



EMPLOYMENT TRIBUNALS

Claimant: Mrs L E Grayson
Respondent: C&D Express Transport Ltd
Heard at: Sheffield **On:** 14 February 2019
Before: Employment Judge O'Neill

Representation

Claimant: Miss T Ahari of Counsel
Respondent: Mr A Weiss of Counsel

RESERVED JUDGMENT

1. The claim for Unfair Dismissal fails.
2. The claim for unfair dismissal having not succeeded then the claim under S38 Employment Act 2002 compensation for failure to provide particulars of employment also fails.

REASONS

Background

The Claimant having had disciplinary charges brought against her resigned and claimed constructive dismissal for breach of the implied term of trust and confidence.

Issues

1. Did the Respondent without reasonable and proper cause act in a way calculated or likely to destroy or seriously damage mutual trust and confidence and did it do so.

2. The Claimant relies on –
 - Failure to deal adequately with the Claimant's grievance.
 - Breaches of confidentiality.
 - By Revealing conversations to Ms Morrell.
 - By Revealing disciplinary status to Pawsons.
 - Suspension without adequate reason or explanation.
 - Commence disciplinary action.
3. Did the Claimant resign for that reason or for some other reason?
4. Did the Claimant act in a way so as to waive the breach by reason of delay or otherwise?
5. If there was a dismissal was it a potentially fair reason and if so what was that reason? In this case the Respondent relies on misconduct and some other substantial reason. The other substantial reason relied on is a breakdown in the relationship between the Claimant and the managing director Mr Ducker and failure to take part in the internal proceedings.
6. Did the Respondent act reasonably in so dismissing?
7. Did the Claimant cause or contribute to the dismissal by reason of culpable blameworthy conduct?
8. If the dismissal was unfair what remedy does the Claimant seek (in this case compensation)? Should compensation be uplifted or reduced by reason of:
 - a. A failure to mitigate;
 - b. The ACAS Code;
 - c. Polkey;
 - d. Would the Claimant have been dismissed in any event for breach of good faith/fidelity? Working elsewhere for a competitor whilst still contracted to the Respondent.
9. Statement of terms and conditions: the Respondent accepts that no terms and conditions of employment which would satisfy Part 1 of the Act have been provided, that compensation for failure to provide would be due if the Claimant succeeds in the substantial claim.
10. Breach of contract for want of notice or notice pay was not pleaded in the originating Tribunal application. It is agreed it is not an issue before us today.

Law

11. The relevant statutory provisions are within the Employment Rights Act 1996 (ERA 1996) sections 94, 95, 98, and S 38 Employment Act 2002. These sections are well known and as both parties are represented, I do not set them out in full.
12. The leading case on constructive dismissal is **Western Excavating [ECC] Limited v Sharp** [1978] IRLR 27 which guidance summarise as follows:-

The Claimant must show there was a fundamental breach ie a serious breach by the employer, that the Claimant resigned in response to that breach and not for

any other reason, that the Claimant resigned promptly in response to that breach and did not waive the breach through delay or any other reason.

13. The leading authority on breach of the implied term of mutual trust and confidence is **Malik and Another v The Bank of Credit and Commerce International SA** [1997] IRLR 462 HL. In that case the House of Lords confirmed that the following implied term was a well-established principal and fundamental term and employment contract: “*the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely destroy or seriously damage the relationship of confidence and trust between the employer and employee*”. Counsel for the Respondent submitted a number of authorities to which I have had regard namely **Vaughan v London Borough of Lewisham** UK EAT/0534/12; **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] IRLR 833; **High Vac Limited v Park Royal Scientific Instruments Ltd & Others** [1946] CH 169. Counsel for the Claimant referred me to **W A Goad (Pearmak) Ltd v McConnell** [1995] IRLR 516 and **Crawford and Anor v Suffolk Mental Health Partnership NHS Trust** 2012 IRLR 402, CA.

Evidence

14. There was an agreed bundle of documents of almost 307 pages.
15. Oral testimony was given by the Claimant and her husband Mr Nigel Grayson. A written statement was submitted by her sister-in-law Ms L Hussain and she was tendered but Mr Weiss elected not to cross-examine in view of the time constraints. Oral testimony was given by the following Respondent witnesses – Mr L Ducker, managing director and Mrs Sue Ludlum, HR advisor. I listened to a transcript of the tape recording of the telephone conversation between Mrs Ludlum and Pawsons having considered the parties views on admissibility and the authorities referred to and admitted the tape.
16. Counsel for each party provided very helpful written submissions.

Findings of Fact

17. Having considered all the evidence both oral and documentary I make the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. When I heard or read evidence on matters which I make no finding or do not make a finding to the same level of detail as the evidence presented to me that reflects the extent to which I consider the particular matters assist me in determining the issues. Some of my findings are also set out in my conclusions in an attempt to avoid unnecessary repetition and some of my conclusions are set out in the findings of fact adjacent to those findings.
18. The Respondent is a family firm of haulage contractors. They have two interconnected businesses namely the Respondent C&D Express Transport Limited and a sister company called A&E Transport Limited. The businesses are owned in equal shares by Mr Lee Ducker (managing director) and his father Maurice Ducker who is retired from the business. Mr Lee Ducker has day to day management and control of both businesses although he consults his father from time to time about all important matters. The businesses are both based in Sheffield.

19. In nearby Rotherham there is a rival haulage firm called Pawsons. Having heard the evidence of the Claimant, her husband and Mr Ducker about the nature of Pawsons business and that of the Respondents and having seen the publicity material in the bundle produced by the Respondent I find that there was a sufficient overlap in the nature of the businesses and the type of vehicles used such that Pawsons is to be regarded as a competitor.
20. The Claimant was employed by C&D initially as an invoice clerk. Her husband Nigel Grayson was for many years engaged by A&E limited as a traffic programmer. In or about April 2018 Mr Grayson was the sole employee of a service company (NLO) he had formed as a tax efficient vehicle and it was through this vehicle that he was engaged by A&E. After his dispute with Mr Lee Ducker in or about April 2018 Mr Grayson moved to a similar position with Pawsons under a similar service contact arrangement through his company NLO.
21. During her suspension the Claimant worked for her husband's company at Pawsons, out of premises provided thereby by Pawsons on their site and using a Pawsons email address. This came to the attention of the Respondents who, through their HR advisor, contacted Pawsons and were informed that the Claimant was working there under a temporary arrangement but was not a direct employee. As a consequence of this enquiry the Respondent were contemplating calling the Claimant to a disciplinary hearing but that did not take place because the Claimant resigned by letter claiming constructive dismissal beforehand.
22. The Claimant and Mr L Ducker told the Tribunal that they had a very good relationship. This appears to be supported by the tone of their email exchanges which included kisses, emojis and informal greetings. Mr Ducker confirms that he confided with the Claimant about his matrimonial difficulties. I accept Mr Ducker's evidence that the Claimant was a valued member of staff and he had no wish to be rid of her.
23. The Claimant was initially engaged in December 2011 as an invoice clerk. She has had no HR or personnel qualifications or experience. She is an ambitious woman and has told the Tribunal that she aspires to a management position.
24. She contends that she was promoted to the position of HR manager in or about January 2018 by Mr Lee Ducker. She said that she was obliged to keep her promotion a secret from Mr Ducker's family and therefore from the other members of staff. She did not secure a pay rise as a consequence of this alleged promotion. She has not been sent on any courses to attain HR qualifications. There are no emails, letters or any other documents confirming her in that position. There are no emails, letter, memos, notices or other documents in the bundle which have been issued by the Claimant in the capacity of HR manager. At most it would appear the Claimant acted in an administrative capacity on behalf of Mr Ducker in placing adverts and contacting drivers. She did conduct an induction interview with Ms Morrell when she joined the invoice section. On this evidence I do not find that the Claimant was ever appointed HR manager as she claimed. The return to work form she signed in January 2018 in her own handwriting describes herself as an administration clerk. I have no doubt that the Claimant has always sought to be as helpful as possible to Mr Ducker and has not hesitated in undertaking extra duties over and above that of invoice clerk. I find it probable that Mr Ducker led her to believe that she was his right hand person and could expect promotion in the future. However, I accept Mr Ducker's

evidence that she was employed only as an administrative clerk and had no supervisory or managerial role in HR or the company.

25. In or about January 2018 Ms Lauren Morrell was appointed to a clerical position to relieve the Claimant who had taken on administrative work in addition to her work as an invoice clerk.
26. The Claimant took Ms Morrell under her wing both at work and socially and on at least one occasion on 24 February 2018 the Claimant and Ms Morrell went out for a social evening with the Claimant's husband and sister-in-law Mrs L Hussain. During the course of that evening Mrs Morrell is alleged to have made some kind of revelation to Ms Hussain which led Ms Hussain to believe that Ms Morrell had said she was having an affair with Mr Ducker. Ms Hussain in breach of confidence, then passed her suspicions to the Claimant and told her that Ms Morrell had said she was seeing a man from Stocksbridge called Lee. Mr Ducker who is also called Lee happens to live in Stocksbridge. There appears to be no evidence at all that the revelation included a confession that Ms Morrell was having an affair with her boss at work but that is the conclusion the Claimant and her sister reached.
27. Mr Ducker denies any such affair. The evidence offered by Ms Hussain is not conclusive and I make no finding that Mr Ducker was having an affair as alleged. The Claimant contends that Mr Ducker admitted the affair in a conversation they had at the end of April or beginning of May. He denies both having had the affair or having made the confession. He admits however having confided in the Claimant about his marital difficulties. I find it unlikely that Mr Ducker made such an admission and I find that the Claimant is probably mistaken.
28. However, I accept that from 24 February 2018 the Claimant sincerely believed that such an affair was taking place between Mr Lee Ducker and Ms Morrell.
29. From that point onwards her relationship with Ms Morrell appears to have deteriorated.
30. The Claimant in her statement made a number of observations about the conduct of Ms Morrell and Mr Ducker during March 2018 which strengthened her suspicions of the affair and about which she appears to be becoming increasingly concerned and annoyed. These were matters in respect of which there were possible innocent explanations but under the scrutiny of the Claimant she interpreted them as confirmatory and might well be said to be an expression of confirmatory bias on her part. Such matters included giving lifts in the snow, being off work at the same time, being flirtatious and Mr Ducker allegedly making too many allowances for Ms Morrell. Mr Ducker had explanations for these matters which I find reasonable and plausible.
31. The Claimant became increasingly concerned about the lateness and absence record of Ms Morrell which she said adversely impacted on the Claimant who had to cover for her. The Claimant alleges that these were disproportionate absences and placed an unreasonable burden on her. She raised this as a matter of complaint with Mr Ducker. In cross-examination her immediate answer as to the capacity in which she was raising this complaint was as a fellow worker. In answer to my questions and somewhat as an afterthought she said that she raised it also in her position as HR manager. I find that her first and immediate response to be more credible and she was raising it as a fellow worker because

of the impact on her and that intervention does not support her contention that she was the HR manager.

32. Mr Lee Ducker says he investigated the absence record of Mr Morrell and found it not to be disproportionate in comparison to other workers.
33. In mid-April Ms Morrell telephoned the Claimant to report that she was unwell and would not be attending work and had been admitted to hospital having taken some kind of overdose. This absence and its reason was supported by a GP fit note. There is such a fit note in the bundle dated 16 April 2018.
34. The Claimant doubted Ms Morrell and her reasons for absence and took it upon herself to conduct the hospital and to make enquiries as to whether or not LM had been admitted. She says she was told that no-one called Lauren Morrell had been admitted at the hospital. The Claimant also took it upon herself to telephone Ms Morrell during the course of her absence.
35. When the Claimant reported her suspicions and actions to Mr Ducker he told her in effect that she was out of line in doing this. She complains that he “dismissed my concerns out of hand”. This was not inappropriate on his part given that this was a sensitive matter of absence from work, supported by a fit note signed by a GP, about which the Claimant had no authority to investigate.
36. It appears to me that the Claimant, from the time when she formed her view that Mr Ducker and Ms Morrell were in an affair, consciously or unconsciously set out to level complaints against Ms Morrell to undermine her.
37. Mr Ducker says that he also spoke to Ms Morrell to reassure her that he accepted that she had a genuine absence from work and that she should inform him if she felt harassed by the Claimant over this matter.
38. The Claimant complains that her conversation with Mr Ducker was a confidential one made in her capacity as HR manager. If it was so made in that capacity then I do not accept that there was a duty of confidentiality on the part of Mr Ducker to the Claimant and it was not unreasonable for him to raise such a matter or HR concern with Ms Morrell.
39. As it is, I find that the complaint was not made as an HR manager but as a fellow employee and I find that Mr Ducker’s conclusion that the Claimant had overstepped the mark to be a reasonable conclusion. Further I find that his conversation with Ms Morrell was not an unreasonable step to take in the circumstances (knowing that the Claimant had called Ms Morell at home and had called the hospital) and not a breach of any duty of confidentiality owed to the Claimant.
40. Following this, relationships in the workplace deteriorated and a rift developed between the Claimant, Ms Morrell and another colleague Aaron Beresford. Although Mr Ducker and the Claimant say that they hoped his dispute with the Claimant’s husband would not have an adverse impact on their own relationship that dispute with Mr Grayson cannot have helped the Claimant’s confidence in the workplace which was now declining. There were occasions when the Claimant lost her resilience and became tearful because of her relationships with others. The Claimant was given a day off on 27 April 2018 because she was feeling under stress.
41. On returning to work on 2 May she overheard a conversation between Mr Ducker and his father to the effect that on 27 April he and other staff had helped

Ms Morrell move house. This seems to have annoyed the Claimant and confirmed in her own mind that Ms Morrell was being given preferential treatment and no doubt further made the Claimant feel insecure. That same day the Claimant complains that Ms Morrell had been rude to her and that both she and Aaron Beresford were creating an intolerable atmosphere for the Claimant. The Claimant left work on 2 May leaving her keys behind. She had a further conversation with Mr Ducker that evening and he asked her to come in to speak to him the following the day namely 3 May to discuss her issues which she did.

42. I accept her evidence that the relationships with Ms Morrell and Mr Beresford had broken down and that she found the atmosphere intolerable. I also accept that the Claimant was also partly responsible for the creation of the bad feeling in the office and had overstepped the mark with Ms Morrell and had put inappropriate pressure on Mr Beresford at home by pressing him to enter into a Facebook conversation with her about relationships. In addition I accept that she sought to exercise authority over other members of staff when she had no authority to do so.

43. Mr Lee Ducker says that the Claimant gave him an ultimatum on 2 May that either Ms Morrell had to go or the Claimant would. The Claimant denies saying this but accepts that she insisted that Mr Lee Ducker had to find a solution to allow her to return to work in an acceptable atmosphere.

I find that whether or not the words the Claimant used expressly amounted to an ultimatum I find that Mr Ducker understood that an ultimatum was being made and that the Claimant would not work with the others.

He suggested that the Claimant have a couple of days off with pay in the hope that on return matters would have cooled down and the staff could be reconciled.

44. However before the Claimant returned to work she was issued with a letter suspending her.

45. This was followed by a letter of 14 May 2018 making allegations that the Claimant had failed to attend work on 3 and 4 May and referring to the alleged ultimatum as being unacceptable. This is at odds with the Claimant's evidence, the copy text of reassurance which indicate that time off had been given and I find it was unreasonable of the Respondent to suggest that she had been absent without leave on 3 May.

However in respect of 4 May, the Claimant had texted to ask whether Mr L Ducker had had a chance to discuss the situation with his father. Her first text on the matters says: "what is happening with regards to my job". The second says "please let me know the decision by the end of play". Infer from these texts that the Claimant was expecting the Respondents to make a decision which allowed her to return on her terms and it is credible that Mr Ducker saw this as an ultimatum.

However the letter of 1 May is extremely confusing and it should have been clear to the parties that the reason for the Claimant's continuing absence was the fact of the suspension imposed on her by the Respondent on 4 May.

46. While the Claimant was off work a number of issues came to light which the Claimant accepts would have led a reasonable employer to fear sabotage and to have reasonably commenced an investigation. These matters included the apparent deletion by the Claimant at home of computer files belonging to the

Respondent. The computer records show that she had apparently logged on whilst at home after 2 May and the files were deleted. In addition the Respondent invoice instruction manual which was last seen in her possession disappeared at about the same time.

47. In cross-examination the Claimant accepted that there was prima facie evidence to justify a reasonable employer acting reasonably investigating these matters as potentially disciplinary conduct.
48. In addition there was a breakdown in the workplace relationships to resolve and the complaints of bullying and harassment which emerged against the Claimant.
49. The Respondent sent the Claimant a second letter on 14 May 2018 which detailed that she was suspended pending an investigation into bullying and harassment of staff, deleting computer files and missing invoice folder.
50. A hearing was arranged initially for 4 June but then deferred to 6 June. It was chaired by the Respondent's solicitor. The Claimant accepts it was fairly conducted and that she was permitted representation by her father. She also accepts that she was invited to produce any evidence that she wished to rely on and given an opportunity to answer the charges against her. The hearing was then adjourned.
51. The hearing was adjourned to 9 July. The Claimant refused to attend. The Respondent under the chairmanship of the solicitor made a decision in her absence not to issue any disciplinary sanctions and this letter was sent to her to that effect dated 9 July 2018. The outcome was that Mr L Ducker wished to meet with the Claimant to discuss how the Respondent might facilitate and support her return to work.
52. The outcome of the disciplinary proceedings was entirely reasonable in recognising the breakdown of staff relationships and setting out the next steps designed to improve matters including the introduction of new policies and procedures including policies on bullying and harassment. The outcome also recognised that the Claimant would require a facilitated return to work.
53. In respect of Ms Morrell, Mr Lee Ducker says that he had investigated her absences and found them not to be disproportionate and that they were genuine. He had no grounds to dismiss or discipline Ms Morrell about her absence records.
54. He likewise investigated Aaron Beresford's behaviour and found that he had grounds to object to the Claimant's conduct towards him through social media and in respect of some matters at work but that his own behaviour in swearing at her and sending her to Coventry over the office lunches were unacceptable and Mr Ducker counselled Mr Beresford about that.
55. By the same token as he decided not to discipline the Claimant so no disciplinary proceedings were taken against Mr Beresford or Ms Morrell in respect of their part in creating a difficult office atmosphere.
56. The Claimant did not attend any further meetings and submitted her letter of resignation dated 13 July 2018. She relied on breach of confidentiality and the implied term of trust and confidence as grounds for claiming constructive dismissal. The latest matter of which she complained was the allegation that Mrs Sue Ludlum had breached her confidence by informing Pawsons of the Claimant's suspension and the disciplinary action being taken against her.

57. During the period of her suspension an employee of the company had reported that he had seen the Claimant dressed up as if she was going to work and driving in the direction of Pawsons. The computer specialist Mr Seed had checked on an email system and found that the Claimant held a Pawsons email address at that time. Mrs Susan Ludlum had a history of senior management before joining her husband's business and from time to time acted as an HR consultant for the Respondent who operated from the premises next door. She telephoned Andrea Pawson on behalf of the Respondent and asked if the Claimant was working at Pawsons during her suspension.

58. The conversation was recorded. The Claimant alleged that the recording was incomplete and had been tampered with. This was denied by Ms Ludlum. I heard the tape and could not discern any clicking sounds which the Claimant said indicated that the tape had been tampered with.

I accept the evidence of Mrs Ludlum who I find to be a credible witness that it had not been tampered with. I further accept her evidence that she did not disclose that the Claimant had been suspended pending disciplinary proceedings or had otherwise breached the Respondent's duty of confidentiality to the Claimant. Mrs Ludlum simply asked if the Claimant was working there and if so the start date. She was told that the Claimant was working at Pawsons on a temporary basis but was not on the books of Pawsons.

59. I find that this was a reasonable enquiry for the Respondents to have made at the time the Claimant was still in their employ and Pawsons were a competitor.

Conclusions

60. In the list of issues submitted by the Claimant in support of the contention that the Respondent acted in a manner calculated or likely to destroy mutual trust and confidence the Claimant relies on:

- a. A failure to deal adequately with the Claimant's grievance;
- b. Breaches of confidentiality:
 - i. When Mr Lee Ducker revealed to Ms Morrell the Claimant's actions and allegations in respect of the overdose;
 - ii. When Mrs S Ludlum informed Pawsons the disciplinary proceedings and suspension.
- c. Suspension without cause or explanation;
- d. Commencing disciplinary action.

61. The Respondent had good reason to suspend the Claimant which she accepted in cross-examination in terms that it appeared from the computer records that she had accessed the company computer from home, and accessed RBS financial files in particular, that key files appeared to have been deleted by her and an induction manual last seen in her possession had gone missing. Further that these matters required an investigation and could reasonably be suspected to be acts of sabotage. In the circumstances these were matters which justify both suspension and a disciplinary investigation and hearing. In the circumstances the Respondents had reasonable and proper cause to act as they did in these matters and their actions do not amount to a fundamental breach.

62. Mrs Ludlum acting on behalf of the Respondents did not act improperly in seeking the information she did from Pawsons and in so doing did not reveal that the Claimant was suspended pending disciplinary action or otherwise breach the duty of trust and confidence owed to the Claimant.
63. Mr Lee Ducker reached the conclusion that the Claimant had overstepped the mark in calling the hospital and telephoning Ms Morrell while she was off sick and questioning the genuineness of the absence which was being supported by a fit note and which given the circumstances of the overdose he judged needed to be treated sensitively. As a consequence he spoke to Ms Morrell to reassure her of her position. This was not unreasonable conduct nor a breach of any duty of confidentiality owed to the Claimant.
64. There was undoubtedly a breakdown in staff relationships. The Claimant had contributed to this in a number of ways which had antagonised her colleagues including, pursuing Mr Beresford at home through social network channels, wrongly criticising the attendance record of Ms Morrell, questioning the genuineness of Ms Morrell's sickness absence including contacting the hospital, giving Ms Morrell calls to believe that the Claimant was trying to oust her from her position, appearing to colleagues to exert authority over others when she had no authority to do so.
65. During the Claimant's suspension, Ms Brooks, Ms Morrell and Mr Beresford all produced statements complaining about the Claimant. The Claimant herself never raised a formal grievance about the conduct of others. However the Claimant was well aware that she was at liberty to make a grievance and knew how to do so. Technically at the time there was no grievance from her which required investigation.
66. The outcome of the disciplinary proceedings was entirely reasonable in recognising the breakdown of staff relationships and setting out the next steps designed to improve matters including the introduction of new policies and procedures including policies on bullying and harassment. The outcome also recognised that the Claimant would require a facilitated return to work and no disciplinary sanction was imposed.
67. Had the Claimant attended the final hearing and had an opportunity to discuss the outcome or had she attended the return to work meeting which was planned for her then she would have been in a position to discuss various matters involving her concerns. Including the fact that Mr Beresford had been counselled about his contact towards her, the clarification of the lines of authority, consideration of physical arrangements to alleviate the tensions between people, the introduction of new policies which will be rolled out to all staff.
68. In all the circumstances I conclude that the Claimant has failed to show that the termination of her contract amounts to constructive dismissal and the burden of proof is upon her to show dismissal. I find that the Claimant has failed to show that there was conduct on the part of the Respondent calculated or likely to destroy or seriously damage mutual trust and confidence. In particular the Claimant has failed to show on the balance of probabilities that the Respondents failed to deal adequately with her grievance, breached their duty of confidentiality towards her, suspended her without adequate reason or explanation, continued with disciplinary action against her.
69. Her claim of unfair dismissal fails.

70. It is accepted that the Claimant was never provided with a Statement of Terms and Conditions. The claim for unfair dismissal having not succeeded then the claim under S38 Employment Act 2002 compensation for failure to provide particulars of employment also fails.

Employment Judge O'Neill

Date 21 March 2019

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON

27 March 2019