



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs D Harris

AND

Respondent

Co-operative Group Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

24 and 25 January 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Ms S Clarke of Counsel

JUDGMENT

The judgment of the tribunal is that the Claimant's claim is dismissed.

REASONS

1. In this case the claimant Mrs Debbie Harris claims that she has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. I have heard from the claimant, and I have heard from her husband Mr Nigel Crowe. I have heard from Miss Emma Kirby (Strategic HR Business Partner) and Mr Martin Baker (Head of Central Operations) on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent is the national organisation which inter alia provides funeral care services. The claimant Mrs Debbie Harris was employed by the respondent as a Masonry Account Manager from 31 August 2008 until her resignation on notice which was effective on 15 August 2017. The respondent had issued the claimant with written terms and conditions of her employment, which included a number of policies and procedures. In particular the respondent had a written grievance procedure.

5. The claimant was responsible for managing three of the respondent's funeral care sites being those in Efford in Plymouth, in Bristol, and in Manor Park in London. The claimant's colleague Mr John McSlow managed the respondent's three Northern sites in Westerhope, Eccles and Glasgow. The claimant's role required her to travel between the three Southern sites and manage the Masonry Administration Teams. These teams have responsibility for processing orders from the respondent's clients which are mainly organisations which require funeral care services. The claimant's role also involved managing the respondent's relationships with masonry suppliers.
6. The claimant was an experienced manager who was well respected by the respondent. In 2015 the respondent had identified some issues of poor performance within the Masonry Administration Team at Manor Park. The team consisted of Jessica Redmill the Administration Team Leader, and three Masonry Clerks namely Kerry Mulvanerty, Susan Clements and Joanne Moore.
7. In early 2016 the claimant sought to address these performance related issues and implemented service changes with a view to improving the service. This was with the approval of her then line manager Mr Mark Potts, the respondent's UK Masonry and Production Manager. Unfortunately at least two of the team perceived that she had a difficult management style and this caused tension within the team. As a result of this Jessica Redmill and Kerry Mulvanerty raised grievances on 3 May 2016. They complained that the claimant had bullied and harassed them and was effectively attempting to "micromanage" them.
8. Mr Potts met with Jessica Redmill and Kerry Mulvanerty, and then the claimant, and tried to resolve the grievances informally. Unfortunately this proved unsuccessful, and in August 2016 Jessica Redmill and Kerry Mulvanerty each raised a formal written grievance against the claimant. The respondent undertook a formal investigation which included meetings during October 2016. Independent managers were appointed to investigate each grievance separately. Mr John Mould issued Kerry Mulvanerty's grievance decision on 4 October 2016. Her grievance was expressed to relate to bullying in the workplace, unfair workplace practice, and allegations of unfair treatment on the part of the claimant. These allegations were rejected and the grievance was not upheld. Kerry Mulvanerty was reminded of her responsibilities under the respondent's Respect in the Workplace Policy. Mr Potts issued Jessica Redmill's grievance decision on 10 November 2016. He rejected the grievance, but did agree to make recommendations as to the respondent's communication style. Both employees decided to appeal the grievance decisions, and the respondent dealt with the appeal process, and issued appeal decisions on 2 December 2016 and 16 December 2016 respectively. Kerry Mulvanerty's substantive allegations were rejected on appeal, but the grievance was partially upheld with regards to management conversations having been made too public. Similarly, Jessica Redmill's grievance decision was not overturned, and the appeal was partially upheld, but only to the extent that a mediation meeting between the parties had been suggested and not arranged.
9. It became clear during this process that there was a breakdown in the working relationship between the various parties. Nonetheless the respondent was surprised to receive the claimant's written resignation by email dated 1 December 2016. The claimant complained that she in turn had been bullied by Jessica Redmill and Kerry Mulvanerty, and that the respondent had not communicated with her fully during this grievance process. The claimant accepted in her evidence today, having now seen the various grievance documents, that the respondent was obliged to investigate the grievances fully against her, including the appeals, and that during this process the respondent had been entirely supportive of the claimant and backed her position. In any event Mr Baker discussed the matter with the claimant, and the claimant was persuaded to withdraw her resignation. There was an informal meeting on 6 December 2016 and there is a written note of the "agreed next steps" which as agreed would seek to resolve her concerns. The five steps with which the claimant agreed were these: Sharing the grievance outcomes with the claimant; Arranging a mediation meeting; Receiving mentoring from Mr Ed Lane;

- Meeting with Mr Baker to discuss career development; and resolving the grievance appeals, which at that stage had not yet been determined.
10. The claimant suggested at this hearing that the respondent failed in breach of its grievance procedure to deal with her resignation and complaint by way of a formal grievance. The respondent's position is that there was no formal grievance as such, and in any event the matter had been resolved on an informal and amicable basis by way of reaching agreement as to the next steps as set out above. It seems clear from the contemporaneous documents, and I so find, that there was no formal grievance from the claimant which the respondent failed to meet in breach of its grievance procedure. The matter was concluded informally with the knowledge and agreement of the claimant in the manner set out above.
 11. A mediation meeting then took place on 3 January 2017 between the claimant and Jessica Redmill and Kerry Mulvanerty. The meeting was chaired by Mr Matt Jackson the respondent's Head of Operations South East who was an experienced mediator. He had also been appointed to assist the claimant with some mentoring from early November 2016. Unfortunately the mediation did not prove successful, and the breakdown in the relationships continued. The claimant now complains that she was given insufficient information about the process and that she was ill-prepared as a result. However, she did not raise a formal grievance about this at the time, and did not ask for further mediation sessions. It seems that the two employees who raised the grievances against her did not approve of the claimant's management, and Mr Jackson felt that both parties had made a number of inappropriate statements at the start of the meeting, and that the behaviour of those involved had been unprofessional, including that of the claimant.
 12. In any event the claimant then proposed to Mr Baker that she withdrew from management of the Manor Park site in order to assist in resolving the difficult working relationships, and she proposed that her colleague Dena Harvey, who was in the Efford (Plymouth) Retail Sales department, should support the management of Manor Park on an interim basis. The claimant agreed to delegate her management role at Manor Park to Dena Harvey, and the respondent agreed to appoint Dena Harvey as the interim manager. The respondent also wanted to arrange a team meeting later in March 2017 to review progress. Meanwhile the claimant continued to have direct management of the Plymouth and Bristol sites, and continued to enjoy her same contractual title and remuneration package.
 13. Unfortunately Jessica Redmill and Kerry Mulvanerty remained dissatisfied and felt that Dena Harvey was not an impartial manager because she continued to report to the claimant with whom she had a close working relationship. On 7 March 2017 Jessica Redmill and Kerry Mulvanerty raised another formal grievance. The respondent then decided to appoint a different manager, again on an interim basis, in the hope that the working relationships might improve.
 14. Mr McSloy agreed to take over on a short-term interim basis only, because he felt he did not have enough time to support the Manor Park site in addition to his Northern sites. Mr Baker then agreed with Claire Newton, the respondent's Masonry Process Systems Manager, that she would manage the Manor Park site from mid to late April. Mrs Newton had in-depth knowledge of the masonry processes and supply chain in the South and East and agreed to provide short-term support. The respondent's aim was to seek to improve the performance of the site and to improve staff morale.
 15. During this process the respondent was considering a strategic change in the direction for its nationwide Masonry business. Mr Baker consulted with the claimant and other managers at her level. The respondent asked the claimant to consider the redundancy options and costs at each of the various sites, which Mr Baker felt she did in a thorough and well-researched professional manner. This included potential closure of the Manor Park site. Mr Baker felt that the claimant seemed eager to progress the closure of Manor Park, but that her views might have been less objective than was ideal and obscured by her personal feelings towards the team there, two of which had complained about her during the detailed grievance procedure explained above. In any event Mr Baker prepared a written proposal for agreement by the respondent at national level. This

- included an outline proposal to close the Manor Park site. The claimant says that she understood that there was a clear proposal to close the site by the last week in April 2017. Mr Baker denies that there was any set time frame, because the proposal had to be considered at national level, and this was bound to involve discussion with trade unions and required other input, for example from HR.
16. Towards the end of April 2017 the claimant was concerned that the matter had not been resolved, and found it awkward dealing with business contacts from the Manor Park area who wanted to know whether or not she had left the business. She emailed Mr Baker on 25 April 2017 saying: "I have received calls from two Care Centre Managers today saying they heard I had left the business, can you send me a copy of the announcement you have made or reinstate me please." Mr Baker responded immediately and was quick to reassure the claimant: "That is very surprising and disappointing. Categorically not the case so I will not need to reinstate you or send an announcement." On the next day 26 April 2017 the claimant emailed Mr Baker to complain that the poor performance of Manor Park was reflecting badly on her and that "the closure of Manor Park has been halted and there is no end in sight."
 17. The claimant then instructed her trade union representative to investigate the possibility of a "protected conversation" with the respondent to seek to agree terms upon which she might leave the respondent's employment. She was then absent on a short holiday and her union representative held an initial discussion with the respondent's HR department. This approach was not fruitful and the respondent did not wish to progress the same.
 18. On her return the claimant then resigned her employment by email dated 16 May 2017. The claimant relied upon three fundamental breaches of contract in her resignation email, as follows. First she stated: "Following my request for help to arrange a protected conversation (copy below) I am saddened not to have received any further communication from you. This latest failing to communicate with me has destroyed any remaining trust or confidence I have in the Co-op group to resolve my employment issues amicably." Secondly, she stated: "I cannot remain in position as the account manager for the South having had the London Service Centre removed from my line management without justification and only an explanation from Martin Baker telling me he needs the employee that is off sick back in work before he can close the office and make all four employees in my London office redundant ...". Thirdly she complained: "Emma Kirby and Martin failed to hear my grievance which I raised on December 1st 2016".
 19. The claimant had expressed her intention in her resignation email to work out her three months notice. Her resignation was accepted by the respondent and was ultimately effective on 15 August 2017.
 20. Having established the above facts, I now apply the law.
 21. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
 23. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld

- Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; Wright v North Ayrshire Council [2014] IRLR 4 EAT; Braganza v BP Shipping Ltd [2015] UKSC 17; and IBM Holdings Ltd v Dalgleish [2017] EWCA Civ 1212.
24. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
 25. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: “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 of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
 26. It is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.
 27. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.
 28. This has recently been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”

29. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
30. The claimant relies on the three alleged fundamental breaches in her resignation email and/or the last straw doctrine, which are said to amount to a breach of the implied term that an employer will not conduct itself in a manner which without reasonable and proper cause is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
31. In the first place I deal with the three alleged fundamental breaches. The first relates to the refusal by the respondent to engage in a protected conversation with the claimant's appointed trade union representative. The claimant accepted in her evidence that an employer is not bound to hold any such conversations with an employee. I agree, and I find that the respondent in this case was entitled to refuse to progress the claimant's request through her union representative.
32. The second alleged breach relates to what the claimant considers to be removal from her "line management without justification". I accept that the respondent might well have given the claimant more information towards the end of April 2017 as to the length of time it envisaged that Claire Newton would remain in her management position at Manor Park, and might have taken more time and trouble to explain to various business contacts that the claimant had not left the respondent's employment and was still in a managerial position. However, I am satisfied from the evidence that it was the claimant's own suggestion originally that she should step back from the management of Manor Park, and that the respondent had appointed interim managers only on a short term basis in the hope of resolving employee performance issues. The claimant suggested that Dena Harvey should take the position, and when Mr McSloy chose not to take it on, the claimant was aware that Claire Newton had been appointed also on an interim basis. At the time of the claimant's resignation she had stood back from her managerial role at that site and an interim manager had been appointed at her suggestion and with her agreement. She retained her job title, management of the other two sites, and her existing terms and conditions of employment. There was no unreasonable or capricious act on the part of the respondent to remove the claimant's managerial status or remuneration. The claimant's objection, which was stated in her resignation email, was that by the end of April 2017 the respondent had not closed the Manor Park site and made the staff redundant. The irony appears to be that the claimant had herself proposed closure of the Manor Park site, which inevitably would have removed her as manager of that site, and when this had not happened as quickly as she would have liked, she seems to have objected to the fact that she was no longer the manager, even though she proposed such a resolution in the first place. I cannot see, and do not find, that in either appointing an interim manager as originally suggested by the claimant, or alternatively by not closing the Manor Park site as quickly as the claimant had envisaged, that the respondent had, without reasonable and proper cause, acted in a way which was likely to destroy or seriously damage the relationship of trust and confidence between them.
33. The third alleged breach is that "Emma Kirby and Martin failed to hear my grievance which I raised on December 1st 2016". However, as set out in the findings of fact above, there was no formal grievance as such, and the matter had been resolved on an informal and amicable basis by way of reaching agreement as to the "next steps" to be undertaken by the parties. There was no formal grievance from the claimant which the respondent failed to meet in breach of its grievance procedure. The matter was concluded informally with the knowledge and agreement of the claimant in the manner set out. Accordingly there was no conduct on the part of the employer which without

reasonable and proper cause was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

- 34. Finally, I deal with the matter of the last straw doctrine. Applying Lewis, if the claimant is relying on a series of acts the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term. In addition, applying Omilaju if relying on a series of acts the claimant must point to the final act which must be shown to have contributed something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment. In this case I cannot find for the reasons set out above that there is any series of acts which taken together cumulatively amount to a breach of the implied term. Similarly, the claimant has not identified any final act (over and above the three fundamental breaches expressed to be relied upon) which is said to have contributed to any series of acts which cumulatively amount to a breach of the contract of employment.
- 35. In conclusion therefore I cannot find in this case that there has been any conduct on the part of the employer which without reasonable and proper cause was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, and there was no fundamental breach of contract in this instance. In these circumstances the claimant's resignation cannot be construed to be a constructive dismissal by the respondent. The claimant's resignation therefore stands as her resignation, and given that she was not dismissed by the respondent, her unfair dismissal claim must fail.
- 36. Accordingly the claimant's unfair dismissal claim is hereby dismissed.
- 37. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 19; a concise identification of the relevant law is at paragraphs 21 to 29; how that law has been applied to those findings in order to decide the issues is at paragraphs 309 to 36.

Employment Judge N J Roper

Dated 25 January 2018

JUDGMENT SENT TO THE PARTIES ON

14th February 2018

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FOR THE TRIBUNAL OFFICE