Ms Williams and asked her to have a word with the claimant about it. No more or no less than that. In fact there were no ramifications for the claimant. Once Ms Williams had talked to the claimant about it the matter was over by 11 August 2016. It was the claimant who would not let that issue go.

(4) We accepted that Mike Kennedy did speak out of turn to the claimant. We have not heard from him but we accept Mrs Golden's evidence on that point about the postcode. However that incident had no connection to any disclosure. It was a spat between two work colleagues. It is the sort of argument that goes on everyday in the workplace, and indeed the claimant gave as good as she got. There were no further fall out from that incident whatsoever.

(5) As there were no grievances raised by the claimant, the respondent could not have ignored them. The emails that were sent by the claimant cannot be identified as grievances. If grievances had been raised by the claimant they would have been dealt with and not ignored by the respondent. If the claimant genuinely thought that she had raised grievances, when she did not receive any response to her emails, she would have raised them again.

(6) The claimant suffered no detriment in any event. The claimant herself accepts that she did not formally raise any grievances under any process or procedure of the respondent. She simply says that those emails should have been seen by the respondent as grievances. We disagree. No employer reading those emails would consider the employee was raising a grievance

46. We then turned to the question of whether the claimant had been constructively unfairly dismissed or whether her resignation had any connection to the way she had been treated leading up to that resignation and was connected to what she says were protected disclosures.

47. The issues about which the claimant complained did not amount to a breach of contract far less a fundamental breach of contract. The relationship between the claimant and the respondent had not broken down irretrievably. Indeed Ms Williams was at pains to tell us, and we accepted her evidence, that she wanted the claimant to stay and work. The claimant, if she had wished, could have continued her employment without any disadvantage to her. Ultimately it was she who decided that she wanted to try pastures new at Stuart Milne. That decision was made not because of any actions by the respondent or indeed by them treating her badly or causing her a detriment because she had raised protected disclosures, it was because the claimant simply wanted to move on. She had had enough of Morris

Homes, especially at the Oakwood site where she felt she could not sell properties. She had been looking to move before these incidents occurred and had contacted Stuart Milne.

48. In those circumstances we find that there has been no breach of the implied term of trust and confidence, which is what the claimant has pleaded. There was, in short, no need for the claimant to leave. She could have continued to work without any hindrance or upset for the respondent but for the reasons set out above she decided to leave of her own accord.

49. Consequently all the claimant's claims are dismissed.

11-10-17

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Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 October 2017

FOR THE TRIBUNAL OFFICE