



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Johnson

Respondent: DFS Trading Ltd

HELD AT: Sheffield

ON: 31 August 2018

BEFORE: Employment Judge Wedderspoon

REPRESENTATION:

Claimant: Mr M Collins of Counsel

Respondent: Mr M Zovidavi of Counsel

JUDGMENT

1. The Claimant was unfairly constructively dismissed.
2. A remedy hearing will be held in this matter on date.

REASONS

1. The Claimant brought a complaint of constructive unfair dismissal. At the commencement of the hearing it was clarified with the Claimant that she ran her constructive unfair dismissal case on two bases. Primarily she complained that there had been a breach of the express term contained in her contract whereby her role as senior finance BP retail and international was changed by the Respondent. Alternatively and her secondary argument is that there was an anticipatory breach of contract in that the Claimant was being placed in a new role effectively setting her up to fail so to be dismissed.
2. The Respondent raised that the anticipatory breach was not expressly pleaded in the Claimant's ET1 form. The ET1 form at paragraph 4 page 7 stated the Claimant's contract of employment was also contained in implied terms the

effect that the Respondent would not conduct itself in a manner which was likely to destroy the relationship of trust and confidence between the Respondent and the Claimant. The Respondent accepted and recognised it was not prejudiced and was able to deal with the Claimant's case as anticipatory breach of contract through cross-examination and adduction of evidence from the Respondent's witness. The Tribunal were willing to hear the Claimant's case on anticipatory breach of contract but noted that this was not apparent from the pleading and would consider any submissions made by the respective parties at the conclusion of the case.

3. The issues for the Employment Tribunal to resolve it being accepted that the Claimant left as a result of a change made to her duties at the Respondent's business was:-
 - a. Whether it was a breach of an express term of her contract that they could lawfully request the Claimant to work in a marketing role from a retail one;
 - b. Whether this was reasonable as seen from the Respondent's perspective and whether it was unreasonable to make this change from the Claimant's perspective in regard to the so called anticipatory breach of contract.
4. The relevant issues were whether the Claimant was effectively being moved into this role with a view to anticipating she would fail in it and consequently that she would be dismissed and whether such a term was sufficiently serious to be repudiatory and if she was entitled to leave for this basis.
5. The Tribunal was provided with 174 agreed bundle of documents. The Claimant gave evidence and the Respondent's commercial financial director Paul Steeples gave evidence. The following facts were agreed:
6. The Claimant was employed by the Respondent from 16 June 2003 when she was recruited as a business analyst. She signed an employment contract which can be found at page 28 of the papers. Contained within it is a title job role. It states "your job role within the company is business analyst although is a condition of employment that all staff are prepared to undertake reasonable duties in other departments which may from time to time be needed by the company".
7. With effect from 1 August 2013 the Claimant was appointed to the role of senior finance manager/retail.
8. The letter in the bundle at page 30 dated 19 August 2013 states that the position is with effect from 1 August 2013 and states "all other terms and conditions remain unchanged". It goes on to say "as you aware working in close partnership with a senior retail management team and your other partnering areas is an important step of the development of the commercial finance function. The work you carried out as part of the recently completed, planning and budgeting process was excellent and has undoubtedly helped to create a sound basis from which we can move forward". It goes on to say "please and sign return the head office copy of your contract of employment in the envelope provided".
9. The Claimant did not retain a copy of that contract signed in August 2013 and nor has the Respondent. Instead the Employment Judge requested sample contracts and these were provided in the afternoon of the first day of the hearing

concerning two finance business partners dating to 2014 the first being dated 24 July 2015 and the second 22 October 2015. They both contained similar wording contained in the document of page 28 namely “although it is a condition of your employment that all staff are prepared to undertake reasonable duties at other departments which may from time to time be needed by the company”.

10. Although the Claimant could not recall the exact terminology of the contract dated in August 2013 she accepted that similar wording may indeed have been contained in the contract that she signed. On that basis the Tribunal finds that the contract signed by the Claimant was in similar terminology namely that the Claimant agreed to undertake reasonable duties at other departments which may from time to time be needed by the company.
11. The organisational chart set out at page 34 indicates the Claimant sitting alongside four other senior finance BP individuals being managed by the commercial financial director Paul Steeples. The other senior finance individuals were senior finance BP supply chain, Leah Cunnane; senior finance BP marketing and omni channel, Emily Cowdroy; senior finance BP commercial, Lucy Collins and senior finance BP manufacturing, Phil Todd.
12. The Tribunal finds that although all of these individuals sat at the same level and had a similar title of senior finance BP they had specific and separate responsibilities, expertise and specialities. The Claimant’s responsibility was retail, property and international.
13. The Tribunal finds that although each of the senior finance partners worked together on projects they did not manage each other’s roles or areas of the business or moved between the roles. Each area of the business was distinct and required its own specialist knowledge and experience.
14. The Claimant’s focus had always been on retail and new stores. That forms the bulk of her day to day work. The Tribunal accepts the Claimant’s estimate that it was 70% of her function. As part of her role the Claimant worked closely with the retail management team being part of its operational and strategy meetings and liaised with area managers. Over the course of her appointment the Claimant built up detailed technical knowledge about how these teams functioned and what the business needs were for them. From this knowledge she had developed a significant specialism.
15. The Claimant was competent in her role as indicated by consistent appraisals achieving generally 100% of her achieved objectives.
16. In about May of 2017 one of the junior business partners called MP became unwell. She was off work for a period of about five weeks. Shortly after her absence another commercial analyst called TB left. On discussions it was considered that the Claimant would take on some of the role namely human resources function. The Claimant was willing to undertake this role and had no expectation of there being any consultation in regard to effectively an add on to her day to day work.
17. In about June of 2017 Mr Steeples the commercial finance director decided to review the structure of the senior finance business partner team and the way in which support was provided to the teams. He was aware at that stage that a new retail director would soon be joining the company. He was also aware of a major deal, strictly confidential at that time and that there were proposed changes to the international team which he believed would impact upon the

way support was provided by the senior finance business partner team. He liaised with his manager Nicola Bancroft the company's chief finance officer in regard to his review and he spent some time considering potential options to improve a service provided by the teams. He took into account that work was not evenly spread amongst the teams which meant that some individuals had a greater workload than others. He knew that the Claimant and another senior finance business partner Emily Mortlock had been supporting the same teams for a significant period of time. His view is that it may be beneficial for them to gain experience in other teams. He also took into account that the marketing team and the HR team had seats on the company's executive board which meant that the senior finance business partner providing support to these teams would be required to support an executive level. He was aware of the very positive feedback in respect of the Claimant which the HR director had provided. He also took into account that he had some discussions with her recently about the excessive extent of her workload and that she was very busy.

18. He took the decision to re-align posts. In that regard he considered it was appropriate to change the teams that Mrs Johnson and Mrs Mortlock supported. Mrs Johnson who was the most experienced he believed would be best placed to support marketing in HR teams. He was confident that she would work well with senior executives on the team. Furthermore he believed it was appropriate for Ms Mortlock who was less experienced to support the retail team who did not support at executive level. Ms Morlock had also been working on a project relating to the confidential deal and he was aware that the work that Ms Mortlock had done could link in with the company that the new retail director would undertake when he joined the business. He decided to reallocate central cost team to another senior finance business partner.
19. He set out his thought process in a rationale which can be found at page 37 of the papers. Although it was suggested to Mr Steeples that this was not a contemporaneous document and was drafted much later the Employment Tribunal reject this. The Tribunal find that Mr Steeples prepare the document to have a meeting with the Claimant and it is somewhat unfortunate that no written notes were made of that particular meeting or that he failed to disclose this note when the Claimant lodged a grievance about the way that she had been treated.
20. On 26 September 2017 Mr Steeples met with the Claimant for a scheduled one to one. He had not alerted the Claimant beforehand that he wished to discuss a structure or amendment to that structure. The Claimant was therefore taken by some surprise to be informed by Mr Steeples at that particular meeting that he was to change the structure whereby Emily with Devon supporting would be covering retail, web and new stores, Leah with Brodie supporting would be covering supply chain, IT and corporate, Lucy will share Becky supporting covering margin and merchandising, Phil Todd covering manufacture with Rob and Gary supporting and the Claimant with shared Becky supporting covering marketing, international property and HR. This is effectively shown in a structure in the papers at page 88.
21. The Claimant indicated to Mr Steeples at the meeting she was unhappy about the proposed change because it no longer fitted her skill set. It appeared a demotion and a downgrade to her existing role. Her view is that the link and synergies between the new responsibilities did not seem to make sense which she felt would have a detrimental impact on anybody performing the role

meaning it would be very difficult to perform well. For example the change would involve reporting to three executive board members who would each have their own demands whereas the retail roles required reporting to one executive board member only. At key times of the year for example budgeting forecast year end working with executive members was critical to the success so she felt supporting three executive members would be ineffective and challenging these key processes. That aside she felt it was a very significant change from her existing role. Mr Steeples told the Claimant that Emily had been told about the change on Monday 25 September and was happy with it. Emily had paid its part in the company's recent acquisition Sofology the so called confidential deal who then just had under 40 stores.

22. On 28 September 2017 she requested a formal conversation with Mr Steeples to discuss the plans and she had a number of questions. She met with Mr Steeples on Friday 29 September at 12pm and she asked a number of questions in that meeting. Mr Steeples told the Claimant that the rationale behind the changed roles was due to the change in personnel and the team and because Emily had supported the work on the Sofology acquisition and he thought it was a natural fit to then give her all the retail work. He told the Claimant that he did not consider letting the Claimant deal with the Sofology retail stores as part of her retail responsibility. He had spoken to Tim Stacey a member of the DFS executive board who the Claimant had worked with daily and he was said to have supported the decision. He told the Claimant he hadn't spoken to other individuals including Jonathan, Tom and Graham in the retail operations manager, Keith in international or Ben in property. The Claimant was unhappy that the feedback was only from one person rather than the key stake holders in the business. HR had not been involved as she understood it at this stage. It appeared to the Claimant that Mr Steeples had simply made the decision himself and not thought through about whether he could actually impose it on the Claimant.
23. I accept the Claimant's case that she asked Mr Steeples in turn what would happen if she did not actually agree to those changes and he told her "this is how it has to be". The Claimant understandably felt that this was heavy handed and disrespectful that she had built up her position over four years and developed significant expertise in the role. The Claimant was unhappy that such a fundamental and significant change was being made to her role and that she had no choice about it. She viewed this an effective demotion removing 70% of her existing duties and moving her into a marketing position which she had very little expertise. When she first joined the Respondent's organisation for a limited period of time she had conducted some low level marketing but it was by far no speciality and she did not have the skills. The change of role did not affect the Claimant's salary. However the Claimant's significant concern that there was an enforced change to her contracted role which she believed was wrong.
24. On 2 October 2017 she directly handed in her notice to Mr Steeples. Mr Steeples stated I find the Claimant shouldn't cut off her nose to spite her face. The comment was the Tribunal find unnecessary and disrespectful.
25. The Tribunal finds in cross-examination the Claimant accepted that it wasn't in so much that there was a lack of consultation with the Claimant. It was just the fact that the change was enforced. She felt she had no choice and her role was effectively removed and changed.

26. On 2 October 2017 the Claimant also spoke to Nicola. She was aware of the changes and asked the Claimant what she thought about the so called new role. The Claimant highlighted her concerns and in particular the lack of synergies between different areas of the business in supporting three executive members at the same time and how on two other occasions members of the team had left or been managed out of the business because of a lack of synergy between the business areas. The Claimant felt this was a means of pushing her out of the business. The Claimant stated she felt she was too old to be moving her career into a different business area. Nicola accepted what the Claimant had to say and the Claimant reached a conclusion there was no attempt to retain her or contradict her fears.
27. The next day on 3 October Mr Steeples announced his resignation to the Claimant's colleagues. On 11 October 2017 the Claimant received a letter from the Respondent accepting her resignation explaining how the decision to re-align the roles and felt that the change was reasonable based on business needs, feedback, personal strengths and development of the business. The Claimant was upset on the basis she felt this was an attempt to re-characterise the reality of the situation that she was told that there had been little feedback taken by senior stakeholders as regards this decision and that effectively her job role was fundamentally affected.
28. On 30 October 2017 whilst searching for work the Claimant saw an advertisement for her position on a reduced salary of £50,000 to £60,000. The Claimant was actually on £65,000 with a fully expensed car and company mobile. The Claimant believes that this role was an effective demotion with less responsibility given the overall reduction in what they were paying in a job market which I believe has remained strong and improved over time.
29. The Tribunal do not accept the Claimant that it was an effective demotion for this reason. However the Tribunal do accept that the changes proposed by Mr Steeples and presented as a fait accompli were effectively a fundamental change to the significant role of retail which this Claimant performed for some four years.
30. The Claimant continued to work her notice in her existing role while searching for new employment. She instructed solicitors who wrote to the company on 31 October 2017. The Claimant's solicitors at this stage flagged up the concerns of the fundamental change to the Claimant's role and that she would be claiming her dismissal was constructively unfair and will be required if bringing Employment Tribunal proceedings. The Tribunal should note that the letter of the Claimant's resignation on 2 October stated the changes to her role had left her little choice but to leave at page 42 of the papers.
31. The letter of the Claimant's solicitors was taken as a grievance and Alex Saldon?? group supply chain director chaired a grievance meeting with the Claimant on Friday 8 December 2017. The Claimant flagged up at that meeting that she felt that she had been given no choice. It had been imposed on her and that she had no relationship with the marketing team. She claimed it was a demotion not fit of her skill set. There had been no consultation. It was imposed on her.
32. The Claimant accepts at this hearing that she was given a fair opportunity to state her case.

33. By a letter dated 19 December 2017 the Claimant's grievance was rejected by the Respondent on the basis that it was rejected that there was any form of demotion, no plans to lower the Claimant's salary, remove any of her benefits and no changes to her terms and conditions. She was one of two business partners remaining with a car and on her enhanced package there were no plans to take that away.
34. The Respondent rather thought that this was new responsibilities for an opportunity for the Claimant to expand her skill set which they thought that the Claimant could ably take on. Mr Steeples had thought his use of cutting your nose off to spite your face on receipt of the Claimant's resignation was perhaps not the best use of his words and was clumsy.
35. The Respondent took the view that the Claimant was being asked to take up the same role only working with different areas of the business which was reasonable. It relied upon the fact that the role was the same including terms and conditions. It was accepted that Mr Steeples could have spoken more to the Claimant about his decision but ultimately did not feel it had been dealt with in an unreasonable manner.
36. By 27 December 2017 letter the Claimant appealed the outcome of the grievance. She stated that the finding that she was being made to take up the same role and only working with a different area of the business was entirely inconsistent and contradictory that no reasonable ??? concluded amounted to anything than a different role.
37. She maintained that to undertake new and different responsibilities of a different subject matter which required outside her skill set was not the same role. She said that she did not believe any reasonable employer could consider that when changing somebody's title, responsibilities, required skill set and the subject matter of their work that no consultation with the affected employee could be required as reasonable particularly in view of the fact that Mr Steeples had conceded he had been thinking about these changes for a while.
38. A grievance appeal hearing was chaired on 8 February 2018 by Paul Scanlon. The Claimant's case is that she again was given a fair opportunity to put her points.
39. ?????? 2 March 2018 the Claimant's grievance appeal was rejected. It was concluded that it was not unreasonable for DFS to change the area of business that the Claimant was supporting in moving forwards. It was accepted that regards to the delivery decision was that Mr Steeples had admitted with hindsight that changes could have been delivered differently. He accepted the intent and rationale of making the decisions in the interest of DFS and the Claimant. He supported Paul's role in deciding the best way to structure the team in going forward.
40. In respect of other occasions that the Claimant was alleged to have resigned the Claimant had previously considered resigning when she had some difficulties with childcare and in respect of the suggestion that the Claimant had brought as resignation to a previous meeting that we had about workload which was that she didn't hand to Mr Steeples. The Claimant couldn't recall doing that but her concerns had been about a better work life balance and working from home and when this was provided the Claimant decided not to resign. I don't see this has any particular relevant to the matters which the Employment Tribunal have to adjudicate in this case.

41. Mr Steeples accepted in cross-examination that if someone failed to perform that they could be subject to capability proceedings and ultimately dismissal. I accept his evidence that this was not in his mind when giving the Claimant the marketing role. He took a view that this was in the best way of re-aligning roles bearing in mind changes within the department but it did I respectively take the view fail to reflect the expertise and specialism of the role that the claimant was performing at the material time and his re-alignment was not a re-alignment at all but was a removal of a significant aspect's of the Claimant's specialist role over time.

Submissions

42. The Respondent submitted there was no ulterior motive or cost savings at all. The replacement for the Claimant was recruited at a rate of £60,000 which was negligible difference into the role that the Claimant was paid flies in the face of the evidence the Claimant was not wanting to be pushed out by Mr Steeples or the Respondent, nor was she being set up to fail is a hypothetical scenario and far too remote. No anticipatory breach of contract had been pleaded. That claim should be rejected.

43. The fundamental question was whether the Respondent was entitled to make those changes. The Respondent submitted it was. The Claimant had four areas of responsibility, accepted the meatier one was that of retail and it was simply being swapped for another one. That would have sat with Claimant's concerns of a work life balance. She had also been someone who had taken on other roles without difficulty and succeeded in them. There was a fundamental need of the Respondent to change its business and re-align it and the fact that the Claimant was reasonably requested as her contract determines to move from one area to another was not in breach of contract.

44. The Claimant accepted that no formal consultation was required for moves to other departments or given other responsibilities such as HR and she was simply just swapping one of her areas to another. This claim should be dismissed.

45. In terms of the case referred to by the Judge to the parties this is the case of Kellogg Brown and Root Ltd v Fitton UKEAT/0205/16.

46. The Respondent submitted the facts were significantly different to those in the current case. An extra commute was required by the Claimant in that case. No reasonable expectation for the Claimant to move. This was wholly different where the Claimant was already retaining a finance function in that department and it wasn't reasonable for the Claimant to refuse that.

47. Mr Collins on behalf of the Claimant submitted his primary case that objectively he submitted was the instruction lawful. He accepted that there was a clause within the contract which permitted a respondent to move an employee reasonably to another department.

48. In terms of whether the Respondent acted reasonably in doing so is a subjective one looked from the Respondent's point of view. They suggest that they thought it was reasonable. However whether the Claimant thought it was reasonable again is looked at from the Claimant's perspective and it was simply suggested that it was not a reasonable one in accordance with the Claimant's view.

49. The Claimant held a specialist business partner role. She had taken on temporary other positions. She had no marketing expertise. A permanent change to her role. A fundamentally different role where she had no experience or expertise was not reasonable.
50. The Claimant was coming towards the end of her career and it was unreasonable in those circumstances to move her into a different area. Alternatively the Claimant runs an anticipatory breach she was being put up into a position to fail. There was an ulterior motive. This was a cost cutting exercise. Somebody at £60,000 without a car has been recruited to replace the Claimant. The Claimant shouldn't have been denied permission to run this case because her resignation letter was brief and doesn't include it. It is very much put in the alternative.

The law

51. Pursuant to section 95(1) subsection C of the Employment Rights Act 1996 an employee is dismissed if the employer 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. Simple terms of constructive unfair dismissal arises where there is a breach of an express or implied term in the employment contract which is a repudiatory breach which causes the employee to leave and they do not waive or affirm that breach.
52. For the purposes of this case the parties having agreed the crux of the matter is in reality whether there was an express breach. I also consider the case of Kellogg Brown and Root Ltd v Fitton UKEAT/0205/16.

Findings

53. The Employment Tribunal find that the Claimant's contract in 2013 contained a clause to determining that her job role was that of senior finance manager retail with a term it is condition of employment that all staff are prepared to undertake reasonable duties in other department which may from time to time be needed by the company. The Tribunal find the wording of that clause permits the company to make reasonable moves of an individual to their duties from time to time. It does not envisage a fundamental change in a role carried out by an employee or a significant removal of responsibilities and tasks.
54. The Tribunal having found the context of this case that the Claimant albeit sharing the similar title of senior finance BP along with her colleagues within the department had specific speciality and expertise and functions within that department. The Claimant's responsibility was clearly retail and international. The Tribunal having found that this performed 70% of her role and that she had an add on of HR which she had taken on to assist the Respondent. Any change to remove the retail aspect of the Claimant's role was a fundamental change of the Claimant's duties and function within the organisation.
55. The Tribunal do not find that this was a demotion in the sense that the Claimant retained the same status level within the organisation and salary but it does find that it was a significant shift in the responsibilities that the Claimant had been performing since 2013 for which she had developed specialist knowledge and skill.
56. Therefore fundamentally the Tribunal find that although the Respondent does have a right to change pursuant to the contract other duties that has to be reasonable. The Tribunal accepts Mr Steeples' evidence to the extent that he

thought that this would be the best way to re-align the department and that he acted within good faith and the Tribunal rejects any suggestion that was from any ulterior motive to make the Claimant set up to fail her. But the Tribunal finds that to that extent it was reasonable from the subjective perspective of the Respondent. From the Claimant's perspective it was wholly unreasonable and unsatisfactory to require an individual who had developed expertise over a number of years to simply give up a significant part of her role and exchange it for marketing for which she had little expertise, specialist knowledge and limited experience. That was a repudiatory breach of contract for which this Claimant was entitled to resign and claim constructive unfair dismissal.

57. The Tribunal is not so minded to find an anticipatory breach of contract. Mr Steeples' actions were I find undertaken in good faith with best attempts to re-align a structure he thought going forward and not a deliberate attempt to marginalise and move the Claimant out of the business. However his actions were fundamentally naïve and displayed a misunderstanding of the specialism and expertise of the role of the Claimant within the organisation.
58. For these reasons I reject the anticipatory breach of contract and I find the unfair dismissal complaint good.

Employment Judge Wedderspoon

Date: 05th November 2018