EMPLOYMENT TRIBUNALS

Claimant: Mrs LAXMI BELL

Respondent: SAMWORTH FOODS LIMITED

Heard at: Leicester Employment Tribunal

On: 14 - 16 August 2017, 24 – 26 January 2018

Before: Employment Judge Dyal

Representation:

Claimant: Mr Korn, Counsel (14 – 16 August 2017)
Mr Feeny, Counsel (24 – 26 January 2018)
Respondent: Mr Finlay, Solicitor

JUDGMENT

1. The Claimant was unfairly dismissed.
2. There is a 25% chance that the Claimant could and would have been fairly dismissed about six months after her actual dismissal. If the Claimant's remedy is compensation, a *Polkey* reduction of 25% will apply to the compensatory award in respect of the period 2 December 2016 onwards in the event that the period of loss extends beyond that date.[1]

REASONS

The issues

1. The sole claim now before the tribunal is of unfair (constructive) dismissal contrary to s.94 and 98 Employment Rights Act 1996. The issues for resolution are as follows:
    a. Was the Claimant dismissed?

[1] It is not yet known what remedy the Claimant seeks and the tribunal has not determined what the remedy should be. If the Claimant is awarded compensation it is not yet known what the period of loss will be.

i. Was the Respondent in repudiatory breach contract?
ii. Did the Claimant resign in response to the breach?
iii. Did she do so without delay, affirmation or waiver? If not was there a final straw which nonetheless entitled her to resign and claim constructive dismissal?

b. If the Claimant was dismissed, what was the reason or principal reason for the dismissal?
c. If the reason for the dismissal was a fair reason, was the dismissal fair in all the circumstances having regard to s.98 Employment Rights Act 1996?
d. If the dismissal was unfair:
   i. If the Claimant's remedy is compensation, should a *Polkey* reduction be made and if so what?
   ii. Did the Claimant contribute to her the dismissal?

2. All other issues of remedy have been deferred to a remedy hearing.

The Claimant's case as to repudiatory breach

3. The Claimant's case needed to be clarified for the reasons explained in the tribunal's case management order dated 17 August 2017 (sent to the parties on 18 August 2017).

4. A lengthy list of breaches was produced by Mr Korn on 15 August 2017. There was a discussion of the Claimant's case as it was presented in that list before the evidence began. In that discussion Mr Korn clarified the Claimant's case as follows:

   The conduct of co-workers / shop-workers on the line is a relevant part of the factual matrix but it is not the Respondent's vicarious liability or otherwise for that conduct which the Claimant relies on for establishing breach or repudiation of contract, rather it is the employer's failure to prevent it, and maintain a safe workplace, and/or its reaction to such conduct that is relied on.

5. Mr Korn identified and relied upon some seven implied terms. However, the case was later streamlined. By the time matters reached closing submissions, Mr Feeney who was by now representing the Claimant, relied upon only three terms:

   a. The implied duty of trust and confidence;
   b. The implied duty to maintain a safe working environment;[2]
   c. The implied duty to operate an effective grievance procedure in a timeous and proper manner.

6. The particulars of breach can be shortly summarised under the following heads:

   a. Failing to investigate or properly handle the Claimant's grievances;
   b. Transferring the Claimant from line 10 to line 8 in breach of Occupational Health Advice and denying the Claimant overtime whilst on line 8.
   c. Giving the Claimant a disciplinary warning in November 2015 in relation to sickness absence;
   d. Failing to investigate a complaint about a colleague's driving (tailgating);
   e. Making false disciplinary allegations against the Claimant;
   f. Forging return to work documentation;

[2] In the event the tribunal has been able to resolve the complaint of constructive unfair dismissal without making any findings in relation to this implied term.

g. Threatening the Claimant with a transfer to another part of the business in May 2016.

The hearing

7. The tribunal was presented with an agreed bundle of documents to which a number of further documents were added by consent. The tribunal heard evidence from the following witnesses:

    a. For the Claimant:
        i. The Claimant herself;
        ii. Mr Bell, the Claimant's husband;
        iii. Mandakini Patel, a former colleague;
        iv. Nita Mahendral, a former colleague;
        v. Mohammed Safiuddina, a former colleague (this witness did not give live evidence because there were difficulties with attendance; however on 16 August 2017 Mr Finlay indicated that Mr Safiuddina's witness statement could be admitted in evidence and was unchallenged).

    b. For the Respondent:
        i. Mr Mark Aston, Operations Manager
        ii. Mr Greg Rodenhurst, Logistics and Supply Chain Manager
        iii. Mr Neil Traynor, Health and Safety Manager
        iv. Mr Richard Orme, Production Manger
        v. Mr Zaib Hussain, Area Manager
        vi. Mr Nigel Barron, former Area Manager in Personnel
        vii. Ms Aneta Kocjan, Team Leader

8. The case for the Claimant was heard during the first tranche of the hearing in August 2017. The case for the Respondent together with closing submissions were heard in the second tranche in January 2018.

9. The Claimant was represented by Mr Korn in the first tranche of the hearing and by Mr Feeny in the second. The tribunal pays tribute to Mr Feeny for handling the obvious difficulties of appearing in the second tranche of a part-heard case with aplomb. The Respondent was ably represented by Mr Finlay throughout. Both advocates made careful submissions in writing and orally to which the tribunal had close regard.

Findings of fact

The Respondent

10. The Respondent is a large employer in the food sector. It has factory premises near Melton Mowberry at which it produces, among other things, high volume sandwiches for customers such as the major supermarket chains.

11. Sandwiches are made on production lines that are designed to operate ultra-efficiently. Each run on each line is timetabled down to the nearest minute. There is some mechanisation but much of the work is done by workers who have to operate as a team. Each worker is assigned to a specific aspect of the sandwich making process which he or she then repeats over and again.

The Claimant

12. The Claimant's employment commenced on 15 March 2014 in the role of Production Operative. She worked in the High Care section of the factory making sandwiches. The Claimant was, and was acknowledged to be, good at her job. She was fast and efficient. However, within about a year of commencing employment the Claimant had interpersonal problems with some of her co-workers and at least one team leader. The exact origins of this are not precisely clear but the following were contributing factors:

    a. The Claimant had high and inflexible standards both in terms of the quality of the output of the production line and also in terms of the efficiency with which it ran. This could make her challenging to work with and to manage.
    b. Secondly, the Claimant was easy to 'wind-up'. She was not thick-skinned, and it was not difficult for colleagues to get a reaction from her.
    c. Some colleagues enjoyed winding the Claimant up and matters could escalate from there.
    d. Not all the team leaders did a good job of keeping the work and behaviour on the lines in good order.

Off-cut

13. Each run on a production line was scheduled to produce a particular number of sandwiches. The run could last anything from 15 minutes to over an hour depending on the quantity. Over the course of the run, the correct amount of bread for the number of sandwiches to be produced would be 'fed' onto the line. However, in the ordinary course some bread would be rejected, whether because misshapen or because an operative had made a mistake when processing it. Those rejects were known as off-cuts. Periodically, someone on the line would call out 'off-cuts?' to the rest of the line in order to find out how many off-cuts there had been and therefore how much additional bread should be fed onto the line. Thus 'off-cut' was a familiar term, frequently heard on the shop floor.

14. However, an issue that permeates the case from February 2015 onwards is that the word 'offcut' was used as a way of making fun of the Claimant and, ultimately, insulting her. It is not clear how or why the practice started, but some of the Claimant's colleagues would shout 'off-cut' and look at the Claimant and/or each other (in a knowing way that was clearly at the Claimant's expense) smirking, smiling and laughing. For some colleagues 'off-cut' became a sort of nick-name for the Claimant. Given that 'off-cut' basically meant something like 'reject' this was unpleasant.

15. If the misuse of the term 'off-cut' had been a one-off event it may not have been a serious matter. However, the misuse of the term persisted over a very long period of time and continued even after the Claimant let it be known that it was upsetting her a great deal.

First grievance

16. On 24 February 2015 the Claimant had a meeting with Mark Aston. There were some crossed wires in advance as to the purpose of the meeting, but all that really matters now is that the Claimant made some complaints to Mr Aston about workplace issues. There is some dispute about what complaints the Claimant raised at that time. The tribunal resolves that dispute as follows:

a. The Claimant did not complain that she had been assaulted in the workplace by Evian (an agency worker).
b. The Claimant did not complain that others were messing with her work to make it look as though she was not doing a good job.
c. The Claimant did complain that she was being nick-named ‘off-cut’ and that people were using that name as a way of making fun of her. This was an allegation of bullying.

17. In short, the tribunal resolves the dispute in this way because Mr Aston said he had no recollection of the first two matters being raised, the tribunal believes him about that and considers that if such complaints had been made he would remember them, especially the assault allegation. The Claimant has misremembered what she told Mr Aston at this time. This is understandable, the chronology is long and there are so many grievances it is hard to fact manage.

18. At this stage Mr Aston did not take the ‘off-cut’ issue very seriously. He simply regarded it as an aspect of a “squabble” between colleagues that he did not need to get to the bottom of to which the tribunal now turns.

Problems on Line 10 (‘L10’)

19. In February 2015 there was a problem on L10, the line on which the Claimant usually worked. There was a group of employees, including the Claimant, who did not get on and who were arguing frequently during shifts. At this stage, the team leaders and Mr Aston decided that the appropriate response was to gather the protagonists together, tell them to stop “squabbling” and “bickering” and tell them they would be split up if there were further problems. No effort was made to discern whether or not there was some underlying issue and the matter was assumed to be a “childish squabble”.

20. On 11 July 2015, there was an incident on L10. An operative, Lillian, left the line due to perceived bullying and the Claimant followed to comfort her. As a result of the incident, Mr Aston decided to split those working on L10 up. He moved the Claimant to L8, Jignesh to L5 and Lilliana to L2. Maria was left on L10.

21. It is important to emphasise that the management action here was splitting the group up. Although Maria was left on L10 this was not because Mr Aston thought that she was less culpable than the others.

22. There is a degree of dispute about the Claimant’s initial reaction to these events. The tribunal finds that the Claimant was very angry she had been moved from L10 but that Maria had not. She raised this with Mr Aston. In so doing she was unable to control her emotions, lost her temper and spoke loudly at Mr Aston about his decision. She then left the site.

23. In brief, the tribunal makes these findings because Mr Aston’s evidence about the Claimant’s conversation with him was credible. Further the notes of a disciplinary investigation meeting between the Claimant and Mr Rose on 14 July 2015, taken by Lauren Clark, record the Claimant accepting that she had walked off site. Further still, the Claimant’s oral evidence about this section of the chronology was confused. She did not appear to clearly recall the meeting with Mr Rose and was adamant that when she met Mr Rose, Ms Clark was not there. However, the notes of the meeting, which the tribunal considers to be the best evidence, record that Ms Clark was there and was the “Company’s rep” (she was an HR Officer). The notes are also signed by

the Claimant on each page. Further this was a disciplinary investigation meeting so it is entirely unsurprising that someone from HR (Ms Clark) was there.

24. As foreshadowed above, as a result of the Claimant's behaviour towards Mr Aston and as a result of her walking off site, a disciplinary investigation was commenced.

Second grievance

25. At the disciplinary investigation meeting of 14 July 2015 the Claimant orally made complaints about the workplace. This is the 'second grievance'. The Claimant made the following complaints:

    a. Some colleagues were falsely alleging that she and Lilliana were each having extra-marital affairs.
    b. She had been laughed at and barged into on the line.
    c. Good sandwiches she had made had been thrown away by co-workers to make her work look bad.
    d. She should not be the one to be moved from L10.
    e. In summary, she had been bullied.

26. Thereafter, Mr Rose purported to investigate the complaints that the Claimant had made. He interviewed a number of the Claimant's colleagues purportedly about the complaints. It would not in fact be right to characterise those interviews as an investigation into the complaints that the Claimant had made on 14 July 2015 because nothing or almost nothing was asked that would shed light on those issues.

27. On 3 August 2015, Mr Rose wrote to the Claimant stating that no further action would be taken in respect of the disciplinary allegations. He also stated that many individuals from the line had been investigated but that nobody had come forward to confirm that there had been any bullying. He went on *"As a business, we do take allegations of bullying very seriously and believe that we have conducted a thorough investigation into your concerns".* On any view that is not a sustainable analysis; the complaints had not been thoroughly investigated indeed they had barely been investigated at all.

Third Grievance

28. On 25 August 2015 the Claimant raised a written grievance. She made several serious allegations:

    a. That she had been physically assaulted on the line by a colleague called Evian (hit in the face with an object), that this had been witnessed by Ian the team leader and that the immediate aftermath had been dealt with by Mr Hussain and Mr Jacob;
    b. That she was spoken to very rudely by Mr Jacob following this incident and in a way that was grossly unsympathetic;
    c. That her work was being messed with by a group of colleagues (good work was being thrown away as if an 'off-cut');
    d. That she was being nicknamed 'off-cut';
    e. That the problems had all started after the Claimant had complained about Regina falling asleep on the line.

29. Mr Barron conducted a significant number of interviews with relevant employees in order to investigate the grievance, including a lengthy interview with the Claimant herself.

30. The evidence gathered did not all go one way, but it is undoubtedly the case that there was some cogent evidence in support of some of the Claimant's specific allegations (being called 'off-cut' and having her worked messed with) and for the general allegation that she was being bullied.

31. For example, Mandakini Patel said as follows (p.178):

    "Whenever I worked on line 10 I noticed thinks like Jenifer would look at Jignesha and Purnima and call out off-cut and laugh[.] I didn't think it was funny but then as work products was running on the line I notice them actually looking at Laxmi and calling her off-cut and Jignesha was using bad language in Gujrati and Laxmi would try to ignore them and sometimes she would say to the people around her are you all listening and seeing what they are doing all the time… when she [the Claimant] went to the end of the line to work they would go there and mess up the product because we can see the sandwich were cut well and the wraps going down the line were good[,] there were few off cuts[,] but when there are not at the end of the line and when they are there it is in 100 which you can tell as they were always messing up her work. After complaint to Yarik and Raj [team leaders] they only laughed and joked with them and the problem was never solved... They made girls cry on that line and bully them like Jenifer pushed me aside and took the knife from my hand too and even though the product is not come to nearly the end she would go down the line calling off-cut, off-cut looking at Laxmi and laughing and Jignesha, Purnima and Maria laughed with her. It was not very nice it is I bullying and harassing her and getting away with it."

32. Liliana Gagea said (p.179):

    "*They look to Laxmi and laughing call out off-cut and mess up the product at the end of the line by plying it up and pretending that it was off-cut and throwing it away… I was treated like a nobody and laughed at. Laxmi was the only one who would stand for what was going on and when complained the team leaders on line 10 and girl grouped don't like it and they the same things happen all the time [sic]."*

33. Jignesh Kumar Gopus said p179:

    "*When I worked on line 10 I saw Jignesha and Jennifer call Laxmi Off-cut and Maria and Purnima laughed at her… Laxmi complained but no one did anything… Laxmi complained to all the team leaders but the problem happened every other day."*

34. In the course of investigating the grievance it came to light that the Claimant had been to three of her colleagues' houses in order to ask them to give witness statements. She was accompanied by a friend who, unlike her, was a Gurjati speaker. The colleagues she called upon were Gujrati speakers with weak English language skills. Mr Barron regarded this as harassment by the Claimant of these colleagues. The tribunal is at a loss to understand why and on the evidence cannot see that the Claimant did anything wrong at all. She did go to three colleagues' houses to ask for a statement over the course of a weekend. But, there is not the slightest evidence that she forced her way in, or that she even had to be persistent to get in or that she was in any way rude or over-bearing. If people did not want to speak to her they could simply have said so and she would have gone away. The Claimant was also criticised for leaving the impression that the man accompanying

her was a solicitor. He was not a solicitor, but she did say he was and did nothing whatsoever to imply that he was.

35. By a letter dated 14 September 2015, Mr Barron delivered the grievance outcome. In the outcome letter he upheld the Claimant's grievance but only to a very limited extent. He accepted that there had been behaviour "*intended to wind up other parties and this continued beyond a point that was acceptable*".

36. However, this was nowhere near a complete vindication of the grievance. He characterised the behaviour in question as follows: *"The discussions supported the fact that the behaviours were not overt but instead they were low level issues occurring on a regular basis".*

37. The contemporaneous documents suggest, and Mr Barron in his oral evidence confirmed, that he did not make any findings of fact about the specific allegations that the Claimant made. He dealt with matters in a very, very broad-brush way. Thus, he did not, for instance, decide whether or not Evian had assaulted the Claimant, whether this had been witnessed by Ian, whether Mr Hussain had managed the immediate aftermath of the incident or whether David Jacob had spoken to the Claimant in the rude and insensitive manner alleged. He did not investigate those matters at all apparently because there were difficulties in identifying who Evian was. But, there were no difficulties in identifying Ian, Mr Hussain or Mr Jacob, who were alleged to have been present during or immediately after the alleged incident yet they were simply not spoken to about this matter.

38. Further, there were no findings as to whether or not colleagues were messing with the Claimant's work and throwing it away, something that seems a serious matter to the tribunal. Nor were there findings about other serious matters raised.

39. Some of the matters alleged by the Claimant and her supporting witnesses were allegations of vicious workplace bullying and were the sorts of things, if proven, one would expect to lead to severe disciplinary sanctions. Unfortunately, the allegations were not adjudicated upon either way and the resolution instead was a meek acknowledgment of 'low level' behaviour that went beyond what was acceptable. It is simply unclear how this conclusion could be reached without actually adjudicating on the serious allegations that had been made one way or the other.

40. Following the grievance outcome, a handful of the protagonists had meetings with Mr Aston and Mr Hussain at which they were told that their behaviour needed to stop. The word bullying was mentioned, but the actual behaviour in question (e.g. abusing the word 'off-cut' to make fun of the Claimant) was not. These were described by Mr Aston as 'educational meetings'.

Transfer from L10 to L8 and OH advice

41. This is a convenient place to interject some findings on the brief move the Claimant was required to make from L10 to L8 mentioned above. This occurred roughly in parallel with the second and third grievance.

42. The Claimant had a significant medical condition affecting her left foot. There was a longstanding agreement in place, which stretched back to happier times, that she would work on lines 8 – 10. This was because the work on these lines involved moving around more and changing position more than the work on the other lines.

43. In July 2015 as set out above the Claimant was moved from L10 to L8. She was undoubtedly very aggrieved about this because Maria, whom she saw as one of the bullies, was left on L10. The tribunal consider that this was the principal reason that the Claimant wanted to return to L10. However, there was also another reason, which was that the Claimant believed that working on L10 was better for her foot than working on L8. She had recently had a metal rod fitted to the foot and L10, in her view, was warmer which was important because the foot was more painful in colder conditions.

44. The Claimant alleges that the transfer to L8 was in breach of OH advice. The tribunal has considered the various OH reports carefully. In summary, the OH advice was that there was such a minimal difference in temperature between L8 and L10 that there was no medical reason to assign the Claimant to L10 rather than L8. In short, it is simply not the case that there was any breach of OH advice in transferring the Claimant to L8.

45. In any event, within about 12 weeks of being transferred to L8 the Claimant was moved back to L10 by Mr Aston upon advice from personnel.

Overtime whilst on L8

46. By way of background it is accepted on all sides that there is no contractual right to overtime, nor any contractual right to require the employee to work overtime.

47. The tribunal considers that there was a breakdown of communication here between the Claimant and her managers. She thought they were saying that she could not do over time unless she was prepared to work on any line. In fact, they were saying that she could only work overtime on L8 and L10 if there was work available on those lines. If there was not work on those lines, then unless she was prepared to work on the other lines, which she was not, she could not work overtime.

48. Once the Claimant returned to L10 all issues in respect of overtime resolved. This issue, which was in any event just a misunderstanding, was short-lived.

Warning in November 2015

49. In November 2015, Mr Aston gave the Claimant a stage 1 warning under the managing absence policy. The Claimant's sickness absence was indeed such as to warrant a warning under the policy. No coherent case has been advanced as to why a warning was inappropriate and the tribunal is unable to discern one.

Tailgating

50. In November 2015 the Claimant reported that a colleague had been tailgating her on the public highway and driving with full beams on. She said it had happened several times on the way to and from work.

51. Mr Barron and Mr Aston both viewed video footage taken by a passenger in the Claimant's car. This was an out of work incident. They therefore suggested that the Claimant go to the police if she remained concerned.

52. The tribunal considers that there is little else that the Respondent could have done. It cannot realistically control its employee's driving on the public highway outside of

working time. Nor can it be expected to investigate and take action in respect of possible instances of dangerous driving that take place outside of working time.

New Contract

53. In early 2016 the Respondent proposed to change the terms and conditions of employment of a significant number of its employees in an exercise known as 'Project Fair Reward'. On 21 March 2016 the Claimant signed a new written contract of employment, the terms of which differed in some respects to her old terms.

Fourth grievance

54. Also on 21 March 2016 the Claimant raised a further grievance. The essence of it was a complaint that she was being abused and bullied on the line by the use of the word 'off-cut'. A colleague, Anna, was shouting the word unnecessarily and she and other colleagues would look at each other smirking and laughing at the Claimant and at her reaction to the use of the word. They would also look at her and laugh.

55. This grievance was investigated, and ultimately dismissed, by Mr Hussain. Mr Hussain interviewed a lot of people (19) which of itself is to be commended.

56. When Mr Hussain interviewed Anna, the alleged protagonist, she admitted that after calling out 'off-cut' she did smile. She said she smiled at all of the staff on L8. This provided some significant corroboration for the Claimant's allegation, namely that Anna would smile after calling 'off-cut'. However, it was not clear why she was in the habit of smiling after calling out 'off-cut'. Used in its proper sense it is a banality that has not comedic quality. Mr Hussain did not ask, or otherwise investigate, the crucial and most obvious of questions: '*why did you smile after calling out off-cut?*'. This was the very thing that he was supposed be investigating. In his oral evidence, he simply said that he did not think he needed to ask that question because Anna had denied that she smiled at the Claimant.

57. The Claimant appealed against Mr Hussain's decision. The appeal was determined by Mr Rodenhurst by a letter dated 16 May 2016. He upheld the appeal to the limited extent that he accepted that there was a link between the use of the word 'off-cut' in the workplace and the Claimant. However, he did not think there was any bullying but accepted that the Claimant experienced it as such. He resolved that the use of the word 'off-cut' would be monitored and that any petty behaviour would be stopped.

'False' allegations

58. On 14 April 2016 the Claimant was suspended following an incident on the line. On 18 April 2016 she was invited to an investigation hearing to answer charges that:

    a. she had behaved in a threatening, aggressive and intimidating manner towards a team leader, by shouting at him and waving a spreading knife close to his face;
    b. she had attempted to pressurise a fellow employee to bear false witness, thus giving credibility to a grievance she had raised.

59. Dealing with the second charge first, this related to an allegation made to Mr Hussein during the course of his investigation into the fourth grievance. Laxmiben Mangela alleged that the Claimant had told her just to say that she could hear people shouting 'off-cut' on L8 from where she was standing on L1 when in fact this was not true. This was undoubtedly a reasonable basis for commencing an investigation. The

allegation was further investigated and upon investigation it was swiftly dropped. It became clear that the evidence was not as strong as it had first appeared. The tribunal is satisfied that the allegation was not true but also satisfied that the Respondent had a reasonable basis to raise it and investigate it.

60. Now dealing with the first charge, it arose out of an incident on the line in which the Claimant made a vociferous complaint to a team leader following what she perceived to be yet further bullying by co-workers. The bare facts of the incident were hardly disputed. The Claimant accepted when interviewed that she had been angry, that she had been shouting or at least speaking very loudly whilst very upset, that she had been gesticulating heavily with her hands, that she was holding a spreading knife and that she was doing this in the course of an interaction with a team leader.

61. There is no meaningful sense in which the allegation was "false". The basic facts of it were true and it was then a question of analysis and interpretation whether the behaviour could be construed as threatening, aggressive and intimidating on which views could reasonably differ. There was certainly a reasonable basis for the charge to be made and taken to a disciplinary hearing.

62. A disciplinary hearing indeed followed and was chaired by Mr Orme. Having considered all of the evidence Mr Orme decided that no further action should be taken. He considered, on balance, that there was insufficient evidence that the Claimant had behaved in a threatening, aggressive or intimidating manner even though she had probably been shouting and waving the spreading knife near to someone's face. This was a perfectly cogent: there was evidence to suggest that the Claimant was emotional and upset rather than threatening, aggressive or intimidating. The suspension was lifted.

63. Having delivered this decision, Mr Orme, aware that the Claimant continued to have problems with work colleagues, spoke to her 'off the record' and suggested that she consider a move to the bakehouse, which is a different part of the business. In essence, this was so she could make a fresh start. Mr Orme was criticised for this in cross-examination but the tribunal saw no merit in the criticism. Mr Orme was trying to help, he made a sensible suggestion and it was nothing more than that.

'Fifth grievance - series of grievances in May 2016'

15 May 2016

64. The Claimant did not in fact raise a grievance on 15 May 2016 but she did report to Mr Barron a conversation she had with Mr Aston on her return to work (at this time she was in the habit of sharing her feelings with Mr Barron). The content of the conversation with Mr Aston is disputed however the tribunal finds as follows:

    a. Mr Aston did not try to prohibit the Claimant from raising further grievances or try to stop her from speaking to personnel for support. He did say that she could raise issues with him first but that is not the same thing.
    b. Mr Aston suggested the that Claimant transfer to the bakehouse. This was just a suggestion and no obligation was implied. The Claimant found the suggestion offensive because she considered herself a victim and thought if anyone should move it should be the bullies.
    c. Mr Aston did not adopt an unwelcoming attitude, but the Claimant misconstrued his suggestion that she move to the bakehouse as unwelcome.

d. The Claimant subjectively experienced the meeting as being unpleasant but it was not. It was conducted in appropriate manner. Mr Aston does have a very robust and no-nonsense style and way of speaking so it would not have been difficult for his intentions to be misconstrued.

18 May 2016

65. On 18 May 2016 the Claimant raised a grievance. In it she alleged, among other things, that in the course of her shift some colleagues on the line had mocked her by re-enacting the incident in which she had been accused of waving a knife in a team leader's face. This was the matter which she had faced disciplinary charges for although they had ultimately been dropped following a disciplinary hearing. The Claimant made this complaint in good faith and it was probably well founded in fact.

66. When the Claimant handed Mr Barron the grievance he said words to the effect that he had run out of managers to hear grievances from the Claimant. Mr Barron does not think he used those words. However, the tribunal prefers the Claimant's evidence, which appeared to be a firm recollection, that he did. However, it was a throwaway comment that Mr Barron has now forgotten making.

67. In the tribunal's judgment what the Claimant was describing in this grievance of 18 May was colleagues behaving in a way that can properly be characterised as cruel. It was undoubtedly the sort of behaviour that, if proven, would justify disciplinary action and quite possibly severe disciplinary action.

68. However, the Respondent did not see it that way at the time. Between Mr Rodenhurst and Mr Barron, it was decided that the Claimant's grievance was just a repetition of earlier grievances and thus that there was no point at all in dealing with it in any way. A decision was taken not to deal with it or take it any further. Mr Barron communicated this decision to the Claimant orally in a meeting on 31 May 2016.

'Forged documents'

69. On 25 May 2016, the Claimant raised a yet further grievance complaining that her signature had been forged on a number of documents. This grievance *was* dealt with. It was investigated, and dismissed, by Mr Peter Snak. The outcome letter is dated 7 June 2016.

70. The Claimant alleges that five return to work forms were forged (p278, 279, 522, 529 and 529a). She contends that although they appear to be signed by her, in fact her signature was forged.

71. The tribunal rejects these allegations. The documents were not forged. Firstly, it is implausible that the Respondent would have forged these documents. There is no rational reason why it would have done so. It could gain nothing from doing so and it has not been suggested otherwise. Secondly, the signature on the forms does look like the Claimant's signature. This is not just the tribunal's assessment, it was also the Claimant's evidence. Thirdly, the Claimant's evidence and reasoning as to why she thinks the forms are forged was just not convincing. In essence it boils down to two things. Firstly, the fact that she cannot recall signing the forms. The tribunal is satisfied that the Claimant genuinely has no recollection of signing the forms but this is best explained by the combination of the sheer banality of the act of signing a return to work form and the considerable passage of time since doing so. The most recent form in question is dated 23 August 2015. Secondly, the other main reason

the Claimant contends that the forms are forged is that some of them misstate the period of absence in question. This is a very weak reason. A simple mistake in identifying the period of absence is a far more likely explanation.

72. The tribunal also rejects the Claimant's evidence that at the investigation meeting with Mr Snak on 31 May 2016 he admitted to her that the documents had been forged. This in the tribunal's view is wildly implausible and totally inconsistent with Mr Snak's decision promulgated just a week later on 7 June 2016. The Claimant's oral evidence about this was unconvincing. Further, the notes of the meeting of 31 May 2016 do not record any such admission and the Claimant's letter of appeal against Mr Snak's decision does not mention it (it surely would have if such an admission had been made) and nor do the notes of the appealing hearing (which the tribunal accepts to be broadly accurate) mention it.

Resignation

73. The Claimant resigned summarily on 2 June 2016 by a letter of that date. There was an accumulation of reasons for her resignation. This included a failure by management to deal adequately with the complaints of bullying that she had made and an overall loss of trust in the company.

Law

74. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA)

75. The Claimant has the burden of proving that she was dismissed. The essential elements of constructive dismissal were identified in *Western Excavating v Sharp* [1978] IRLR 27 as follows:

    "There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

76. It is an implied term of the 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".* (*Malik v BCCI* [1997] IRLR 462). Whether that term has been breached must be judged objectively.

77. The implied term can be breached by a single act by the employer or by the combination of two or more acts. In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, [1986] ICR 157, CA, Glidewell LJ stated: "… *the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?".*

78. It is well established that in adjudicating upon the question of whether or not there has been a breach of the implied term of trust and confidence the tribunal must apply an objective test. This is plain from the speeches in *Malik* itself, but has been emphasised repeatedly since including in, among other authorities, *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 and *Leeds Dental Team v Rose* [2014] IRLR 8.

79. A breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances *Morrow v Safeway Stores* [2002] IRLR 9.

80. In *W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516* the EAT (Morison J presiding) accepted that there was an implied term in the contract of employment *'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.* Conduct amounting to a breach of that term might also, depending on the facts and circumstances, amount to a breach of the implied term of trust and confidence.

81. In *Buckland*, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies; (ii) if 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; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

82. There is a nice question as to whether or not the same approach applies when dealing with the implied term identified in *Goold*. On the one hand in *Hamilton v Tandberg,* unreported EAT 2002, the EAT suggested that in the case before it "at least" a range of reasonable responses test should be applied to determine whether or not there was a breach of the *Goold* implied term (see para 22). However, on the other, *Hamilton* pre-dates *Buckland* and therefore the definitive guidance of the Court of Appeal as to the interface and relation between the test for constructive dismissal (rooted in the law of contract) and the test for unfair dismissal (a statutory test). Further, *Hamilton* was doubted by Elias J in *Claridge v Daler Rowney* [2008] IRLR 672.

83. On balance, the tribunal considers that *Hamilton* cannot survive *Buckland* and what is said at paragraph 22 of *Hamilton* is no longer good law. However, <u>in this case</u> the distinction makes no difference. Whether an objective test is applied, or whether the range of reasonable responses test is applied, to determine whether or not there has been breach of the *Goold* implied term the answer is the same.

<u>Identifying the reason for dismissal in a constructive dismissal case</u>

84. It is necessary to identify the reason for dismissal in an unfair dismissal case and that is so even where the dismissal is constructive. The reason for dismissal in such a case is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See *Beriman v Delabole* [1985] IRLR 305 [12 – 13].

<u>Contribution and Polkey</u>

85. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) of the Employment Rights Act.

86. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further *Nelson -v- British Broadcasting*

Corporation (No. 2) [1980] ICR 110. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

87. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> *"... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ..."*

Discussion and conclusions

Was the Claimant dismissed?

88. The tribunal considers that there were numerous failings in the manner in which the Claimant's grievances were dealt with in the pre-21 March 2016 period which cumulatively amounted to a breach of the duty of trust and confidence:

    a. First grievance: in February 2015 the complaint of bullying that the Claimant made was not taken up in any meaningful sense and was assumed to be part of a childish "squabble". In itself this was a coarse way of dealing with the matter rather than a grave error: it was the first time a complaint had been raised and there was little to indicated that there was or may be a serious underlying problem that might endure.
    b. Second grievance: in July 2015, the Claimant made more detailed and serious complaints of bullying on the line. Mr Rose dismissed those complaints purporting to have investigated them thoroughly. In fact he had not come close to doing so and had barely investigated the complaints of bullying at all. This was much more significant because by now the Claimant had raised serious allegations of bullying, it was the second time a complaint had been raised within the space of a few months and it was now obvious that there may well be underlying issues that required proper intervention.
    c. Third grievance: in August 2015 the Claimant committed a grievance to writing and gave significant detail. The complaints that she made were in parts generalised but also in parts well particularised. The complaints included some very serious allegations such as a workplace assault, an appalling reaction to the assault by Mr Jacobs, colleagues vandalising her work to make it look bad, being nick-named 'off-cut' and more. It was clear by now that there were very serious issues being alleged. Supporting witnesses corroborated the Claimant's complaints in various important respects and gave evidence of their own of horrible bullying on the line, including being barged into. Mr Barron failed to adjudicate on the specific allegations that were made one way or another and failed even to interview the three supervisory/managerial employees said to have been present at or around the time of the alleged assault. It would have been one thing if Mr Barron had passed these serious issues up to be adjudicated upon in disciplinary proceedings, but he did not. He meekly concluded with a very broad brush that there were some adverse behaviours that had gone too far but he characterised them as being low level and 'not overt'. That conclusion could

not sensibly be reached without actually adjudicating on the specific allegations that the Claimant made, something neither Mr Barron nor anyone else did.

89. The tribunal considers that, at the least cumulatively, the above short comings amounted to a breach of the implied term of trust and confidence. They were also cumulatively a repudiatory breach of the *Goold* implied term.

90. However, on 21 March 2016 the Claimant signed new terms and conditions of employment. Mr Feeny conceded that, if the Respondent was in repudiatory breach of contract by that date, the Claimant affirmed the contract on 21 March 2016. For that reason, Mr Feeny focussed primarily on subsequent events in his oral submissions. Nonetheless, the pre-21 March 2016 events remain important. They are the context in which the subsequent events took place.

91. The fourth grievance was raised on 21 March 2016 but was not adjudicated upon until after 21 March 2016. The investigation and outcome therefore post-date the affirmation referred to above. The outcome was delivered by Mr Hussain in a letter dated 19 April 2016.

92. Mr Hussain failed to grapple with a central issue which was why it was that Anna, whom the Claimant complained had taken up the mantle of the ‘off-cut’ teasing, would smile at colleagues after shouting off-cut. Anna twice made an important admission that this is what she did and for reasons that cannot be good ones in light of what the Claimant’s complaint actually was, Mr Hussain did not think there was any need to ask her why she would smile after shouting off-cut. By this stage there was a long history of the Claimant complaining that she had been nicknamed ‘off-cut’ and that colleagues were abusing the term and smiling/laughing together at her expense. It was plain by this stage that the use of the term had caused the Claimant considerable upset. Mr Hussain reached the improbable and unsustainable conclusion (later overturned by Mr Rodenhurst on appeal) that there was no link between the use of the word ‘off-cut’ and the Claimant.

93. When set in its factual context, the failure (without any reasonable or proper cause) to properly investigate a central allegation of the Claimant’s fourth grievance was a breach of the implied term of trust and confidence and a repudiatory breach of the *Goold* term.

94. On 18 May 2016 the Claimant raised a grievance complaining that colleagues had mocked her by re-enacting the knife waving incident during the course of a shift. This was the incident for which she had been suspended and had faced serious disciplinary proceedings. Although there was a proper basis for the disciplinary proceedings and although ultimately no action was taken it would undoubtedly have been very distressing and worrying for an employee in the Claimant’s position to face them. What the Claimant was describing in this grievance was a malicious and cruel piece of bullying.

95. On 31 May 2016 the Respondent communicated a decision to the Claimant that it would not investigate or take any action in respect of the 18 May 2016 grievance. On the face of it this was a major dereliction duty which objectively speaking seriously damaged or undermined the relationship of trust and confidence. No employee should have to put up with such behaviour at work as the Claimant complained of on 18 May 2016, and if the same is reported, absent some special consideration it should be investigated and properly managed.

96. Mr Finlay submitted that there was reasonable and proper cause not to investigate or take the matter further. The tribunal does not agree. The Respondent considered that the grievance of 18 May 2016 was just a repetition of previous grievances which had already been dealt with. But it was not. Firstly, it described a fresh incident that post-dated the previous grievances. Secondly, it described an incident that was more tangible (and thus more amendable to proof one way or the other) than the 'off-cut' complaints. Thirdly, the incident described was a new level of cruel taunting of the Claimant who by now was on any view known to be a vulnerable employee.

97. The tribunal considers that the Respondent's refusal to deal with this grievance, but instead to stonewall the Claimant in relation to the incident was indeed a breach of the implied term of trust and confidence and a repudiation of the contract of employment. There was no reasonable and proper cause for this refusal and it left the Claimant with no redress or avenue for redress.

98. Mr Finlay made the point, and made it as well as it could be made, that by this stage the Claimant had made myriad grievances and that so many things were bothering her about the workplace that realistically nothing the Respondent could have done would have resolved the situation. The tribunal does not agree:

    a. Firstly, the fact is that the Claimant remained an employee of the Respondent who was having problems in the workplace. She raised a grievance on 18 May 2016 that set out a prima facie case that her colleagues had bullied her by re-enacting the knife waiving incident. That was a matter that was crying out to be dealt with. It described cruel conduct that was likely to be amenable to proof (through witness evidence at the least) one way or the other.
    b. Secondly, matters had not reached anywhere near the point where the problems were so intractable that no solution or intervention was worth trying. Very few interventions in fact had ever been tried: the women on L10 were briefly split up in the summer and autumn of 2015 and there were some 'educational talks' in November 2015. It could hardly be said that all reasonable interventions had been exhausted to the point it was no longer worth investing time into resolving the grievance.

99. All in all, the tribunal considers that the refusal to deal with the grievance of 18 May 2016 was in and of itself a breach of the implied term of trust and confidence (necessarily a repudiatory breach) and a repudiatory breach of the *Goold* term.

100. In case that is wrong the tribunal records that it is also its view that the refusal to deal with the grievance of 18 May 2016 was a final straw. That final straw contributed to a repudiatory breach of the implied term of trust and confidence and/or the *Goold* term whereby the breach was constituted by the final straw combined with the failings in respect of the fourth grievance and/or the failings in respect of the first and/or second and/or third grievances.

<u>Resignation in response to breach</u>

101. The tribunal has no doubt that a material part of the reason for the Claimant's resignation was that she believed that her grievances, particularly the grievance of 18 May 2016, had not been adequately dealt with. The decision not to deal with the grievance of 18 May 2016 was only communicated to the Claimant on 31 May 2016. The Claimant resigned in response, without delay, affirmation or waiver, on 2 June 2016 and was thereby constructively dismissed.

Reason for the dismissal

102. The most recent and causatively significant repudiation of the contract of employment was the decision to refuse to deal with the grievance of 18 May 2016. The tribunal considers that the principal reason for the dismissal is revealed by the reason for this refusal.

103. The reason for the refusal was a genuine, but mistaken, belief that the Claimant was repeating a grievance that had already been adjudicated upon and thoroughly dealt with.

104. The only potentially fair reason that this might arguably amount to is SOSR. The tribunal accepts that a genuine but mistaken belief can sometimes amount to SOSR. It also accepts that the reason here was neither capricious nor whimsical. But, it would not be fair to say that the bare repetition of a grievance could, even in principle, be capable of justifying dismissal. At least not without a lot more by way of aggravating features than existed in this case. For instance, there was no suggestion here that the grievance of 18 May 2016 was raised in bad faith nor raised to be obstructive nor otherwise malignly. In short the reason was not a substantial one.

105. The tribunal therefore considers that there was not a potentially fair reason for the dismissal.

Fairness of the dismissal

106. Even if there was a fair reason for the dismissal, most likely SOSR, the dismissal was not fair in all the circumstances. The belief that the claimant had merely repeated a grievance which had been previously made was entirely unsustainable. No reasonable employer would have formed that belief in the first place but nor would any reasonable employer have sustained it.

107. Before dismissing the employee any reasonable employer would presumably have given the comparative content of the grievance of 18 May 2016 and past grievances further thought and analysis. It would immediately have realised that the grievances were not the same and differed in important respects.

108. Further, any reasonable employer would have followed some procedure before dismissing for this reason. Having notified the employee of the possibility of dismissal for repeating a grievance any reasonable employer would allow the employee to make representations about that. This did not happen.

109. Finally, to dismiss the Claimant for repeating a grievance was a sanction that was well and truly outside the band of reasonable responses. It came nowhere near the level of seriousness required to move straight to dismissal.

110. Further, the tribunal rejects any suggestion that this was a case in which matters had reached the point where the employment relationship was doomed and that it was right to move straight to dismissal because no intervention or management approach would fix things. The Respondent had not done a great deal to try and remedy the working relationship with the Claimant. Any reasonable employer with substantial administrative resources (the Respondent is large employer), would surely deploy a variety of approaches before concluding that the relationship was irretrievably doomed.

Contributory fault

111. On 15 May 2016 Mr Aston suggested to the Claimant that she might want to transfer to the bakehouse. This was pragmatic idea that might have worked well. The bakehouse is a warm environment so it would have been better for the Claimant's foot and such a move would have been in accordance with OH's advice. Mr Barron made a similar suggestion on around 18 May 2016 after the Claimant raised a grievance but before any decision had been taken as to how to deal with it.

112. Mr Finlay submitted that the Claimant's refusal to transfer was contributory conduct and that a reduction should follow.

113. The tribunal does not ultimately agree. There *was* merit in the Claimant transferring to the bakehouse. However, there was no instruction at this time to move there and there was no obligation on the Claimant to move there absent an instruction. Although the Claimant's evidence was not entirely consistent as to why she did not move, the tribunal is satisfied that at the time it was because the Claimant passionately believed that she was being bullied and that it was the bullies who should be moved not her. In all the circumstances, while that was not the only way of looking at the matter it was not, in the tribunal's view a blameworthy, foolish, perverse or bloody-minded way of doing so.

114. The tribunal also notes that the Claimant's refusal to move to the bakehouse did not cause or contribute to the decision not to deal with her grievance of 18 May 2016. So, the putatively blameworthy conduct could not in any event sound under s. 123(6) ERA.

Polkey

115. In his submissions, Mr Finlay set out a basis for a *Polkey* reduction which the tribunal considers to be credible.

116. If the Respondent had acted fairly, it would have dealt properly with the Claimant's grievances. Then, depending upon the outcome of those grievances it would have taken appropriate management action. There is a scenario in which, despite the Respondent dealing adequately with the Claimant's grievances and taking reasonable action in light of the findings, the Claimant would have remained deeply dissatisfied with the managers in High Care and/or in conflict with co-workers there. The tribunal says this because:

a. There was a long history of unhappiness and unsatisfactory relations between the Claimant and others in High Care;
b. The Claimant was not easy to work with because of high and inflexible standards and this was a potential source for conflict and disagreements to arise;
c. The Claimant could be upset easily at times and this, combined with the history of the Claimant's employment in High Care, means that there was real scope for further disagreements to arise.

117. In the event of the said scenario coming to pass, it is likely that the Respondent would have eventually tried to exercise its express contractual power to move the Claimant to a different workplace, in probability, to the bakehouse. This would have been to (a) move her out of the unhappy work environment to a new one and (b) move her to a warmer environment in accordance with occupational health advice.

118. If the Respondent had done that, there is a real chance that the Claimant would have refused outright to move. If so, she would have be in breach of a reasonable management instruction. She may well have stood her ground even if warned that the consequence of doing so could be dismissal. If so, this may well have led to her dismissal. Provided that the Respondent followed a fair process in requiring the Claimant to move such a dismissal could be a fair one.

119. The tribunal considers that while such a dismissal is a possibility, there are a lot of variables involved. Other scenarios are possible including that the Claimant would have been satisfied if her grievances had been dealt with properly and that further grievances would not have arisen (whether because the Claimant had attained a degree of satisfaction or because her colleagues modified their behaviour in light of the grievances being taken very seriously or both). But it is a sufficiently realistic scenario that it cannot be dismissed as a 'sea of speculation'. Overall, the tribunal considers that there was something like a 25% chance of a fair dismissal along the lines of the scenario postulated by Mr Finlay coming to pass.

120. However, it is unlikely that this scenario would have come to a head very quickly. There are a lot of limbs to it and the tribunal estimates that if it had come to pass it would have deferred the date of dismissal by about six months.

121. Hence the tribunal concludes that there is a 25% chance that the Respondent could and would have fairly dismissed by around 2 December 2018.

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Employment Judge Dyal

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Date 14.02.2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17.02.2018

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FOR EMPLOYMENT TRIBUNALS