EMPLOYMENT TRIBUNALS

Claimant: Mrs C J Powers

Respondent: Pneumatic Tools & Compressors Ltd

Heard at: Nottingham **On:** Tuesday 6 November 2018

Before: Employment Judge Legard (sitting alone)

Representation
Claimant: Mr J Collard, Solicitor
Respondent: Miss N Owen of Counsel

JUDGMENT having been sent to the parties on 6 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Issues

1.1 Both parties provided separate lists of issues; there was no significant difference between the two. The Claimant brings complaints in respect of:

(a) constructive unfair dismissal;
(b) breach of contract;
(c) unpaid holiday pay.

Therefore, the issues were essentially as follows:

Constructive dismissal

1.2 Did the Claimant terminate her contract of employment in circumstances in which she was entitled to do without notice by reason of the employer's conduct? In determining that question the Tribunal should consider the following –

(a) Did the Respondent commit a fundamental breach of her contract of employment entitling her to resign? The Claimant relies on the so-called '***Malik'*** term of trust and confidence, of which more below.

(b) If so, did she resign in response to that breach and for no other reason?

(c) If so, did she affirm the contract or waive the breach by delaying her departure;

The above are often referred to as the '***Western Excavating'*** principles after the case bearing the same name.

Breach of contract

1.3 The breach of contract complaint depends, of course, to a large extent upon the answers to 1.2 above.

Holiday pay

1.4 What, if any, sum is due to the Claimant in respect of her holiday entitlement which was untaken as at the date of her termination in accordance with regulation 14 of the Working Time Regulations or in accordance with the terms of her contract?

1.5 There also appears to be a claim brought under section 38 of the 1996 Tribunals Act in respect of an alleged, or indeed admitted, failure on the part of the Respondent to provide a statement of written particulars required under section 1 of the 1996 Employment Rights Act. I

deliberately left that to one side pending further argument as to whether or not such a claim has been adequately pleaded (or indeed whether it needed to be). Otherwise no jurisdictional issues arose.

2. Evidence

2.1 I heard evidence from the Claimant and, on the Respondent's behalf, from Mrs Thomas, one of the Directors of the Respondent Company. I was referred to a number of documents within an agreed bundle, comprising just over 100 pages. Intriguingly, I have not heard from either Mr Thomas or Mr Allcock. Both witnesses were thoroughly cross-examined. I found the Claimant to be a truthful and persuasive witness of fact, who gave clear, credible and straightforward evidence and, in my judgement, was, if anything, prone to understatement as opposed to exaggeration.

2.2 Mrs Thomas had a very difficult task to perform given that she was not a witness to the main event in question. Whilst I have no reason to doubt either her honesty or her integrity and taking into account that giving evidence is no easy task, she nevertheless struggled at times to give uncomplicated answers to uncomplicated questions.

3. Findings of fact

3.1 These findings are made on a balance of probability. The Respondent Company is a very small family owned business operating in the Nottingham area. It has been operating there for many years and specialises in the supply, maintenance and repair of compressor products. Mr and Mrs Thomas are the only two Directors of the business. They are also employed by the business although it is fair to say that Mrs Thomas had relatively limited day to day operational involvement, which is left to her husband (Gareth), the Managing Director.

3.2 Mr Allcock was employed as an engineer and the Claimant as an office/accounts clerk. The Claimant had been employed since 2003. Mr Allcock had been employed since approximately 1990. Mr and Mrs Thomas have a son (George) who runs his own IT consultancy business

in London. It was George who helped the Company set up its own website and internet based business, for which he was engaged in a consultant capacity. I accept that he is not employed by the Respondent. Nevertheless, George would often provide cover for his parents in the event of holidays (something accepted in evidence by Mrs Thomas) and, presumably, sickness. On one occasion in 2016 George provided cover for a period of over 2 weeks.

3.3 It is therefore a very small family business within which there are three principal employees at any one time. They appear to have rubbed along together, without incident or alarm, for many years.

3.4 It was a relatively common occurrence for scrap metal to be left outside the work premises with a view to it being collected by metal scrap merchants. That scrap metal can be left by various businesses, including the Respondent, that share premises on the industrial site.

3.5 On 5 April, a person or persons unknown left a metal-framed workbench or similar outside the Respondent's premises so that it was the first thing confronted by both Mr Allcock and Mr Thomas on their arrival at work the following morning shortly before the Claimant.

3.6 At this point, I refer to the Claimant's evidence. I do so not simply because I accept it in its entirety but also because I note that the Respondent faces the not inconsiderable difficulty of disproving her testimony, having failed to call either or both of the principal Respondent witnesses to the events in question.

3.7 I am told that this is because the Respondent being such a small business, they could ill afford anyone to be absent from the business for any time. I regard that explanation with a degree of circumspection. First, the Respondent has had many months notice of the date of this hearing to make arrangements. The Respondent could have asked George to provide cover (as he is known to have done before) or they could have requested a postponement or asked for the hearing to be listed on a particular day when Mr Allcock was available – I understand he is a

part-time employee. Alternatively the Respondent, which is legally represented, could have requested to simply stagger witnesses through the course of the day so as to ensure that the business, that is located not particularly far from this tribunal, could be run without interruption. Therefore, I return to the narrative.

3.8 On her arrival at work, the Claimant was immediately confronted by Mr Allcock who demanded to know whether it was she who was responsible for leaving the metal frame outside the premises. I assume it must have been an eyesore, an encumbrance or an obstruction although it is not entirely clear.

3.9 What happened next was this. Mr Allcock said in response to the Claimant's greeting of "good morning": "*Have you left this?"* He pointed to the metal frame. The Claimant said: "*No*", to which Mr Allcock replied: "*Well Gareth thinks you did*". The Claimant then entered her place of work whereupon Mr Thomas said to her in an equally unfriendly tone: "*Over to you is it. Have you left that crap outside?*" Again, the Claimant answered that she had not, to which Mr Thomas said: "*Well who did then?*" The Claimant replied: *"I have no idea but it wasn't me*".

3.10 She then went to the canteen and made herself and Mr Thomas a hot drink and returned to the office. As she did so, she asked them both for an apology for being accused of something that she had not done or was not responsible for. She sat down at her desk. Mr Allcock, a physically large gentleman (a matter agreed by both witnesses) followed the Claimant into the office, stood in the doorway entrance with Mr Thomas standing to his left. He then began shouting and swearing at the Claimant saying that he had not accused her of anything. The Claimant describes Mr Allcock as red faced, pointing and extremely aggressive with both his body language and words being threatening, intimidatory and distressing.

3.11 Mr Thomas witnessed this entire incident. The Claimant then asked Mr Allcock to stop pointing at her, to which Mr Allcock said: "*Why don't you just fuck off then*". The Claimant, feeling threatened by that, swore back in defence saying words to the effect of "*Why don't you fuck off*".

3.12 Following that, both Mr Thomas and Mr Allcock walked away. The Claimant collected her handbag and immediately left the premises. She described herself as shaking, fearful, very upset and intimidated.

3.13 As I have already pointed out, the Claimant worked for the Respondent for approximately 14 years. She had an unblemished record and, on her own uncontested evidence, she very rarely had a day off for sickness. Only once had she had cause in those 14 years to leave work early and without permission and that was in the wake of the 2015 election when, on her case, and nothing turns on this, Mr Allcock and Mr Thomas were celebrating the election result with party poppers and the like knowing that she was of a different political persuasion and causing her to become upset. That episode does not form part of the constructive unfair dismissal complaint and is of only very minor relevance to this case. Its only relevance is because it goes to show that the Claimant is, in my judgement, a person of reasonably robust mind and health and not somebody who is easily intimidated or upset by what might be termed as run of the mill banter and the like.

3.14 Later the same day, she received two voicemails from Mr Thomas. I have not been provided with any transcript but the words were to the effect of "*Can you give me a call to find out what's happening.*" There is no suggestion in my view that Mr Thomas made any enquiry as to why she left work but it was rather to determine her intentions. In other words, whether she was planning of returning to work. That is an important distinction.

3.15 The Claimant did not respond to either call. She was clearly shaken and stressed by the incident and at that time did not relish direct verbal or face to face contact with either Mr Allcock or Mr Thomas. Instead, she sent an email timed at 10:44 addressed to both Mr and Mrs Thomas at the business work email address as follows:

> "*Following the events this morning, I have made a decision that I will return to work on Monday on the condition that I receive a*

written apology and a pay rise of £1 an hour with immediate effect. Threatening and accusatory behaviour is not acceptable in a place of work. It therefore needs to be addressed. I hope this matter can be resolved as soon as possible.

Regards
Celia"

3.16 Mrs Thomas accepted under cross-examination that there was no contact with the Claimant between the receipt of that email and the letter that was subsequently sent by the Respondent to the Claimant on 19 April. The Respondent did not receive the Claimant's fit note until Wednesday 11 April. The Respondent later sought to excuse its inaction by reference to the Claimant being unwell and yet they appear not to have considered it appropriate to take any direct action upon the contents of that email within that time, even if only to acknowledge acceptance of it.

3.17 None of the Respondent's employees, and that includes the Claimant, are particularly well versed in what can often seem very daunting HR procedures that govern many workplaces the length and breadth of the country. Indeed, the Respondent did not have any written policy in place, be that disciplinary, grievance or similar. That is not necessarily surprising given the size of the Respondent's undertaking and it may go some way also to explain why the email dated 6 April from the Claimant was written in such a way. If, for example, there had been a grievance policy, one might reasonably have expected the office clerk to have made reference to the same within her email. The fact is that the Respondent effectively ignored both the email and the contents therein.

3.18 Furthermore, I find that the Claimant was entitled to be economic with the content given that, on her case, Mr Thomas, who was an addressee, had witnessed the entire event and accordingly did not require the same to be spelt out in any great detail.

3.19 The Respondent did however take legal advice on the same. I find it surprising, without having enquired into the nature of that advice, that the

lawyers did not suggest that it should be treated as a grievance. Be that as it may, the Claimant submitted a fit note on 11 April citing 'work related stress' as the reason for her absence and indicating a return to work not before 23 April 2018.

3.20 Mrs Thomas's evidence is that on Wednesday 11 April, she attended a legal advice appointment. Following that appointment she prepared a letter to be sent to the Claimant inviting her to a meeting to discuss the events of 6 April and to discuss her subsequent email to herself and her husband. She goes on to say that, on the following day, prior to sending the letter to which I have just referred, Mrs Thomas then received the fit note. Because she did not want to upset the Claimant by discussing the events of 6 April, she then amended her letter to simply acknowledge the fit note and to make arrangements for her return to work.

3.21 Therefore, it is not clear what the original draft letter contained or whether it was fundamentally altered in the wake of the fit note and, if so, why. Overall, I found Mr Thomas's evidence on this particular point most unsatisfactory and confusing.

3.22 Nevertheless, on 19 April the Claimant was still off sick. A letter was written to her by the Respondent inviting her to a meeting at 9am on Monday 23 April and informing her that she was required to attend a brief return to work interview to discuss her recent absence and her ongoing work. It goes on to say:

> "*The meeting will be short, will last approximately 10 minutes. The purpose of the meeting is to confirm you are well enough to resume your regular duties, update as to any changes whilst absent, discuss with you the reasons for your recent absence and recommendations made by your doctor and discuss ways the Company may assist you whilst you are recovering."*

3.23 Once again, Mrs Thomas's explanation as to why they waited until 19 April to send it does not sound true. I am unable to see what difference, if any, is made by sending the same letter on 12 April as opposed to 19 April. In

any event, I am satisfied that that letter is a standard form return to work letter and nothing more. It certainly does not purport to invite the Claimant to a grievance meeting or similar. It does not seek to address the clear and unequivocal complaint of threatening behaviour set out in her email dated 6 April nor could it be reasonably interpreted as such. It offers a 10 minute unaccompanied meeting to discuss standard return to work issues only.

3.24 I also note that during the course of her absence, the Claimant did make a telephone call to the Respondent's accountants in order to clarify the contents of a payslip. I see nothing untoward about that whatsoever and it is certainly not inconsistent with her remaining unfit for work. She was simply questioning the amount that she received in pay.

3.25 The Claimant's response to that letter was swift and she replied on 20 April confirming her resignation as follows:

> "*I confirm I cannot accept the conduct of* [the Respondent] *in that they have acted aggressively and in an intimidating fashion by the actions of your employee, Trevor Allcock, who shouted and swore at me and directed excessively aggressive body language towards me in the course of his employment. This was witnessed by Gareth Thomas who took no action. I have raised a grievance in my previous email, which appears to have been ignored and as such the above conduct is a repudiatory breach of my contact of employment which I accept and therefore can consider my appointment terminated by reason of said breach of contract conduct as of today.*"

3.26 There was some other issues raised in evidence and those included payment of sick pay, keys and so forth. I did not consider those to be relevant as they either did not contribute to the resignation of the Claimant or they post-dated the resignation.

3.27 The Claimant's final pay slip gave no indication that she had received any remuneration by way of holiday pay. The Respondent's case is that they

left everything to their accountants and, without producing any evidence in support, contend that the Claimant was paid all that she was contractually due. In relation to holiday pay, there is some assistance to be gained from some early letters of appointment dated 21 November 2003 and a later letter dated 27 December 2017, which appears to show the Claimant's holiday entitlement being 28 days as a minimum.

3.28 The Claimant contacted ACAS on 23 April and submitted her Claim Form on 1 June.

4. Submissions

4.1 I want to express my personal gratitude to both representatives for the very professional manner in which they have represented their respective clients before me and in particular the clarity with which they presented their closing submissions. I do not propose to rehearse the same within the context of this judgment. Both Mr Collard and Miss Owen concentrated their submissions on the facts as opposed to the law. That said, I was referred to a number of authorities.

4.2 Ms Owen directed me to the well known case of ***Kaur v Leeds Hospitals NHS Trust [2018] EWCA Civ 978*** and specifically to paragraph 40 of the same when Underhill LJ takes a considered look at the case of ***Omilaju v Waltham Forest LBC*** and specifically what might characterise a 'final straw' in a final straw case. She paid particular regard to paragraph 21 and the passage in italics within it.

4.3 On his part, Mr Collard referred me to two cases ***Shergold v Fieldway Medical Centre***, an EAT decision before the then President Burton P, and specifically paragraphs 30 to 32. I do not find that authority to be particularly helpful given that it arose in consequence of what are now outdated statutory grievance procedures. He also referred me to the case of ***Blackburn v Aldi Stores*** and specifically paragraphs 24 and 25, which was of a little more assistance.

5. The relevant law

5.1 The law relating to constructive dismissal is well rehearsed. Put simply, in order for the tribunal to find in favour of a Claimant, it must be persuaded that a) the employer acted in a way such as to fundamentally undermine the contract of employment often by acting in breach of the implied term of trust and confidence; b) that the employee left in response to that breach, and c) in so doing, she did not waive the breach by, amongst other things, delaying her departure – the so called ***Western Excavating*** principles.

5.2 The ***Malik v BCCI [1997] IRLR 462*** formulation is that the employer must not conduct itself in a manner calculated or likely to destroy confidence and trust. It may also be significant in many cases that the employer's conduct in question must have been without reasonable and proper cause – see ***Hilton v Shiner Ltd [2001] IRLR 727***. Conduct which breaches the term of trust and respect is automatically serious enough to be repudiatory, permitting the employee to leave and claim constructive dismissal – see ***Morrow v Safeway Stores Ltd [2002] IRLR 9***.

5.3 In ***Goold v McConnell***, the EAT accepted that there was an implied term in a contract of employment that "*the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they have*".

5.4 Whether the conduct complained of destroyed or serious damaged the relationship of trust and confidence is a matter for the tribunal and it is to be judged objectively. Even if the employer's act which was the proximate cause of the resignation was not by itself a fundament breach of contract, the employee may be able to rely on a course of conduct considered as a whole under the last straw principles (see ***Lewis v Motorworld Garages***). However, the last straw must contribute to the breach of the implied term, it cannot be innocuous – see ***Waltham Forest v Omilaju*** and also ***Kaur v Leeds Hospitals NHS Trust*** to which I have referred above.

6. Conclusions

6.1 I am satisfied that the Claimant was subjected to an unprovoked and expletive ridden harangue by Mr Allcock on 6 April which caused her to feel intimidated and to become distressed and concerned for her own safety. I find that during the course of that outburst, Mr Allcock (a physically large man) gesticulated at her and blocked the exit from a relatively small office. I am further satisfied that his body language was such as to cause a person of reasonable firmness to feel intimated in a way the Claimant described.

6.2 I am also satisfied that Mr Thomas, the Managing Director, witnessed that event and did nothing, either at the time or subsequently, to intervene let alone give any indication that he considered the behaviour of Mr Allcock to warrant any action, disciplinary or otherwise.

6.3 The Respondent did not at any time seek to reassure the Claimant that it would address her concerns that were clearly set out in her email or that it would arrange a meeting at which she could express those concerns in a neutral environment, or that it would take steps to prevent such actions or behaviour from happening again.

6.4 Whether considered cumulatively or independently, I am satisfied that the Respondent's conduct, including that of Messrs Allcock and Thomas for whose actions or inaction the Respondent is vicariously liable, was calculated or likely to serious undermine or destroy the relationship of trust and confidence and was, on any objective view, without reasonable or proper cause. I have been careful at all times to apply a strictly objective test.

6.5 I am equally satisfied that the Claimant left in response to breach and for no other reason. I was initially concerned by the Claimant's reference within her email to a pay rise of £1 per hour with immediate effect. However, having heard and seen the Claimant give evidence, my doubts were allayed. It was abundantly clear on the evidence that the Claimant would not have countenanced a return to that working environment, which

involved working alongside Mr Allcock, unless and until the Respondent had demonstrated that it was prepared to deal with the incident in question and take steps to prevent a reoccurrence.

6.6 It was for that reason, combined with the incident itself, which led the Claimant to resign. She had no job to go to. She had 14 years of service to lose and it was a decision taken simply and purely at that time to protect her health. Whilst I have every sympathy for the Respondent business being small as it is, I have no hesitation in finding that their action or inaction amounted to a fundamental breach of the implied term.

6.7 There was no affirmation. I find that the 19 April letter in itself unequivocally demonstrated that the Respondent was not prepared to deal with the matter as the Claimant had reasonably requested. That further contributed to the breach of the implied term.

6.8 In any event, a gap of 2 weeks between an incident and resignation is wholly insufficient on these facts to amount to affirmation. The Claimant did nothing in the interim period that was, in my judgment, inconsistent with acceptance by her of a repudiatory breach. It is noteworthy that the Claimant never returned to work after the incident in question.

6.9 The claim for constructive unfair dismissal therefore succeeds as does the claim for breach of contract for the same reasons.

6.10 The claim for holiday pay. The Claimant's leave year was 1 January to 31 December. I am satisfied that she was entitled to 28 days of leave per annum and she had only taken one day of leave at the date of termination. I am therefore satisfied that I can adopt the pro rata principle set out in regulation 14 of the 1996 Regulations and apply that statutory formulation in assessing compensation for unpaid holiday pay. That said, I left the precise calculation to a remedy hearing.

6.11 Following oral promulgation of the judgment on liability, the representatives of both parties requested time in order to see if the amounts in dispute were capable of agreement. Having done so, both

representatives then agreed the sums of compensation and I gave Judgment accordingly.

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Employment Judge Legard

Date 14th January 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE