EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

EH JJHT

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 6 and 7 December 2018 and on 4 January in Chambers.

EMPLOYMENT JUDGE Warren

Representation

Claimant : Mr Jonathon JF (friend)
Respondent: Ms Niaz- Dickinson, Counsel

RESERVED JUDGMENT

The claimant resigned. Her claim of unfair constructive dismissal is ill founded and is dismissed.

REASONS

Background and Issues

1. By an ET1 presented to the Tribunal on 15 June 2018 the claimant alleged that she had been unfairly dismissed by the respondent. The

respondent denied unfair dismissal and alleged that the claimant had resigned.

The Evidence

2. We heard evidence from the claimant and JF on her own behalf and on behalf of the respondent we heard evidence from AC, DN, MT and JS. The Tribunal had a statement from TB on behalf of the claimant. The evidence was untested, but uncontroversial in the light of the legal tests to be applied in this case.

3. There was an agreed bundle of documents amounting to over 550 pages. References to page numbers in this judgement relate to the pagination of the bundle.

4. Statements were taken as read.

5. Only findings of facts from the evidence relevant to the issues in this case have been made.

6. The decision was reached on the evidential test, the balance of probabilities.

The Agreed Facts

7. The claimant was employed by the respondent from 28 November 2011 to the 9 May 2018, when she resigned citing a breach of the fundamental term of trust and confidence as the reason for her resignation.

8. She was employed as an out of hours repairs assistant team leader. The respondent is a housing association.

9. There is little controversy in the evidence in this case. The issues relate to the way in which an investigation, disciplinary process, and grievance were handled.

10. The agreed facts are that the claimant and JF worked in different departments within the respondent's organisation. They had been involved in an affair for around six years.

11. Over a period of around 20 months immediately preceding the claimant's resignation, they had sent each other over 12,000 email messages, most of which were of a personal nature. The claimant sent nearly all of them from her private Gmail account, to JF's office email account. They were saved on the office server, and came to light during a data search for another member of staff.

12. The first 12 emails examined contained, as described by JF, private,

highly personal and intimate sexually explicit content, and included an image sent by the claimant to JF, of her in her underwear.

Facts found from the Evidence

13. When matters came to light the couple were individually called into meetings by AC, then Operations Manager, who, in the presence of MT, from the People and Organisational Development Team, suspended them both pending an investigation. The claimant was shown printed versions of the 12 emails, and she made no comment. The claimant was told that 'We would be investigating and 'we' would escort her back to her desk. The clear implication being that 'we' referred to AC and MT. She did not object to either being on the investigating team at that stage. She agreed that the note of the meeting is accurate. A letter of suspension was sent to her on 13 March. It again referred to 'we' and was signed by AC, who indicated that if she had any queries she should refer them to him. The obvious conclusion, in the absence of any suggestion of another appointee undertaking the investigation, was that AC was dealing with it himself. The claimant did not raise any query or objection at this stage.

14. AC had had cause to speak to the couple about inappropriate behavior at work in the summer of 2016 (p.128). There had been no further complaint. AC spoke to the claimant and JF in January 2018 about sending a personal email to a group accessible mailbox. They were told that this was a breach of the ICT policy (p.79 – 94) and asked not to do it again.

15. MT and AC agreed that an agency worker should be engaged to examine the couples' email accounts on the server. The worker signed a confidentiality statement.

16. MT liaised with the agency worker and received a bundle of emails (p129 – 154,155-160,161 – 196, and 258 – 487). She discussed them with AC. Many were of a sexually explicit nature, but there were others in which the claimant spoke of her colleagues in very undiverse terms, both derogatory and hurtful and with a clear lack of respect.

17. On 21 March 2018 the claimant attended an investigation meeting. JF and the claimant believed that their meetings would be heard together. In fact, they were heard separately. JF asked for a different investigation team has he had had dealings with AC and MT before. He threatened to resign unless this was agreed. A new team were brought in for him, his meeting was postponed, and it started with a new team on a different day

18. The claimant made no request at all in relation to AC or MT, and cooperated fully in the meeting. Her main issue was that she felt her privacy had been breached as the emails were private between her and her lover. It was explained that the emails had been taken from the company servers. She was

asked about the comments she had made about colleagues – and agreed that she would not have made them had she been aware that others might see them. It was noted that the claimant apologised in the meeting, and had not meant others to see any of the emails. The claimant commented for the first time that she did not think she would be able to return to work because she worked closely with AC, and he had seen the emails, he reassured her that was her choice and he would not treat her differently. She did not however express any concern over AC being the investigation officer during the meeting, or in the correspondence about the minutes of the meeting, which she was allowed to amend. The minutes clearly reflect the claimant engaging in the meeting giving answers and raising appropriate queries. There is no sense of her being unable to speak or in fear, although her embarrassment is reflected in the minutes.

19. AC prepared a report, which recommended that there was a case to answer to 3 allegations:-

(1) Breach of the ICT policy, specifically misuse of company resources for excessive personal use, and the nature of the emails exchanged.

(2) Breach of the Code of Conduct including comments on appearance, attitude and professionalism which showed clear disrespect to colleagues.

(3) Breach of the Equality and Diversity policy including derogatory or potentially harmful comments about sexuality and ethnicity.

20. A full investigation pack was sent to the claimant on 29 March 2018, confirming that the claimant was called to a disciplinary hearing on 3 April.

21. The claimant was signed off on sickness absence because of stress. She was offered access to the occupational Health nurse but refused at this stage.

22. JF resigned on 3 April 2018.

23. On 12 April the claimant was signed off sick for a further 2 weeks and as invited to attend a Sickness Welfare meeting on 16 April. She agreed to attend. She confirmed that the stress she was suffering had been caused over the privacy issues, and not the disciplinary process itself. She explained that her GP had offered her counselling and that she had to wait for a first appointment. She was offered immediate access through the respondent's own scheme. She was asked to give consent for the respondent to access her GP for advice on setting up the disciplinary hearing. The claimant refused consent, because she felt this was 'another breach of her privacy'.

24. On 26 April the claimant as again signed from work for 2 weeks. Because she had failed to make contact with the respondent as had been asked

of her, to discuss the way forward, the respondent decided that it would again set up a disciplinary hearing. The claimant was notified that the hearing would take place on 4 May 2018. It was to be heard by DN, Assistant Director Finance, supported by JS an HR advisor. The claimant's response was that she would not attend until her GP signed as fit to return to work.

25. On 2 May the claimant lodged a grievance against MT, AC and unnamed others about her treatment during the investigation. She considered it improper for AC to have read her emails as he was male, worked with her, and as a result she felt it would be impossible for her to return to work. She described the Trust as seriously negligent. She complained that she was unaware of who was to chair the meeting (but agreed in cross examination that the invitation letter did in fact tell her), and that she was being harassed into attending.

26. Because the grievance related to the conduct of the disciplinary process the respondent chose to deal with it as part of the disciplinary hearing and advised the claimant accordingly, but further adjourned the hearing to 9 May, offering the claimant any adjustments she may need to attend, to make written submissions, or to send a representative. The claimant explained that she wanted to be able to attend in person when she was better.

27. On 9 May the claimant resigned, citing the appointment of AC as the investigative officer, the attempts to 'force' her to attend a disciplinary hearing whilst she was sick, intending to hear her case in her absence, and her right to be able to return to work, as serious violations in breach of her human rights and her right to Dignity at Work. She alleged that this was an unfair and constructive dismissal.

28. The respondent held the disciplinary meeting on 9 May, but did not reach any findings. Instead it offered the claimant an opportunity to reconsider her resignation, and to make further representations to the disciplinary officer.

29. The claimant rejected the offer and her resignation was accepted on the 10 May.

30. The respondent did however continue the grievance process. It did not make any findings in the claimant's favour other than to consider that the appointment of a female investigation officer would be considered in such circumstances in the future. The claimant appealed the outcome. The appeal was considered on paper, and her appeal was rejected. The respondent confirmed that they had complied with all of their policies.

31. The policies engaged in this case were the Equality & Diversity Policy, and Equality and Diversity procedure (p69 – 78); ICT Security policy (p79 – 94); Disciplinary procedure and Code of Conduct.

32. There was no policy requiring the respondent to undertake a privacy impact assessment before investigating.

The Law

33. Section 95 Employment Rights Act 1996 provides:

> "(i) For the purposes of this Part an employee is dismissed by his employer if
>
> > (c) the employee 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."

34. That situation has been referred to in numerous decisions as "constructive dismissal". The authorities demonstrate that for an employee to be able to claim constructive dismissal, four conditions must be met, namely:

> (i) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
>
> (ii) The breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify him leaving;
>
> (iii) The employee must leave in response to the breach and not for some other unconnected reason;
>
> (iv) 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 and agreed to vary the contract.

35. The breach relied upon by the employee may be a breach of either an express or an implied term. The implied term relied upon most frequently by an employee is the implied term of trust and confidence. There is a helpful review of the law relating to the breach of this implied term contained in the decision of the Employment Appeal Tribunal in the case of Safeway Stores Plc -v- Morrow 2002 IRLR 9. The decision traces the progress of the implied term from the decision in Western Excavating Ltd -v- Sharp [1978] IRLR 27 to Mahmud -v- BCCI [1997] ICR 606. In the latter decision the House of Lords expressed the term as an obligation 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."

36. The term was revisited by the House of Lords in Johnson –v- Unisys [2001] IRLR 279, where Lord Millett referred to the obligation thus: "This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them".

37. Further, Safeway Stores Plc –v- Morrow 2002 IRLR 9 is authority for the contention that in general terms a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract.

38. The question in every case is whether, objectively speaking, the employer has conducted himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. Furthermore, an employer can breach the implied term of trust and confidence by one act alone or by a series of acts which cumulatively amount to a repudiatory breach of contract, even if the last event in that series is not actually a breach of contract at all. The question to be asked is whether the cumulative series of acts taken together amount to a breach of the implied term.

39. The application of the law has been summarised by the Court of Appeal in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 in the judgment of Dyson LJ:

> "14. The following basic propositions of law can be derived from the authorities:
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> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, Mahmud v Bank of Credit and Commerce International SA [1997 ICR 606 I shall refer to this as "the implied term of trust and confidence".

> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
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> 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"
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> 5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:
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> "Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

40. Counsel for the respondent referred me to the case of Leeds Dental Team v Rose [2014] IRLR 8 (EAT) Judge Burke stated "the test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employers subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention spoken of…"

41. Mr JF referred me to the case of Barbalescu v Romania - European Court of Human Rights 5.9.2017 Strasbourg – monitoring of an employee's email account resulted in the violation of his right to respect for private life and correspondence within the meaning of Article 8 of the ECHR.

The Conclusions

42. Both the claimant and JF accept that they sent over 12,000 emails to each other in contravention of the respondent's ICT policy. The claimant accepted in her evidence that disciplinary action was justified, and that it was reasonable for the respondent to undertake an investigation. She further accepted in her statement that a written or final written warning would have been appropriate.

43. I therefore conclude that the respondent had reasonable and proper cause to investigate the allegations against the claimant.

44. The issue lies with the way in which the investigation was undertaken, and in particular with the appointment of AC as the investigating officer.

45. It must have been obvious to the claimant that AC was the investigating officer, and to say otherwise damages her credibility. She had several opportunities to object to him undertaking the investigation – at the suspension meeting, on receipt of the suspension letter, and at the investigation meeting, or at any point in between.

46. The suspension meeting minutes have been confirmed as correct by the claimant as amended by her. There is no suggestion of discomfort on her part in the way AC handled the meeting either at the time or afterwards, until she refers to an 'intolerable interrogation' in her grievance. That does not match the written agreed minutes at all. The minutes reflect a sensitive, and professional set of questions to which she gave appropriate answers. She was shown a set of images and emails reflecting a small part of the respondent's evidence. That was entirely appropriate – she had to be given the opportunity to explain and comment, and would no doubt have complained if that hadn't happened.

47. Her explanation was that this was the point of no return as AC had seen the evidence, and she could no longer work with him.

48. It is worthy of note that the first few emails, which included some images of the claimant, and some containing sexually explicit written content, were handed to AC at the very outset, before there was a decision to investigate. It was thus unavoidable that the quandary in which the claimant found herself, would have arisen in any event.

49. The respondent is criticised for undertaking such an expansive investigation. Of the around 12 – 13000 emails on the server, the agency worker considered around 4 – 5,000. If they had not done so, it would have been open to the claimant to argue that the investigation had been less than thorough – and that the rest of the emails were innocuous. As it was the further investigation

revealed emails which clearly breached the Equality policy, and Code of Conduct being derogatory about a disabled employee, female employees, a gay employee, a client, and a manager. Some from the claimant, some from JF to her, but without what should have been a censoring reply from her. The claimant appeared not to understand that although private, these emails were stored on the company servers to which some employees had legitimate access, and were therefore always subject to the risk of being read and repeated elsewhere.

50. The request for a referral to occupational health and request to make contact with her GP when the claimant was signed from work with stress, was in accordance with the terms of the respondent's policies, as was the decision to proceed to a disciplinary hearing in her absence. She did not challenge this. The claimant agreed in her evidence that she did not intend to attend the disciplinary hearing in any event.

51. The claimant resigned before the outcome of the disciplinary and grievance outcomes were known to her.

52. The investigation officer was entirely appropriate – he was a senior line manager. If the claimant had objected to the investigating officer on the grounds of his sex, or the fact that she would have to work with him afterwards, and been refused, this may have to be considered in a different light, but she did not and the company were entitled to believe that she was as comfortable with their choice of investigating officer as they were.

53. I found no evidence that the respondent reacted to the material found on the server in a cavalier way. There is evidence of care being taken to ensure an appropriate agency worker removed the emails, and signed a confidentiality statement, and from then only the managers and HR representatives directly involved appear to have sight of them. I neither heard nor saw any evidence that a wider audience had been involved.

54. There is no basic requirement that an employer need consider the privacy of an employee in circumstances where the employee herself has placed the sensitive material into a company server accessible by a range of employees for quite legitimate purposes. The real breach of privacy was caused by her own actions.

55. I cannot find any evidence of a breach of the fundamental term of trust and confidence such as to justify the claimant in resigning. The respondent had just and proper cause to undertake an investigation. The investigation led to evidence being found to justify a disciplinary hearing. The claimant failed to cooperate to enable the respondent to respond to her sickness absence appropriately within the disciplinary procedure, and so a hearing date was set. She was offered alternative ways of participating and rejected them all. In her evidence she confirmed that she did not intend to attend the hearing whenever it

took place. In any event she resigned ahead of both the grievance and disciplinary outcomes.

56. I have considered the case of Barbalescu, but do not find it to assist. The factual premise of this case is totally different. Mr Barbalescu complained that his emails were being monitored without him knowing about it and without cause. In this case the claimant placed the emails on the company server, they were not generally monitored. She knew that they would be on the server, and knew there was an ICT policy of which she was in breach. There was therefore no breach of her Article 8 rights when the company looked at its own server and found her emails on there

57. In the alternative, had I found that the claimant had been procedurally unfairly dismissed, I would in any event have found, in the light of the admissions made by her, that there was a 100 per cent chance of her being dismissed in any event, or in the alternative, that she had contributed to her own dismissal by her conduct to the extent of 100%.

58. I have taken care not to include any detail of the emails in this judgement so as to protect those referred to in them in derogatory terms, and because I saw no reason to further embarrass the claimant – she admitted the nature of the content, and I needed nothing further to enable me to reach my decision

Employment Judge Warren

Signed on 9 January 2019

Judgment and reasons sent to Parties on

15 January 2019