



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Mrs S Acock

v

**Respondent:**  
Oak Underwriting PLC

**Heard at:** Reading **On:** 11 and 12 December 2018

**Before:** Employment Judge Gumbiti-Zimuto (sitting alone)

## Appearances

**For the Claimant:** Mr C Keyzor (Lay representative)

**For the Respondent:** Mr P Gorasia of Counsel

**JUDGMENT** having been sent to the parties on **7 January 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. In a claim form that was presented at the Employment Tribunal on 12 November 2017, the Claimant made a complaint of unfair dismissal. She alleged that her resignation was a constructive dismissal. In its response, the Respondent denied the Claimant's complaint of unfair dismissal.
2. During the course of this case, I have been concerned with determining whether or not the conduct of the Respondent amounted to a fundamental breach of the Claimant's contract of employment entitling her to resign her employment. The alleged breach of contract in the case is probably best described as a breach of trust and confidence which arises from a series of events which occurred towards the end of the Claimant's employment with the Respondent and the Claimant will seek to rely on what is known as the "last straw" principle in this case.

## Evidence

3. I heard evidence from Vanessa McPhail who at the relevant time was Business Support Manager and I also heard evidence from Kirsty Hall who is the Head of Business Support and the Claimant gave evidence in support of her own case. They all provided me with written statements which I have considered as their evidence in chief and I have taken into account the contents of those statements even if I do not make reference to them during the course of this judgment.

## The Law

4. The law that I have applied in this case is briefly explained in the case of London Borough of Waltham Forest v Omilaju and I have reminded myself of the guidance which is set out in that case. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment. 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. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must impinge on the relationship in a sense that looked at objectively is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. A relatively minor act may be sufficient to entitle an employee to resign and leave his employment if it is the last in a series of incidents.
5. If it is a final straw case, if in the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the alleged final straw to see whether or not in fact it does have that effect.
6. Where there is an entirely innocuous event, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle and an entirely innocuous act on the part of an employer cannot be a final straw even if the employee genuinely but mistakenly interpreted the act as hurtful and destructive of the trust and confidence in his employer. The test is of whether the employee's trust and confidence has been undermined is objective.
7. So, an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts and an employee to rely on a final act as a repudiation of the contract by the employer there has to be a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to have the same character as the earlier acts and nor does it have to be blameworthy or unreasonable but it has to be capable of contributing something to the series of earlier acts and if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee soldiers on and affirms the contract instead of resigning, the employee cannot subsequently rely on those acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the conduct in question is continued by a further act or acts in response to which the employee does resign, she can rely on the totality of the conduct in order to establish a breach of the implied term.

## Findings of Fact

8. What are the circumstances which apply in this case? The circumstances of this case I think can be relatively shortly set out and I refer to a number of points in the Claimant's witness statement as setting out what I consider to be the highlights of the Claimant's case.
9. The Claimant, a 56 year old lady, has an exemplary work record. She describes herself as diligent and hard working, She has a good employment record with the Respondent. This was confirmed by Ms Hall when she gave evidence pointing out that the Claimant had good appraisals throughout her employment.
10. For the purposes of this case, it is necessary for me to start in about 2016. The Claimant says that in about February 2016 she made a one-off comment which was either overheard by or mentioned to Sarah Hall which suggested to Sarah Hall that the Claimant did not like her or something of that nature, when all the Claimant intended was to make a funny comment. However, the Claimant says that she maintained a good and professional relationship with Sarah Hall. Sarah Hall happens to be the sister-in-law of one Kirsty Hall.
11. The next point in the chronology that I need to deal with in order to explain how I arrive at my decision really is the fact that the Claimant identifies that in March 2017, Sue Burnham, a longstanding employee, resigned her employment and at about this time, the Claimant's line manager, Davina Widdows, was pregnant. There had been issues which arose in relation to the working of the team that the Claimant worked in and a meeting was called on 3 May. At that meeting, the Claimant describes how Davina Widdows proceeded to stand during the course of the meeting while the rest of the team were sitting. The Claimant describes Davina Widdows' behaviour in the meeting as very unprofessional; she describes her raising her voice and says that her body language was aggressive. The claimant says that all the people who attended the meeting, apart from one person, spoke up pointing out the "*double standards and hypocrisy*" of Davina Widdows who was "*regularly inappropriate with her bad language and behaviour*". The Claimant points out that even Emma Harris, who was the quietest member of the team, spoke up and when she did so, Davina Widdows raised her voice and argued back rather than listening. She says that this is not the way that a team leader should have behaved.
12. This was meeting at which Vanessa McPhail was present as an observer although she herself did not lead the meeting or participate. It was during the course of that meeting that Vanessa McPhail says she heard reference to the phrase "snakey". At that time, Vanessa McPhail says that although it appeared to be being used in a derogatory way, she did not know what it meant and she did not attach any particular significance to it at that point.
13. The next point in the chronology, that I take from the Claimant's witness statement, is that after what the Claimant described as "*a car crash team meeting on 3 May*", two longstanding members of staff resigned. One of those was Natalie Holt or Natalie Clarke who had 12 years' service at the point that she resigned.

14. On 22 May, a series of informal meetings took place between Kirsty Hall and each member of the team including the Claimant. The Claimant is critical of the view that it is expressed by Kirsty Hall about this meeting and how she records the outcome. The Claimant points out that there was no contemporaneous notes taken of the meetings that were held with Kirsty Hall and one of the outcomes of the meetings held with Kirsty Hall was that there would be a meeting with Davina Widdows to clear the air. The Claimant says that meeting did not take place.
15. The Claimant makes general complaints. She explained that she started work early and that Kirsty Hall also started work early. The Claimant took the opportunity to speak to Kirsty Hall. The Claimant says that the senior management were not paying attention to her workload and were aware of her health being impacted. The Claimant points out that the number of staff employed by the Respondent working with her had reduced from eight to two due to resignations taking place. The Claimant says that in her discussion with Kirsty Hall she would be provided with some reassurance. The Claimant was speaking to Kirsty Hall about workloads and lack of support from the Respondent. The Claimant was told by Kirsty Hall that reinforcements were on their way but the staff to replace those who resigned would need to be the right staff and that it would take some time before that in fact happened.
16. The Claimant says that the Respondent had failed to acknowledge her issue and she refers to health problems such as high blood pressure which was exacerbated by the increased workloads which arose from the introduction of a new computer system on top of the reduction in the number of colleagues.
17. The next item in the chronology that occurs is that on about 12 July, some emails came to the attention of Sarah Hall. She forwarded these emails to Kirsty Hall and Vanessa McPhail and as a result of those emails, a decision was made to carry out an investigation. The investigation was conducted by Venessa McPhail.
18. The Claimant's case and the Respondent's case are very different at this point as to what in fact was happening on 17 July which was the date of the meeting that the Claimant had with Vanessa McPhail. The Claimant's view of that meeting is described in paragraph 112 of her witness statement and she talks about being taken by surprise at the meeting and she also makes reference to the Respondent failing to follow its own procedures or the ACAS Code on Disciplinary Procedures and she lists from A to G a number of ways in which she says the Respondent failed to comply.
19. The Respondent's position is very different. What the Respondent says is that the meeting on 7 July was not a disciplinary investigation meeting – it was a preliminary fact find meeting and that it was not a meeting which was held in breach of the ACAS Code of Practice – quite the contrary, it was carrying out the sort of preliminary fact-finding exercise that the ACAS Code of Conduct required to take place.
20. The Claimant says that on 17 July, she arrived at work early at about

10:07. Soon after arriving at work, she had an issue and she raised this issue with Vanessa McPhail who said that they would look at it in the afternoon. At about 10:30, the Claimant was then called into a meeting with Vanessa McPhail who asked her to follow her upstairs to the MD's room and the Claimant says that on entering the room she observed that there was another one of her colleagues, Mark Suffield, in a corner and that before she sat down, the Claimant said "*this looks serious*" and Vanessa McPhail's response was "*yes, it is very serious, bad news, this is a disciplinary*".

21. That is contested by Vanessa McPhail who relies on the notes which were made by Mr Suffield and which were provided in the trial bundles at pages 193 and 194 and the introduction to those notes is very different as it appears to give an introduction which makes no reference to a disciplinary taking place.
22. I have considered the content of that note and I have also heard the evidence of the Claimant and the evidence of Vanessa McPhail. I have taken into account the Claimant's amendments to the notes which were made by Mr Suffield and I note that those amendments were made a considerable period of time after the meeting itself took place and they make variations to those parts of the meeting which do not sit easily with the Claimant's account. Otherwise, the Claimant says that broadly she accepts the contents of the minutes/notes which were prepared.
23. It seems to me that the significant and important part of those minutes which helps me conclude whether the Claimant is correct or incorrect in her protest about the accuracy of the notes is looking at the way that the meeting came to a conclusion. The Claimant does not really argue with that. The Claimant does not appear to with the fact that there was to be a further stage in the process which was to be conducted by one of her colleagues. This suggests to me that this was not a disciplinary meeting as the Claimant suggests but is properly characterised as an initial fact-finding meeting. I prefer the evidence which was given by Vanessa McPhail as to not only what the purpose of the meeting was but also what was said during the course of the meeting.
24. I accept that the Claimant during this meeting made the complaint that she felt that she had been bullied and humiliated at the meeting. That may not be precisely how it is recorded but I accept that is what the Claimant intended to say even if it was not what she actually said. I accept her evidence when she says that is what she said in the meeting. I note that the Claimant explains that she felt that there was humiliation due to the fact that Mr Suffield was there and that she felt pressured by his presence.
25. The Claimant goes on to say that Vanessa McPhail had an aggressive approach from the start of the disciplinary and at one point made a comment that if the Claimant "*thinks that she is going to sit with Carol she is mistaken*" - again, in a tone which was aggressive. That part of her evidence I do not accept. I accept the evidence given by Vanessa McPhail that she was not aggressive but professional; I had the opportunity of seeing Vanessa McPhail give evidence and assess her for myself and seen the way that she was quite courteously but firmly questioned by Mr

Keyzor on behalf of the Claimant and I am satisfied that it is more likely than not that she did maintain the sort of demeanour that she described. Whilst the Claimant felt that she was bullied and may even have said that she was bullied during the course of the meeting, I do not accept that she was in fact bullied by Ms McPhail behaving in a bullying or aggressive manner.

26. I turn now to the content of the notes themselves on page 193 of the bundle. What the notes show is that after the introductions, the Claimant was shown the offending email. The Claimant accepted that she had sent the email and the Claimant is recorded as having confirmed that there is no misunderstanding about the correspondence and it is pointless denying or stating otherwise. The note says that Ms McPhail said that Sarah Hall had seen the correspondence and it was Ms McPhail's view that the email was in breach of the Respondent's acceptable use policy and that she read out the definition of bullying.
27. The notes then record that Ms McPhail confirmed the next steps and that the matter is now being put to a formal procedure and that Dave Rowntree will be investigating and collating evidence which includes all previous emails including any deleted emails and once the pack has been assembled, the Claimant will be invited to a meeting that Vanessa McPhail will chair where the Claimant could put her case, that the Claimant would be allowed representation, and it cannot be a family member or anyone else involved in the incident.
28. All that is as I understand it accepted by the Claimant. What happened next in terms of the chronology is that the Claimant said that the matter was born out of bad feeling and that she had never got along with Sarah Hall and that she does not deal with Sarah Hall. The Claimant is said to have said that she had been very close on numerous occasions to handing in her notice and in fact that she feels bullied. The Claimant is said to have confirmed that she is now happy to hand her notice in. At that point, Vanessa McPhail cautioned her not to make any rash decisions. Again, as I understand it, that version of events is broadly accepted by the Claimant. The discussion continues and the Claimant goes on to indicate that she intends to resign her employment because she does not want to be under the cloud of an investigation as it will make things horrible. The Claimant did not like the idea of being investigated for bullying.
29. I note however that the Claimant in her own evidence accepted that it is reasonable for an employer to determine whether or not an instance of bullying has occurred and that in doing so it is appropriate for an employer to carry out an investigation to see what happened and then if appropriate to proceed to a disciplinary hearing.
30. The meeting on 17 July finished with the Claimant expressing a wish to resign but she was counselled against that and indicated that she would be thinking about it. The Claimant went home. The Claimant appears to have spoken to her husband and later on in the day the Claimant telephoned Vanessa McPhail and during her telephone conversation with Vanessa McPhail, she reaffirmed her wish to resign her employment with the Respondent and subsequently the Claimant sent in her letter of

resignation at 20:29.

31. The email in which the Claimant resigned her employment contained the following passage: *"I can confirm that I give notice as of today to end my employment with Oak Underwriting. The accusations of bullying by myself to another member of staff I find totally devastating as this is totally untrue and I cannot continue to work for Oak whilst being investigated in this way."* The Claimant's employment with the Respondent subsequently came to an end and she has brought these proceedings against the Respondent.
32. The Claimant's position is that she resigned as a result of the humiliation, pressure at work, the Respondent's failure to support the Claimant in respect of health, the accusation of bullying and the Respondent's conduct of 17 July meeting being the last straw and the series of acts and failings constitute a breach of trust.

### Conclusions

33. So, what are my conclusions on the basis of those facts. I think the first thing I have to determine is whether or not there was pressure at work and it seems to me that there was pressure at work. However, what is not apparent or clear to me is that the pressure that arose at work could be characterised as arising from a breach of contract on the part of the Respondent or conduct which is capable of amounting to a breach of contract. Yes, there was a reduction in the number of staff and yes, there may have been tardiness in providing resources to supplement the Claimant when a team of employees had reduced from eight to two. However, I have heard the evidence of Kirsty Hall and I have also heard from Vanessa McPhail and it seems to me that there is nothing in the evidence which has been given by them that suggests that there was any breach of contract by the Respondent in the way that it dealt with resources and there is nothing in what was said or done that appears to me to suggest that they were in breach of any duty that they may have to the Claimant in respect of providing her with the facilities or resources in which to carry out her job. So that part of the case it seems to me does not really support a suggestion that there is a matter which would give rise to a breach of contract either in isolation or taken together with other matters.
34. The Claimant also relies on the failure to support her in respect of her health. Other than an assertion that on 31 May, she was in the doctor's surgery with Davina Widdows, it seems to me that the Claimant really has not explained in what respect the Respondent was failing her. I am not sure I understand what it is exactly the Claimant expected the Respondent to do; there is certainly no indication that she asked them to do anything specific in respect of her health. Again, taken in isolation or taken in conjunction with pressure at work, I cannot see that is a matter which amounts to a breach of contract.
35. The Claimant then talks about humiliation and the way that the Claimant was dealt with on 17 July. It is not clear to me exactly what the Claimant is relying upon as being acts of humiliation and I assume it is the conduct of the meeting on 3 May and also the way that the matter on 17 July was

dealt with by the Respondent.

36. In respect of the 3 May meeting, I am really not able to identify anything in the conduct of that meeting even taking the Claimant's version of the event at its height as anything that taken in isolation or in conjunction with the other matters feeds into a breach of contract.
37. As to 17 July, there is nothing in the conduct of Ms McPhail in my view which suggests a breach of the term of trust and confidence and I am quite satisfied that what was happening on 17 July was Vanessa McPhail satisfying herself as to whether or not this was a matter which required further investigation. The reason why I accept that is because if one looks at the email that provoked the meeting on 17 July, taken in isolation, it does not appear to me to amount to a breach of contract. However, when you consider it in context, it is clear that Vanessa McPhail was entitled to take the view that this was a matter that needed looking into.
38. Firstly, she had been at a meeting on 3 May at which there was reference to derogatory term "snakey". At the time, it bore no particular significance for her. She subsequently came to understand that that was a reference to Sarah Hall and taken in that context it gives rise to a reappraisal to the situation.
39. Secondly, Sarah Hall was clearly very upset when she reported the contents of the email when she discovered them and the manner in which she presented would have justified a conclusion that there was something that need to be looked into. It may be that once looked into, Sarah Hall's upset was unjustified but certainly there was something there that required investigation.
40. Then, thirdly, the Claimant herself had accepted that she had been responsible for comments and it would appear from the manner in which she referred to matters at the meeting on 17 July appeared to be accepted that perhaps that behaviour was not appropriate and there was some regret expressed. Vanessa McPhail referred to her as being remorseful in the way that she spoke about events and it seems to me that there was something there that Vanessa McPhail was entitled to say this ought to be looked into.
41. Perhaps an indicator of what this eventually amounted to is the fact that Carol Dancer, one of the Claimant's work colleagues who was party to this email exchange was also the subject of investigation, and at the end of that process, there was no action taken against her. I see no fault in the way that Vanessa McPhail treated the email. I do not accept that she described the meeting as a disciplinary meeting and take significant note of the fact that when the Claimant expressed a desire to resign. It was Vanessa McPhail who was prevailing upon her to take her time and to consider whether or not she ought to do that. It was a reasonable, sensible approach to take. I also note that the Claimant herself took the opportunity to consider matters. She speaks of talking to her husband and she telephoned Vanessa McPhail and reiterated her desire to resign and then subsequently, at about 8:30 in the evening, sent an email resigning her employment.



- 42. Taking all those matters into account, I see nothing in the manner in which the Respondent dealt with the incident on 17 July that could in isolation be considered a breach of contract or taken together with other matters could be considered a breach of contract, or taken together with the totality of all the matters relied upon by the Claimant could constitute a last straw entitling the Claimant to resign.
- 43. My conclusions in this case is that the Claimant's complaint that she was dismissed is not well founded and is dismissed.
- 44. There are no other complaints that I am asked to consider in this case other than those that arise from the conclusion that the Claimant was dismissed and so my decision is that the Claimant's complaints are not well founded and are dismissed.

**Costs Application**

- 45. The Respondent wrote to the Claimant's representative on 22 February 2018 and sent a costs warning letter which pointed out its analysis of the Claimant's case and, to summarise and explain why they did not think that the Claimant had any reasonable prospects of succeeding in the case.
- 46. The points that are made by the Respondent it appears to me are points that a proper legal analysis of the apparent facts of this case would set out but I have to be satisfied that in continuing to argue this case notwithstanding the costs warning letter, the conduct of the Claimant or her representatives was unreasonable within the meaning of the Employment Tribunals Rules and it seems to me that if a case like this is one which attracts an order for costs against a Claimant who is unsuccessful in the case that the general rule in Employment Tribunal proceedings that costs do not follow the event save where the exceptions identified in rule 76 apply would be meaningless. I see nothing in the conduct of Mr Keyzor which justifies an order for costs. The arguments that he has presented, although I do not accept them, have been clearly and eloquently presented and perhaps Mr Keyzor's calling was not of an electrician but an advocate and I reject the application for costs.

---

**Employment Judge Gumbiti-Zimuto**

Date: 27 February 2019

Reasons sent to the parties on  
1 March 2019

.....  
For the Tribunal office