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# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs T Sawkins  
**Respondent:** Essex Cares Limited  
**Heard at:** East London Hearing Centre  
**On:** 11<sup>th</sup> April 2019  
**Before:** Employment Judge Reid

## Representation

**Claimant:** In person  
**Respondent:** Ms Smeaton, Counsel

# RESERVED JUDGMENT

The Judgment of the Tribunal is that:-

1. The Claimant was not constructively dismissed by the Respondent contrary to s94(1) Employment Rights Acts 1996.
2. Her claim for unfair dismissal is therefore dismissed.

# REASONS

## Background and issues

1 The Claimant was employed full-time by the Respondent as a Sensory Training Facilitator from 25<sup>th</sup> November 2013 until 20<sup>th</sup> August 2018 when she resigned. The Claimant is blind and had prior to her employment acted as a volunteer at the Respondent, presenting 'Lived Experience' sensory awareness training. While employed by the Respondent, the Claimant had a support worker for 30 hours a week funded by Access to Work, her daughter Miss Heidi Sawkins.

2 The Claimant presented a claim form on 14<sup>th</sup> November 2018 claiming constructive unfair dismissal (page 2). Box 8.2 of the claim form was chopped off in the copy in the bundle and the entire text of box 8.2 was at page 173. The issues in the claim were as follows, as identified in the draft list of issues prepared by the Respondent and discussed with the parties at the beginning of the hearing:

- 2.1 Did the Respondent commit a fundamental breach of the Claimant's employment contract by breaching the implied term of trust and

confidence, relying on the following matters:

- 2.2.1 the Respondent's failure to put in place contingency plans to cover the absence of either the Claimant or of Miss Sawkins, despite the Claimant's regular requests, resulting in the cancellation of training sessions because there was no cover
  - 2.2.2 the Respondent's failure to deal with the Claimant's unmanageable workload despite the Claimant bringing her stress levels to the attention of her line manager and a failure to put in place anything to assist or alleviate that stress or to provide support (including when later taking over additional responsibility for volunteers)
  - 2.2.3 chastisement of the Claimant for not being in the office
  - 2.2.4 management meetings being frequently postponed
- 2.2 Did the Claimant resign in response to the breach
- 2.3 Did the Claimant delay in resigning so that she waived the breach and affirmed the contract of employment.

3 The Claimant attended the hearing with Miss Sawkins who assisted her ably throughout the hearing. The Respondent's witnesses were Ms Gatenby department manager and Ms Murray, the Claimant's line manager (who was managed in turn by Ms Gatenby). The Claimant, Miss Sawkins, Ms Gatenby and Ms Murray gave oral evidence. There was a one file bundle to page 283 to which a small number of documents were added at the outset of the hearing, which extra documents had been sent to the Claimant the day before. I heard submissions at the end on both sides, the Claimant also providing her summing up notes and Ms Smeaten her opening statement to which some short oral submissions were added. The Claimant's brother had died the day before the hearing and I explored with her whether she would like to postpone the hearing to another day when she might feel more able to cope with it but she said that she wanted to go ahead.

4 The Claimant had prepared her own witness statement by typing it and using software which then read it back to her. She had been assisted in reviewing the documents in the bundle by Miss Sawkins and I allocated reading time for them to go through the new documents they had not yet had a chance to review. The Claimant had prepared some closing summing up points to which Miss Sawkins added some manuscript extra points for her during the hearing. I asked Miss Sawkins to read the summing up notes out at the end of the hearing so that the Claimant had a final chance to check she had said all she wanted to.

#### Findings of fact

5 I find that the Claimant's role of Sensory Training Facilitator at the Respondent was created with her in mind (FG para 1) as her skills and abilities had been identified

when she was still a volunteer. The role however was not created for her (C para 2) because the role was advertised and she had to be selected at interview. I find that this role was an achievement for the Claimant who had not been employed for the previous 27 years and that she was keen to do well. She maintained high standards (page 77) and wanted to be viewed as a professional (page 82). I find she made quite a personal investment in the Respondent. I find she also invested a great deal in the working relationship with Ms Gatenby taking into account her oral evidence that she had adored Ms Gatenby initially and had wanted to be like her as so successful and approachable.

6 I find that the Respondent made efforts to facilitate the Claimant working in a way which made it easier for her and to take into account the office is in Chelmsford but the Claimant lived in Colchester (FG para 2) so that the Claimant would also have a place of work in Colchester to avoid the travel. Whilst the Colchester premises could also be used to hold other sensory training activities, I find that the driver for the setting up of the Colchester office was the Claimant's new employment. This approach to being flexible about where work was done (and in places away from management scrutiny) was inconsistent with the claimed subsequent comments of a derogatory nature to the effect that the Claimant was never in the office because it was clear from the beginning that the Claimant was not going to be expected to be always at the office in Chelmsford but could be in the Colchester office, or working at home ie there was a culture of acceptance of working away from the main office. Ultimately the Claimant decided that the two buses involved to get to the Colchester office did not work for her and she decided that if going into the office she would be driven to Chelmsford by Miss Sawkins. It was agreed that the Claimant could work at home two days a week (page 67) though the Claimant did not always stick to this (page 67) despite it being allowed. The Claimant complained that working from home was supposed to be an option (C para 20) but it was an option and had been agreed. However I find that that the Claimant herself wanted to be present in the office as much as she could because she wanted to be acknowledged and work with other team members (C para 20) and I therefore find it was not the Respondent who was putting her under pressure to be in the office more and making adverse comments about that; the Claimant was pushing herself to be in as much as possible from which I find she was rather more making an issue of it than the Respondent was, taking into account her oral evidence that the 'chastisement' she referred to was by Ms Gatenby and Ms Murray on a couple of occasions only and seen to be chastisement by her because of the tone they used, rather than what they said. There were no concerns or issues about her way of working in the November 2017 mid year performance review (or any issues she raised about how her way of working was going) and in the March 2018 end of year performance review (pages 76-85). Overall the reviews were very positive with the Claimant described as a role model and an asset to the team. There was nothing in these reviews to suggest anything but that the Claimant was doing well, although acknowledged she was working hard due to an increased demand for training. There was also nothing to suggest that the Claimant was seriously unhappy about any aspect of her work (in fact she called the increase in work wonderful and she had met that challenge despite it being mentally tiring) except for contingency planning (page 85).

7 The Claimant had reasonably regular documented supervisions with her line manager Ms Murray throughout her employment (pages 65-75,92,99,106,112). In addition she had a documented mid year and an end of year performance review (page 76). Later, during 2018 these meetings were supplemented with some further informal meeting with both Ms Murray and Ms Gatenby (JM para 5). I find this degree of supervision and support to be relatively high and thus not showing an employer who was not interested in

employees' concerns or not interested in giving them opportunities to raise any problems.

8 The Claimant (C para 24) took 8 weeks time off sick from February 2017 due to stress. I find based on her oral evidence and her account at page 264 that this was primarily to do with personal matters, though being busy at work did not help that situation and she was worried about who would cover training if she was absent. She was reassured that she should not return to work until she felt ready (page 259). I find that she had a phased return to work (C para 25) with weekly meetings for the first 3 weeks to discuss how she was coping. The Claimant complained that the final fourth meeting was not held (C para 26) but I find based on her oral evidence that she did not complain when this meeting was not held. Her only taking one day off for carpal tunnel surgery was also consistent with her drive to want to be at work, based on her oral evidence that she only took a day off for this because she wanted to show she was 'back'. I find that the Claimant was driving herself and it was not the Respondent driving her to come back too soon. If the Claimant felt she was unwell but still going into work (C para 29) she did not say so. She drove herself to get back to work because of her concerns about training sessions not being covered if she was absent and wanting to be seen as a professional but how to deal with the sessions when she was off was a matter for the Respondent, whether that meant covering the session by another member of staff or by having to cancel the session.

9 I find that during supervisions the Claimant raised a number of issues with the Respondent. These included feeling under supported in September 2016 as regards help with marketing (page 67,68) and in November 2017 issues over the lack of a contingency plan for absences which she had raised before (page 84). I find that the Respondent did have a contingency plan in place to cover the Claimant (and Miss Sawkins) (JM para 4) but that the Claimant did not agree that it was good enough, taking into account her oral evidence that she accepted that as far as possible the Respondent covered the work if she was absent. I find based on Ms Gatenby's oral evidence that the contingency plan for the Claimant's or Miss Sawkins' absence was that Ms Murray could take over delivery of the training session as she was qualified to do so and that Deborah Holden or Sarah Wood could cover Miss Sawkins. I find that the Claimant said she did not want to work with Sarah Wood. I find based on Miss Sawkins' oral evidence that in any event if Miss Sawkins was off sick the Claimant could work at home instead if she wanted to which helped on non-training days. Planned absence such as Miss Sawkins' annual leave had been covered more easily because notice was given. However I find, based on Ms Gatenby's oral evidence, that unexpected last minute sickness absence might mean that the Respondent had to cancel a training session with an organisation because if only notified that morning there was insufficient time either for the Miss Sawkins substitute to drive to Colchester and pick up the Claimant and be at the training location on time or for the Claimant substitute to go to Colchester and pick up the relevant equipment (kept by the Claimant) before going to deliver the training. I find this inevitably lead to some training sessions being cancelled because Ms Murray would not always be able to cover a session if at short notice but this was a matter for the Respondent to deal with and take any criticism for. Training could also be cancelled for other reasons such as low numbers or snow (page 96). Whilst the Claimant wanted to be seen as a professional and may have felt such cancellations reflected badly on her, ultimately this was a matter for the Respondent. I find that if training sessions were cancelled they would have to be rebooked for another day but this did not in practice increase this part of the Claimant's workload because they were rebooked and the number of sessions after the November 2017 busy patch (see below) remained broadly consistent and at a manageable level.

10 In August 2017 the Claimant raised an issue with Ms Murray about not feeling valued. Ms Gatenby's response that same day (page 91) was to suggest weekly meetings with Ms Murray and that she was speaking to HR about the Claimant's pay. The Claimant's response acknowledged the challenging times and that everyone was stretched (page 89). Ms Gatenby further responded that the Claimant was valued, respected and appreciated (page 89). Ms Gatenby also identified that the Claimant had not taken up the option of a payrise linked to the acceptance of new terms and conditions (page 88) as a way to bring about a payrise for the Claimant and offered to meet with the Claimant and Ms Murray to go through the new terms with her (page 86). She then arranged a meeting with the Claimant and the Sensory Operations Manager on 16<sup>th</sup> August to go through the contract (FG para 7) and sought approval for the payrise to be backdated to 1<sup>st</sup> June 2017, even though the Claimant was not entitled to have it backdated. She said she was deeply unhappy that the Claimant felt undervalued. After the meeting about the contract the Claimant thanked Ms Gatenby for her support about the new terms (FG para 7), which does not support her assertion (C para 39) that she was pressurised into agreeing to the new terms. I therefore find that Ms Gatenby responded promptly to the Claimant's concerns and took steps to address the feeling undervalued and the lack of a payrise. Despite this, in the next supervision on 22<sup>nd</sup> August 2018 (page 92) the Claimant was still saying she felt not valued even though it was repeated again that she was (page 93). No concerns about an excessive workload were raised at this supervision although the Claimant was busy (page 93). By the time of her next supervision in October 2017 (page 99) it was accepted that she was very busy (page 102) and doing some extra hours (page 100) but I find that the Claimant was entitled to take time off in lieu if she did so. Responsibility for invoicing was taken off the Claimant consistent with a recognition that the Claimant was very busy (FG para 11). The Claimant said she was feeling good and enjoying her role more (page 100).

11 In November 2017 the Claimant was very busy delivering training sessions (page 95). She told Ms Gatenby that she was struggling (FG para 10) and Ms Gatenby arranged for marketing duties to be taken off the Claimant. Despite the busy period she was positive in her review on 21<sup>st</sup> November 2017 (page 84) and did not raise any complaints. November 2017 in any event was an unusually busy month and matters reverted to a more normal pattern from December 2017 onwards. In any event I find based on her oral evidence that her complaint about feeling she had to work evenings and weekends related to the period after April 2018 when she took over additional responsibility for managing the volunteers.

12 The Claimant referred to a 'stress form' in her ET1 submitted in November 2017 which she said was not dealt with. I was told at the hearing that the Respondent had looked for this form but had been unable to find it. The Claimant's case was that she had raised this again in February 2018. However, she did not raise it in her March 2018 end of year performance review which was largely positive and consistent with the stresses in November 2017 (when she had been exceptionally busy) having dissipated to a sufficient degree. The Claimant says (C para 38) that she was advised to re-submit the form but does not say she ever did so.

13 In January 2018 Ms Murray emailed the Claimant about the Respondent's grievance policy (page 105). Neither Ms Murray, nor Ms Gatenby nor the Claimant explain in their witness statements what the trigger was for sending this but I find based on the second paragraph that it was triggered by a conversation Ms Murray had had with the

Claimant about Ms Gatenby's management style and the Claimant's concerns that she was not in practice getting the support she felt she needed although being told Ms Gatenby was there to help. I find that by raising management style the Claimant was repeating that she felt undervalued and not always supported despite the previous efforts to reassure her and to do what Ms Gatenby could within the constraints she was under. Because the Claimant cannot access a pdf document, Ms Murray set out an extract from the policy as to how to raise a grievance. The Claimant did not then go on to raise a grievance about Ms Gatenby or anyone or anything else.

14 Around a week later in her next supervision (page 106) the Claimant said in her agenda item that she still felt undervalued (page 107) and despite by now the number of training sessions having dropped from the November 2017 peak, the Claimant said she still had a heavy workload (page 108); it was therefore agreed that the Claimant would block out a week a month to catch up with admin (page 108). However, she was now in a position to do some professional development training (page 109) which she had not felt she had had time to do in December 2017 (page 102). Despite having said she felt undervalued (page 107) the Claimant also said that she felt more confident and valued (page 110) and referred to the 'large thorn' of the lack of a solid contingency plan. She also recorded that taking away the invoicing work from her had helped (page 110). She did not mention anything else as being a particular thorn in her side apart from saying management did not fulfil promises but not identifying what those were.

15 In her end of year review in March 2018 (page 84) the Claimant identified that she had improved her ability to prioritise to avoid stress and felt pleased with the training she had delivered despite being very busy and that she met the challenge (page 85). The only specific problem she raised was contingency planning (page 84,85). .

16 By her next supervision in April 2018 (page 112) the Claimant's workload was manageable due to a lull in training (page 114) and the Claimant accepted in her oral evidence that between April 2018 and August 2018 training levels were quite low and that in April 2018 before she took on the additional responsibility for the volunteers her workload had been manageable. She was worried that there was now a lull in training (page 114) which I find was a concern to the Claimant because of her drive to see the success of the training services she delivered. She took on a new responsibility for co-ordinating volunteers (page 118) which she was pleased to take on (page 119) and at which, based on her oral evidence, she wanted to prove she could do. She also accepted in her oral evidence that this was not a new responsibility the Respondent was forcing on her. I therefore find that her workload was now manageable enough for her take on new responsibilities without a concern about it adding too much to her workload and to fit in professional development courses. She thanked Ms Murray for the useful and productive supervisions (page 116). All of this was consistent with the Claimant now feeling reasonably happy about her role and not raising any significant problems despite telling Ms Murray that she was working extra hours around May/June 2018 which I find based on her oral evidence was not couched by her at the time in terms of not being able to cope, but that she was struggling to fit it all in. She was told she would get another payrise because she had exceeded her targets (page 114). Despite all of this, she was however still saying she did not feel valued (page 116). I find she was saying this despite two payrises, repeated reassurances, very positive comments about her work, work being taken off her to help her manage her workload at busy times and being asked to take on the volunteer co-ordinator role which met her desire to have more of a management role.

If the Claimant did feel undervalued it was not because she was in fact undervalued or because the Respondent did not take steps to make it clear she was valued or had not provided appropriate support. The Respondent had also allowed her to go in work time to Switzerland on an access project for Greater Anglia even though the Respondent derived no direct financial benefit from it (FG para 13) in May 2018 which is also inconsistent with not taking steps to show that she was valued.

17 The Claimant and Ms Gatenby met on 15<sup>th</sup> August 2018 (FG para 14/ page 123). There are no notes of the meeting but I find based on the email that although she had seemed very pleased with taking on the volunteer co-ordinator role, the Claimant was now saying it was not in her job description to manage them. Ms Gatenby queried with Ms Murray what the management element would involve and what supervisions were required. She asked Ms Murray to undertake a time and motion study for 2 weeks to establish the Claimant's workload. I find based on Ms Gatenby's oral evidence that the reason for the time and motion study was that she did not understand how the Claimant was so busy when the training bookings were not high. Given the Claimant had veered between saying previously she had too much work and more recently that things were manageable now that bookings had gone down and she could take on new work (but also telling Ms Murray that she was working extra hours), I find this was a reasonable approach. I find based on Ms Murray's oral evidence that she in turn told the Claimant before she resigned that the study would be done.

18 There was an exchange of emails on 20<sup>th</sup> August 2018 (page 125-131) precipitated by the Claimant notifying Ms Gatenby and Ms Murray of a problem in the toilets (page 126) which she rightly felt should not have arisen in a workplace such as the Respondent's. Ms Gatenby replied within 10 minutes alerting those responsible to the problem and apologising to the Claimant (page 125). The mood of the exchange then took a turn for the worse with the Claimant feeling that Ms Gatenby had missed the point (page 127-128). Ms Gatenby accepted that the Claimant was frustrated by this issue (page 129). The Claimant was also frustrated at a meeting with Ms Gatenby having been cancelled although in fact it had not been (page 130). The upshot was that Ms Gatenby provided the Claimant with the details of a contact in HR to speak to if she wanted to (FG para 15, page 131). Whilst things were becoming somewhat testy between the Claimant and Ms Gatenby, I find that this was not an inappropriate thing to suggest as an option to the Claimant given it was clear she did not have confidence in Ms Gatenby. It was at the end of this day that the Claimant composed her resignation letter (page 133) though she did not email it to Ms Gatenby and Ms Murray until 22<sup>nd</sup> August 2018 (page 132).

19 The Claimant's resignation letter did not mention any failings by the Respondent to explain why she was leaving. She referred instead to the role changing and that she had been saddened by the lack of promotion opportunities. However, having resigned she attached a list of matters she said would possibly keep her (page 134) which was a curious thing to do if resigning because of the way she had been treated which she was later to claim was so bad that it amounted to a breach of contract by the Respondent amounting to constructive dismissal.

20 Although the Claimant expressed her first wish of either an increased salary or her existing salary based on a 5 day week but only working 3 days as a 'pipe dream', I find that she was nonetheless putting it forward for consideration because it was first on her list. This sheds light on her decision to resign because it tended to suggest that a

significant reason at the time was her pay. She again raised contingency plans as an issue. She also raised other matters as regards more support, better communication and supervision. The fact she suggested a 3 day week but on her existing salary (ie in principle the same amount of work but in 3 days not 5) was inconsistent with her having significant problem with her workload prior to resignation.

21 The Claimant complained that management meetings were frequently postponed. By 2018 there was a high level of input from Ms Murray her line manager and from Ms Gatenby who although not her line manager also took part in discussions. Some degree of postponement or cancellation of meetings between busy people in a busy team was inevitable and I do not find taking into account the above findings of fact that this was at a level which showed a lack of care for the Claimant or a failure to address any concerns about her work.

22 The Claimant complained that she felt under pressure to bring in more money but taking into account the above findings I find this was pressure she put herself under rather than it being something the Respondent did – just because the Respondent asked for weekly budget updates did not mean it was putting her under pressure and there was never any criticism by the Respondent of the Claimant's involvement in the level of bookings generated, taking into account marketing responsibilities were taken off her so it was clear that she was not solely responsible for generating new bookings.

23 The other matters the Claimant referred to in her ET1 post-dated her resignation (decision to put her on garden leave, issues about the return of her laptop and work phone, delays to the exit interview process) and are not matters she can rely on because they were issues arising after she had resigned and cannot therefore be breaches of contract by the Respondent which caused her to resign.

#### Relevant law

24 A constructive dismissal (and thus a dismissal for unfair dismissal purposes) is defined in s95(1)(c) Employment Rights Act 1996 as where the employee terminates the contract (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

25 In *Western Excavating v Sharp* [1978] IRLR 27 it was identified that a constructive dismissal must involve a repudiatory breach of contract, going to the root of the contract or which shows the employer no longer intends to be bound by one or more of its essential terms. The burden of proof was on the Claimant to show that there was a fundamental breach of contract, it contributed to why she resigned and that she did not delay, thus affirming the contract. The breach of contract by the employer must be an effective cause but does not have to be the only cause or the principal cause of the employee resigning (*Wright v North Ayrshire Council* [2014] IRLR 4).

26 The term identified by the Claimant was the implied term of trust and confidence under which an employer should not without reasonable cause act in such a way calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee. In *Malik v BCCI* [1988] AC 20 it was identified that the employer's conduct needs to be viewed objectively to establish whether it is likely to destroy or damage that trust and confidence the employee is reasonably entitled to have



in the employer, looking at all the circumstances. As to the reasonable and proper cause part of the test, even if the employee's trust and confidence in the employer is in fact undermined, there may be no breach if, viewed objectively, the employer's conduct was not unreasonable (*Sharfudeen v T J Morris t/a Home Bargains EAT/0272/2016*).

### Reasons

27 Taking into account the above findings of fact I conclude that the Claimant has not shown that the Respondent breached the implied term of trust and confidence regarding a claimed failure to put in place contingency plans, regarding an unmanageable workload, being chastised for not being in the office and for postponing meetings, whether taken individually or considered together in the round. The Claimant did have busy periods and worked hard but the Respondent took steps to take work off her where possible and she took on new work when she felt less busy. The Claimant was not chastised for not being in the office, even if she felt she was. Whilst meetings may sometimes have been postponed and this was possibly irritating and upset the Claimant, some degree of meetings being postponed or cancelled is inevitable in any organisation particularly when the Claimant's level of personal input from her managers was already high. The Claimant was successful in her role and was valued; although she felt she was not valued and felt she lacked moral support, she was seeking from the Respondent a degree of reassurance which it was not reasonable to expect the Respondent to give her when it had taken the steps it could to deal with the problems she raised. She said that 'promises were not kept' by the Respondent but when asked what these promises were said it was moral support. Viewed objectively, the Respondent's conduct was reasonable even if the Claimant had lost trust and confidence in the Respondent.

28 The Claimant in her summing up notes also referred to a failure to provide a healthy and safe working environment. Taking into account the above findings of fact the Respondent did not fail to do this.

29 The Claimant was not therefore constructively dismissed by the Respondent because the Respondent did not breach her contract. There were some ups and downs over the years of her employment, some times of hard work, some times things did not go the way she wanted and she felt she was not valued, but these did not amount to a breach of the implied term of trust and confidence. She resigned voluntarily when things had not worked out for her at the Respondent in the way she wanted. Her claim for unfair dismissal is therefore dismissed.

Employment Judge Reid

23 April 2019