EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms M Miecznikowska **v** **H&M Hennes & Mauritz UK LImited**

Heard at: Watford **On**: 6 February 2019

Before: Employment Judge Bloch QC

Appearances

For the Claimant: Mr I Fahiey – Claimant's fiancée
For the Respondent: Ms C Rayner - Counsel

JUDGMENT

1. The claimant's complaint of unfair (constructive) dismissal is dismissed.

CASE MANAGEMENT DIRECTIONS

1. The remaining issue (whether certain claims of the claimant were covered by a COT3 agreement entered into by her) is listed to be heard on the **30 April 2019** (with a time estimate of **3 hours**) with the following directions:

    1.1 Within 14 days of this judgment being sent to the parties the respondent is to formulate the issues to be decided at the preliminary hearing on the 30 April 2019.

    1.2 The claimant shall within 14 days of receipt of the respondent's draft list of issues agree or amend that list.

    1.3 The parties are to be at liberty to serve and exchange witness statements in relation to the issues to be decided at the preliminary hearing, no later than 14 days before that hearing.

REASONS

1. The claimant was employed by the respondent from 17 April 2014 until her resignation on 8 February 2018. Latterly, she was employed as a visual merchandiser (from 26 October 2015), a management level position. This

involves responsibility for displaying the respondent's merchandise on the shop floor, in accordance with the respondent's guidelines as to the "look" it wishes to achieve.

2. The issue for decision today was whether or not the claimant was constructively dismissed by the respondent on 8 February 2018 and if so, whether that dismissal was unfair.

3. On 30 October 2017 (having returned to work after being sick for 18 days), the claimant raised a grievance about what she believed to be discrimination experienced in relation to her sickness on 5 October 2017 and unlawful deductions from her salary on 6 October 2017.

4. Her claim in relation to non-payment for 6 October 2017 was subsequently the subject an ACAS COT3 agreement. There is lack of agreement between the parties as to whether that COT3 covered not only the financial aspect i.e. non-payment on 6 October 2017, or also the claimant's claim that she had been discriminated against in that regard.

5. On t12 November 2017 there was an incident between the claimant and her line manager Burcu Cansiz. The claimant was unhappy and refused to come to work early on the following day, given the lateness of her working on 12 November 2017. The claimant says that after she advised Burcu about the Working Time Regulations requirement of substantial and interrupted breaks between shifts, Burcu was rude to her. On the other hand, Burcu regarded the behaviour of the claimant as rude to her and she noted in a discussion document alleged rudeness of the claimant towards Burcu and staff. The claimant raised a further grievance on 15 November 2017 dealing with (as she perceived) discrimination, harassment and victimisation she had experienced on 5 October 2017 and the more recent issues on 12 and 13 November 2017. Thereafter the COT3 was signed on 18 December 2017 and (as indicated above) there is a dispute as to exactly what issues were settled between the parties.

6. The principal complaint by the claimant leading to her claim of constructive dismissal arises in regard to the time which the respondents took to conduct an investigation into her grievances. She had her grievance meeting on 19 December 2017 and the hearing took about 3 hours. I shall return to this in more detail. The claimant was given the opportunity of being represented at that hearing but did not take it up. The hearing was with the claimant's Area Manager, Halima Begum, who gave evidence before the Tribunal. Many issues were traversed in the course of that hearing which culminated in the claimant being asked whether there was anything further she wished to say. She was apparently satisfied that all her points had been covered.

7. In relation to the complaint of delay in the claimant receiving the outcome of her grievance, I heard evidence of Ms Begum in this regard which I accepted. Having received the grievance on 15 November 2017 there

was some short delay of the usual kind involving co-ordinating diaries of witnesses and others before the hearing took place on 19 December 2017.

8. At that meeting Ms Begum explained that because of the busy Christmas period it would be challenging to arrange meetings with other employees as part of the investigation. She asked the claimant if she was content to continue working in her store while the investigation was on-going and she confirmed that it was.

9. At the end of December 2017 Ms Begum telephoned the claimant's store on two occasions to speak to her and update her. However, she was unavailable to take the call and messages that Ms Begum left were not returned. On t11 January 2018 Ms Begum telephoned the claimant. She explained that she had been unable to speak to two witnesses, Holly and Nathania and offered to provide a grievance outcome without speaking to them first. The claimant said she would like Ms Begum to speak to them first rather than provide her outcome without doing so.

10. On 12 January 2018 Ms Begum emailed the claimant to say that she would receive the grievance outcome during the following week and the claimant responded to thank Ms Begum for letting her know.

11. On 15 January 2018 Ms Begum telephoned the claimant to explain that she had been unable to speak to Holly and Nathania. Nathania had been absent from the business due to sickness and Holly had refused to say anything on record because she was afraid of Magda (although Ms Begum chose not to tell Magda about Holly's refusal at that time).

12. On 19 January 2018 Ms Begum decided to email the claimant to confirm the grievance outcome as it was her last day before her annual leave. She was sure that she had sent the email but unfortunately when later checking her emails, she noticed that although she had clicked the send button, the email had been stuck in the email outbox and had not been sent to the claimant. During the period which followed up until 8 February 2018 (when the claimant resigned) the claimant did not chase Ms Begum for the outcome or complain about the further delay.

13. On 6 February 2018 the claimant had a conversation with Burcu Cansiz regarding prioritisation of work. Burcu advised the claimant that she would like the area that the claimant worked in to be changed and that she (Burcu) had a different idea as to how it should look. She also asked the claimant to update specific parts of the store in accordance with the respondent's guidelines. According to the claimant she agreed to do the latter and asked if Burcu would like to work on the area that she had her own vision for, as the claimant needed to prioritise her workload effectively in order to make sure that she completed all her deadlines on time. She maintained that as a member of the management team she (the claimant) was expected to come up with a management plan to ensure best practice.

14. The version of events told to the Tribunal by Burcu Cansiz was somewhat different. She had completed a form indicating the areas where she felt development was necessary and set an action plan. During her conversation with the claimant in this regard (according to Burcu) the claimant said: "If you have any ideas do them yourself" or words to that effect. Burcu felt that the claimant's attitude was rude and entirely inappropriate for her to talk to her manager.

15. Accordingly, Burcu decided to act informally and hold a discussion with the claimant about her conduct. Her record of their discussion on 8 February indicates Burcu's view that she felt that the claimant's conduct was "unacceptable as a senior manager if suggestions are being made to Magda [the Claimant] the expectation is she actions these without giving attitude". Burcu decided to take no further action and proposed that the issues be reviewed in her next dialogue/appraisal. However, the claimant started crying and asked if the meeting could be reconvened. Following further discussion, the claimant decided to leave the premises as she was apparently feeling unwell.

16. At about 5:00pm she explained she had handed in her notice effective immediately to HR.

17. Insofar as there were differences of recollection or nuance between the parties to what happened on 8 February I accept the evidence of Burcu in preference to that of the claimant. Burcu struck me as a witness who was balanced in her approach and doing the best she could to recollect matters as they occurred. The claimant, in my judgment, while not seeking actively to mislead the Tribunal, presented emotionally and as someone who would be very upset to receive any negative feedback. This was apparent during the hearing when by her general "body language" and facial reactions she showed considerable anger and upset at various points. I thought it likely that this intensiveness might have encouraged her to recall the relevant events in a way that was favourable to her case and also to indicate that she might well have reacted rudely to Burcu on 8 February, as Burcu recalled.

18. On 12 February 2018 after Ms Begum had learnt that the claimant had resigned and had not received the grievance outcome, Ms Begum emailed the claimant a copy of the grievance outcome. She apologised and explained that she had sent it previously. It was only subsequently that she had found it stuck in her email box and Ms Begum did not dispute that the claimant received the grievance outcome for the first time on 12 February 2018. Ms Begum on 12 February 2018 created a .PDF of the grievance outcome and she explained this in the following way: the template letters which the respondent has in its system include an auto date function which means a Word version automatically displays the current date when it is opened. When Ms Begum opened the word version on12 February it displayed the current date. Accordingly, she changed the date to the one which appeared on the version she thought she had sent on the 19 January 2018, i.e. she changed the date to 19 January 2018. She then created a .PDF so that the date would not

change to the date on which the claimant opened it. Ms Begum's intention in changing the date and creating the .PDF was the claimant would have an identical copy of the version she thought she had sent the claimant on 19 January 2018.

19. There was considerable suspicion cast on this version of events by the claimant. It was suggested on behalf of the claimant that Ms Begum had not tried to email the claimant on 19 January 2018 but only did so for the first time on 12 February 2018. During cross-examination on behalf of the claimant Ms Begum stuck to her guns and rejected the idea that she had manufactured the document to cover up her own delay. I concluded that Ms Begum was telling the truth. When asked if it might have been possible for her to look on her system for the original .PDF she explained that the computer system automatically logs emails in Word and that her first thought on 12 February was to find that email which would be conveniently accessible in date order in Word. I do not regard that version of events improbable and do not believe that Ms Begum was lying.

20. Turning to the law. The law in this area is well known and does not need detailed explanation. If a claimant is to succeed in a complaint of constructive dismissal the claimant must prove that the respondent committed a breach or series of breach of the contract of employment going to its root (often in the form of breach of the duty of trust and confidence) and that the claimant responded to that breach by walking out (effectively accepting the repudiated breach). In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833 Court of Appeal stated that in a normal case where an employee claims to be have been constructively dismissed it is sufficient to a Tribunal to ask itself the follow questions:

    (1) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?

    (2) Has he or she affirmed the contract since that action?

    (3) If not, what was the act or acts (or omission) by itself a repudiatory breach of contract?

    (4) If not, was it nevertheless a part of a course of conduct comprising of several acts and omissions which, viewed cumulatively amounted to a (repudiatory) breach of the implied term or trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation).

    (5) Did the employee resign in response (or partly in response) to that breach? .

21. I concluded that the respondent did not commit any breach of contract, still less any repudiatory breach by reason of delays on relation to the claimant's grievance. There was no substantial delay in holding the grievance meeting on 19 December and no breach in regard to the period

until 19 January during which time the claimant was kept informed of developments. Nor was there any breach as a result of the delay between 19 January and 12 February in the circumstances of genuine error on the part of Ms Begum, as I have found. I found it a powerful point that at no stage did the claimant made any complaint about the delay in her grievance outcome. She presented in evidence as a strong-minded and articulate person and one who was acutely aware of her rights and any possible infringement of them. I therefore do not accept that she was deeply distressed by the delay in receiving the grievance outcome. That is perhaps not so surprising, given that for some time since the autumn of the previous year she had been looking for other employment and had eventually in effect landed a job by the 5 February 2018. I did not regard it as significant that that this job offer was subject to the usual kinds of documentary caveats.

22. Another area of complaint emphasised by the claimant was the grievance hearing itself. The notes of the grievance hearing are set out at some length in the bundle and they indicate a long and diligently pursued process by Ms Begum. While it is right that the notes themselves do not mirror precisely the letter of grievance itself, first, the notes cannot be comprehensive and cover every point (giving that the meeting lasted some 3 hours) and secondly, between those notes and the detailed outcome letter itself it is obvious that Ms Begum was doing her best to cover in substance of points of grievance raised by the claimant. For example, whilst the claimant maintains that the notes do not refer to the allegations of victimisation or discrimination, nonetheless the outcome letter does. In my judgment there is nothing in the manner of the conduct of the grievance hearing or the response setting out the grievance outcome which amounted to a breach of contract on the part of the respondent, still less a repudiatory breach of contract.

23. The claimant made general complaints about the way in which she was allegedly victimised or discriminated against since her return to work in October 2017. While it is right to say that there was some disagreement between herself and Ms Cansiz from time to time (as indicated above) there was no evidence to suggest any victimisation or discrimination being practised against the claimant. As indicated above, if anything, my firm impression (based on the evidence and demeanour of the claimant during the hearing) is that the claimant was able to and did “give as good as she got” and indeed my impression was that she would not have tolerated gladly any criticism of her work or attitude. I should add that in relation to her first grievance, while that was upheld in part. in my judgment insofar as not upheld that was a conclusion to which management could properly come and did come without any question of victimisation or discrimination towards the claimant.

24. Further, I conclude that in relation to the events of the 6 February 2018 culminating in the 8 February 2018 discussion, there was no basis for regarding this as constituting a breach or, still less, a repudiatory breach of contract by the respondent, nor could it (or any part of it) be described in

any real sense as the “last straw” in a series of acts or omissions against the claimant.

25. Finally, I was left in considerable doubt as to the cause of the claimant’s resignation on 8 February 2018. I have no doubt she was upset by what she perceived to be unfair criticism by her line manager. The existence of another job offer must, in my judgment, have played a considerable role in her decision to resign that day. Put differently, the claimant did not in my judgment show (on the balance of probabilities) that she resigned in response to any perceived breach by the respondents of the contract of employment. Even if she had had any justified grounds for complaint on that day (whether because of the events on that day or because of delay in receiving the grievance outcome) they would not have amounted individually or cumulatively to a repudiatory breach of contract entitling her to “walk out`’. In my judgment even of some justified complaint, she “jumped the gun” by walking out of her employment.

26. In conclusion, the claimant’s evidence fell far short of establishing a constructive dismissal. There was in my judgment no repudiatory breach of contract by the respondent at any stage, no series of breaches upon which she could rely and no final straw. Further, she failed to persuade me that her resignation was caused by the matters about which she complained rather than that she had obtained a job offer to work elsewhere.

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Employment Judge Bloch QC

Date: …12/03/2019……..

Sent to the parties on: 21 March 2019

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For the Tribunal Office