



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Dalgarno

Respondent: Bettakleen Limited

Heard at: North Shields

On: 22 & 23 March 2018

Before: Employment Judge Pitt (sitting alone)

Representation:

Claimant: In person

Respondent: Mr D Robinson-Young of Counsel

REASONS

1. This is a claim by Mrs Anne Delgarno, date of birth, 31st August 1950, who was employed by the respondent from 17th January 2006; the effective date of termination was 1st August 2017. At that time the claimant had 11 years continuous service and was 67 years of age.

The Facts

2. Mrs Dalgarno was employed with the respondent's predecessors from January 2006. In 2007 there was a share sale by the original company to Trevelyan Hall and the entire shareholding of respondent became owned by Trevalyn Hall Ltd. The claimant remained employed by the respondent.

2.1 During the spring early summer of 2017 negotiations were commenced between Trevalyn Hall and a company known as Ground Control Limited. The negotiations were confidential for commercial reasons and concluded on 21st July 2017 at 7pm. At that time Ground Control Limited purchased Trevalyn Hall via a share transfer. Mr Jim Johnson's role as a Director and owner of Trevalyn Hall ceased at that time but he remained on as a Consultant with Ground Control, although from what he tells me this was an unpaid role.

2.2 At this time, Mrs. Dalgarno worked one day a week for the respondent in the role of an HR Manager for a group of companies which included the respondent Bettakleen and Litterboss. She had always had a good working relationship with Mr Johnson. The claimant was not informed before the share sale that it was to happen.

2.3 On Monday 24 July, the next working day following the sale, all staff at Bettakleen were informed by Mr Johnson and staff from Ground

Control of the sale. The claimant does not work Mondays and was not present at the meeting. The claimant, and again I have no reason to doubt this, tells me that she then started receiving communications from the staff and indeed there are documents in the bundle from Rachel Greef and Tina Whinfield that say that they felt that 'Ann', the claimant, would have been able to answer their questions if she had been present.

- 2.4 The claimant went into the office on 26 July which was her usual working day and during, what I accept was a heated debate/conversation/meeting with 19 members of staff, she told them incorrectly that the TUPE rules and regulations applied, that a failure to consult would therefore possibly lead them to raising a grievance. The claimant now tells me, and I accept, that this was an error in the heat of the moment and it had not been her intention to do that at the time.
- 2.5 On the evening of 26 July Paul McMorris telephoned her to confirm that it was not a TUPE transfer. The claimant offered to go in and put right her mistake. Mr McMorris did not think that was a good idea. However, in a follow up call Mrs Dalgarno insisted that that would happen.
- 2.6 Following that call she then received a call from Mr. Jim Johnson. I still do not quite understand why he felt the need to do this if he, as he asserts, he had stepped down from the business, however in her witness statement the claimant states: "He was abrupt and furious. He accused me of telling all the staff to put a grievance against the company. His tone and manner were awful and unacceptable and left me feeling distressed. I was deeply upset about this. He said I should have known better and I should go in and report back to him when I had done this". Mr Johnson accepts in his witness statement that he was furious, irate and annoyed at the time.
- 2.7 The claimant went into the office the following morning to be met by Mr Richard Johnson who is the son of Mr Jim Johnson. He told her that he had been instructed by his father to be there to ensure she got it right. This is confirmed by Mr Johnson Senior's own witness statement. The claimant tells me, and there is nothing to contradict this, that following seeing Mr Johnson Junior she felt so undermined she had no option but to write her resignation letter and she handed it to Mr Johnson before the meeting.
- 2.8 She had a meeting with the staff and from the information in the bundle from Tina, Rachel and indeed Mr Johnson everybody agrees that at that time Mrs Dalgarno was upset, further 'it was very distressing to see her like that,' 'she was crying,' 'she was upset' Ms Whinfield in answer to questions posed to her states 'She read out a statement from a script she had prepared, she could hardly speak, she was crying, apologised to everyone for misinforming them but no one blamed Ann for this.'
- 2.9 The meeting did not have the expected outcome i.e. to reassure the

employees; as a result of that Ms Meah, of Ground Control, became involved. She travelled to the respondent offices on 28 July to reassure staff. She spoke to a number of members of staff although not the claimant as it was not the claimant's working day. Although with hindsight I might criticise her for not contacting her the claimant upon her arrival and ask her to attend I accept that she had a busy day, seeing numerous employees about their employment. She did however speak to the claimant via telephone on her way home.

2.10 The claimant discovered that she could resign with one week's notice which is what she did her last working day was Wednesday, 1 August. Her resignation was accepted without further enquiry by Mr McMorris on 2nd August. The claimant submitted a complaint to Mr Morrish. He acknowledged the complaint and informed the claimant that Ms Meah would deal with it. Ms Meah responded to the complaint, she did not however ask why the claimant had felt it necessary to resign. Indeed she states ' I know the Litterboss and Bettakleen senior managers are saddened that you have decided to leave the business and are extremely grateful for your support and advice and guidance you have provided to them ...' there is no suggestion about the claimants rescinding her resignation and returning,

2.11 The claimant contacted ACAS in order to commence proceedings. It was at this point Mr Morrish then invited her to have a meeting to discuss the situation. He was not however prepared to accommodate the claimants request to travel to the north east and Ms Meah attended in his stead. The meeting took place in September there is a contradiction about what happened in that meeting but for the purpose of liability I do not think anything hangs on that.

The Issues

The issues to be determined were as follows;

- 1 What was the reason for the claimants resignation, was it the behavior of Mr J Johnson or because she was embarrassed by her mistake
- 2 Did Mr Johnson's behavior amount to a fundamental breach of the employment contract entitling the claimant to resign
- 3 What was Mr Johnson's position within the company? If he was no longer a director/owner can the claimant claim constructive dismissal as a result of his behavior or was he on a 'frolic of his own'?

The Law

3 I am grateful to Mr Robinson-Young for giving me the aide memoire in terms of the law.

In terms of termination of employment, section 95(1) (c) of the Employment Rights Act 1996 entitles an employee to resign and terminate the contract because of the employer's conduct. The case of **Western Excavating v Sharp 1978 IRLR 27** held that if the employer is guilty of conduct which is a significant breach going to the root of the contract or shows it no longer intends to be bound by one of the essential terms of the contract then the

employee is discharged from further performance. This was expanded upon in **Malik v The Bank of Credit and Commerce International 1997 Icr 606**; the test to be applied is '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 an employer and an employee.' Mr Robinson-Young also refers me to **Tullett & Prebon PLC v BGC BrokersLP 2011 EWCA Civ 131** and **Leeds Dental Team v Rose 2014 ICR 94**; in applying the Malik test the Tribunal has to assess the conduct complained of and determine if objectively the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

Discussion and Conclusion

- 4 The first question I asked myself was why did the claimant resign? I am satisfied that Mrs Dalgarno resigned as a result of the behaviour of Mr Johnson. It is clear not only from the claimant's evidence but also from Mr Johnson's account that he was furious, irate and annoyed. It appears that this was because it was he who was being blamed by the staff for the uncertainty. It is not clear to me why he felt he had to make the phone call but what is clear is he instructed the claimant to go in and deal with 'it', that is her error, the next day. Having gone in the next day Mr Johnson Jnr told the claimant his dad. Mr Johnson Senior had instructed him to be there to make sure she got it right. That is confirmed by Mr Johnson's witness statement.
- 5 I accept based on what the claimant says in her witness statement and what she has told me in evidence that she did not resign because she was embarrassed by her mistake. If that had been the case I am satisfied she would probably have told that to Mr McMorris or even Mr Johnson on Wednesday, 26 July. Mr. McMorris in his evidence said, when he spoke to the claimant, he knew why she had resigned and that was because of the behaviour of Mr Johnson. That is to say the behaviour of Mr Johnson during the phone call and also that he instructed somebody else to be with her at the meeting.
- 6 Is that a fundamental breach? Whilst the behaviour of Mr Johnson in the phone call might be described as being in the heat of the moment and could usually be retracted, probably of itself it would not amount to a fundamental breach. However, it was compounded by his instructions to Richard to be there the next day to ensure that the claimant in effect did as she was told. In particular I note that Richard Johnson had never had previous dealings with Litterboss staff and whilst I am urged by the respondent that Mr Johnson Junior was there for support this is not borne out on the evidence I have heard from the claimant or Mr Johnson Senior. Clearly in his witness statement Mr Jim Johnson says it was to ensure the correct message got across. I have not had the opportunity to hear evidence from the witness Richard Johnson so I accept the claimant's account.
- 7 Was it a breach without reasonable or proper cause in a manner likely to destroy or seriously damage the relationship? On the respondent's case Mr Johnson had no cause at all to telephone the claimant. But even if he did the behaviour that he displayed that night was unprofessional and discourteous to say the least, especially to a junior member of staff with whom he had always

had a good working relationship for eleven years. For that same employee to discover the next day that she was not trusted by Mr Johnson to carry out his instructions would on any objective view cause the employee to doubt whether or not her employer had faith in her; would leave her to feel undermined by that situation and would break the trust and confidence between them.

- 8 Turning to the status of Mr Johnson. The first point I would make is that the issue of Mr Johnson's status was not raised before this Tribunal until the hearing, it is not referred to in the ET1 nor is it referred to in the agenda which Employment Judge Johnson dealt with. Indeed the document from Companies House confirming his resignation was only produced on the morning of the hearing. I put it to Mr Johnson that he had not resigned. He denied this. I therefore concluded that his resignation with Companies House was effective from the date of the transfer. However it is clear that the claimant had no knowledge of that. So where does that leave us? It is clear that the claimant was under the belief he still had authority to act in the manner that he did. It is reinforced by Richard Johnson the next day when he says he had been instructed to be there and it is reinforced by Mr McMorris who although knowing why she has resigned does not raise with her the fact that Mr Johnson has no standing within the company.
- 9 The question I have to ask myself is can his actions bind the company? On the evidence that I have heard I concluded he can and does. For the following this reasons. Although he had resigned as a Director of the company he was working as a Consultant. He may have been an unpaid Consultant but he was still a Consultant. When I look at the documentation, in particular the letter sent from Ms Meah in response to the claimant's complaint, page 176, she specifically says, "It is regrettable Jim Johnson, Nicky Tucker and Paul McMorris were away from the business on the Tuesday following the announcement". There is no reference in there that Mr. Johnson was not part of the business. In the correspondence and in the meeting on Monday morning following the sale, everybody is told it is business as usual and I take that to mean that nothing had changed. I came to the conclusion therefore that as he was a Consultant working on behalf of the company albeit unpaid, he was acting as their agent on the night in question and therefore he can bind the company by his actions and was not off on a frolic of his own.
- 10 I have also looked at the effect of the efforts of the respondent following the resignation. I do not think that they did make proper attempts to discover why the claimant left. There was an assumption that was borne out by Ms Meah in her evidence that the claimant left because of her mistake. However if that was the case I think she would either have resigned during the conversation with Mr Johnson the night before or have written a letter to hand in as soon as she arrived in the office, neither of which she did. She did not resign until she saw Mr Johnson Jnr. Both Mr McMorris and Ms Meah state that they tried to dissuade her but neither of them asked the crucial question why are you leaving. If they had they may have understood and reassured her about Mr Johnson's position in the company.
- 11 In particular I note Mr Morrish's comments. He, in his e-mail in August was of the view she was a valued member of the team and that he really wanted her to stay. This is not borne out by his responses to questions that were posed

to him by Mrs Dalgarno in writing. At page 64 in answer to a question he replies, for reasons we simply do not understand, "I wanted to sit across the table and explain and give you one more opportunity to reconsider this pointless action before you wasted a whole bunch more of our time and the courts". And then in response to another question, "I run a £140 million business and whilst I was more than happy to meet you in Billericay for a 30 to 60 minute meeting taking a whole day out to travel to see you with Tanya made a lot less sense to me and therefore I left this for Tanya to meet with you". The language is intemperate and it does show in my submission a disregard for the claimant and her feelings. I note also that this was after ACAS had become involved. I suppose those last comments are an aside to the main question.

- 12 So to sum up, the claimant resigned as a response to the behaviour of Mr Johnson. I found that the two actions, his behaviour on the phone and instructing his son to be present to be a fundamental breach of the employment contract; as a Consultant he bound the company by those actions; therefore the conclusion I come to is that the claimant was dismissed as per section 90(1)(c) Employment Rights Act 1996. No reason has been put forward by the respondent to show it was a fair dismissal pursuant to section 94 Employment Rights Act 1996. That being the case I concluded that the claimant an unfairly dismissed.

Employment Judge Pitt

Date 10th May 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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