



EMPLOYMENT TRIBUNALS

Claimant: Miss B Walker

Respondent: JD Services HVAC Ltd

Heard at: Ashford **On:** 15 January 2019

Before: EMPLOYMENT JUDGE CORRIGAN

Representation

Claimant: Mrs Y Gibbons, lay representative (friend)

Respondent: Mr D Bansal, Solicitor

RESERVED JUDGMENT

1. The Claimant was not constructively dismissed by the Respondent and her claim is dismissed.

REASONS

Introduction

1. By her claim dated 21 May 2018 the Claimant brings a complaint that she was constructively dismissed and deprived of being able to work the rest of her notice period.

2. On the face of it this was a constructive wrongful dismissal claim. However, the Claimant's entitlement to notice was two weeks' pay, whereas her claim is for the balance of the one month's notice period which she gave when she resigned. It was agreed with the parties that I would therefore also hear submissions on unfair dismissal.
3. The Claimant confirmed that she was not claiming deductions made from her final pay and that her claim is limited to the balance of her notice period.
4. The issues agreed with the parties were therefore:
 - 4.1 was the Respondent in fundamental breach of contract? The parties made no reference to it, but in the absence of breach of an express term, the Claimant relies on breach of the implied term of trust and confidence (see paragraph 33 below).
 - 4.2 did the Claimant resign in response? At the hearing, the Respondent did not take a point about the Claimant waiving the breach by affirming the contract.
 - 4.3 was there a potentially fair reason for dismissal?
 - 4.4 was dismissal within the range of reasonable responses?
 - 4.5 what was the Claimant's entitlement to notice/compensation?

Hearing

5. I heard evidence from the Claimant on her own behalf and evidence from Ms Tara Short (Former Colleague) on behalf of the Claimant. I also heard evidence from Ms Jaylee James Jones (Quality & Administration Manager), Mr Matthew John Newing (Managing Director), and Mrs Kimberly Newing (Company Secretary) on behalf of the Respondent.
6. The parties provided a bundle of documents and the parties' representatives made oral submissions. Based on the evidence I heard on the document before me I find the following facts.

Facts

7. The Respondent is owned by Mr and Mrs Newing and provides a range of Mechanical, Electrical, Heating, Air-conditioning, Ventilation and Building Services. The Respondent employs between 40 to 50 employees at any one time.

8. The Claimant worked for the Respondent as an Administrator from 21 September 2015. By the time she left her employment the Claimant was paid £341.91 net weekly.
9. The Claimant's contract of employment was in the bundle at pages 29-35. The Claimant was entitled to one month's notice if she terminated the contract but was entitled to one week per completed year of service if the Respondent terminated the contract (two weeks in the Claimant's case).
10. The Respondents liked the Claimant and considered her a good employee.
11. The Claimant's work space was in an open plan office occupied by about 8 employees. The space was a little larger than the Tribunal room. The Claimant had moved around desks during her employment depending on her role.
12. The Claimant was absent from 16 February 2018 to 2 March 2018 due to a bereavement, and on 8-9 March 2018 for the funeral. Mrs Newing and Ms James sent a number of texts over that period seeking to be supportive, and to support a return to work. The Claimant in evidence accepted they were supportive and allowed the time off.
13. Shortly after her return there was a change in the Claimant's behaviour.
14. On 16 March 2018 the Claimant and Ms Short made comments in a team meeting about having better things to do with their time than work on a Saturday in response to a request for volunteers to work overtime on a particular Saturday. This is disputed but I accept the account of Ms James who made a note about it a few days later on 21 March 2018. Her account is supported by the notes of the meeting between the Claimant and Mr and Mrs Newing on 21 March 2018 (written the same day) in which the Claimant's comment in the 16 March meeting was discussed and the Claimant is recorded as saying "it wasn't just her".
15. The Claimant resigned with notice by letter dated 19 March 2018. She gave one month's notice.
16. The Claimant said in the letter 'It is important to me to work for a company that encourages creativity rather than restricts it. Although your compensation has

been fair, I feel that I am unable to continue working in an environment that staff's welfare is not part of companies' ethos [sic]'

17. Mr and Mrs Newing met with the Claimant on 19 March 2018 to discuss the letter, to understand why she had made these comments and whether she would reconsider her resignation. At the time the Claimant said the Respondent had not been supportive during the period of absence. Mr and Mrs Newing said they believed they had been supportive having tried to phone the Claimant and also to make contact via text message. They also disagreed about her comment in relation to creativity and explained why. The Claimant confirmed she wished to resign. The Claimant agreed this meeting was amicable.
18. The Respondent wrote on the same day confirming acceptance of the resignation and that the last working day would be 18 April 2018. The Claimant says she received the letter prior to the discussion but I find that on the balance of probabilities it was the other way around. She agrees she was asked to reconsider in the meeting and it is more likely that the letter confirming acceptance of the resignation came after that.
19. The Claimant says that after this meeting the Directors did not include her in conversations and she felt left out and in particular on 20 March when Mrs Newing arrived at work she chatted with the Claimant's colleagues but ignored the Claimant. I accept that Mr and Mrs Newing may not have spoken directly to the Claimant, as they themselves accept that they did not necessarily speak to the Claimant on a day to day basis, but there was no particular reason for this as I also accept that they did not dislike the Claimant and did not understand why her attitude had changed.
20. After the Claimant's resignation she and Ms Short began whispering, tutting and complaining. Again this is disputed but I accept the account of Ms James who made a note about this on 21 March 2018. She also reported the behaviour to both Mr and Mrs Newing on the same day which is confirmed by both of them and the note of their meeting with the Claimant on 21 March 2018.
21. On 21 March 2018 the Claimant was told by Ms James she was to move desks to work near another colleague to concentrate on tasks she needed to finish before she left. In evidence the Claimant accepted the reason for the move was to enable her to concentrate. There was a dispute about where this conversation took place. The Claimant says it took place in the open plan office and Ms James stood over her as she moved her belongings and the whole office stopped working to watch what was going on. She said she was

embarrassed and felt like she was being treated like a child being removed to the “naughty corner”. I accept Ms James’s evidence that the conversation about the desk move initially took place away from the team in the warehouse and the Claimant agreed to it. Ms James made a note of the incident on the same date which supports her account and on the balance of probability I accept this. I accept that the conversation then continued at the desk as the Claimant continued to make comments about the move, and that this did draw the attention of Ms Short and the rest of the office.

22. The Claimant accepts there was a further discussion with Ms James after the move. Again I find this took place off the open plan floor in the Warehouse, according to Ms James’s note. I also accept Ms James’s note of that conversation at page 73-74. the Claimant accepts it in part, and the note was made on the same day. Some of the comments by the Claimant are also consistent with comments she herself made at the time in emails.
23. Ms James asked the Claimant not to make comments on the office floor. The Claimant said she was being treated like a five-year-old. Ms James sought to reassure her that this was not the case and the intention was to support her. Ms James asked the Claimant why she was unhappy. The Claimant said that she did not “want to be here”. Ms James asked her if she did not want to work her notice. The Claimant said she did want to work to her notice out of respect for her colleagues.
24. This was followed by a discussion shortly after between the Claimant and Mr and Mrs Newing. Their account was recorded in a joint note made the same day. The Claimant does not agree with all of it, though she accepts parts. I accept the note is an accurate account, though I also accept the additional comment made by Mrs Newing discussed below. The Claimant was asked what had caused her conduct. The Claimant said she was not happy about the desk move and she felt she was being treated like a child. Mr and Mrs Newing explained that the reason was she had been behaving disruptively with Ms Short. The conduct in the meeting on 16 March was also discussed. The Claimant was asked if anyone had offended her but the Claimant said it was not anything anyone had done. Mrs Newing sought to reassure the Claimant that they would like her to continue with her notice period and leave positively but that it was her choice. She was invited to break and leave the office to have a coffee and then to come back to discuss how she wanted to proceed with working her notice.
25. The Claimant says that when she said she wanted to work her notice out of respect for her colleagues Kim Newing laughed at her and said “it’s not your

colleagues you should have respect for us as owners of the business". This is disputed by both Mr and Mrs Newing, though there is reference in their note to the comments in the meeting on 16 March being disrespectful to the team, line manager and the business. I accept this comment was made as the Claimant recorded her account of it at the time in her email on 22 March 2018. I also accept that Ms Newing may have laughed as she said it but not that she was "laughing at" the Claimant. I find the overall intention of both Mr and Mrs Newing was to reassure the Claimant about working her notice and leaving in a positive way.

26. Both parties accused the other of behaving negatively in the meeting on 21 March. The Respondents recorded the Claimant's language and behaviour as negative, rude and argumentative (p76) but this is not reflected in the note of what was said in the meeting itself. Mrs Newing also accepted in evidence that the Claimant was visibly upset which is why it was suggested that she take a break. On the other hand the Claimant says she felt bullied and harassed but this is not reflected in the note of the meeting. I find there was a discussion in which both Mr and Mrs Newing raised issues with the Claimant's behaviour though their overall intention was to understand what the matter was to have caused that behaviour, and reassure the Claimant so she could work her notice. The Claimant was unhappy both before and during the meeting which culminated in the suggestion that the Claimant go out and get a coffee before coming back to discuss her notice.

27. The Claimant then emailed at 10.28 the same day (page 77) saying the following: 'I am extremely disappointed at the way I have been treated since I handed in my resignation on Monday 19th March. I had hoped that we would be able to part on good professional terms but now I see that that is not possible...

Today you have relegated me from my normal location of work in a degrading and humiliating fashion and continuously spoken to me as if I was a child or committed a crime...

Your actions have left me distressed and humiliated and I am no longer able to continue in this capacity.

I see no other alternative but to leave with immediate effect.

For the avoidance of doubt, I regard your conduct since Monday as constructive dismissal and will be taking legal action to seek recompense".

28. On the same date the Respondents replied offering the opportunity to discuss her concerns. The Claimant replied on 22 March 2018 making it clear she would not be returning.

29. The Respondent replied on 22 March stating that her resignation with immediate effect was accepted and that the Claimant's last day of employment was 21 March 2018.
30. The Claimant worked elsewhere for two weeks from 26 March 2018 at £8 per hour from 9AM to 5PM (7 hour days).

Relevant law

Constructive dismissal

31. Section 95 of the Employment Rights Act 1996 states:

(1) For the purposes of this Part an employee is dismissed by his employer if . . . _

. . .

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

32. The leading authority is *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221. For section 95 (c) to apply the following must be shown:
- 32.1 a repudiatory breach of contract by the employer (i.e. a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract and which entitles the employee to leave without notice);
- 32.2 the breach caused the resignation; and
- 32.3 the employee did not delay so long before resigning that she is regarded as having affirmed the contract and lost the right to treat herself as discharged.
33. There was an implied term in the Claimant's contract of employment as described in *Malik v Bank of Credit & Commerce International* [1997] IRLR 462 that the employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
34. A breach of the implied term involves conduct which seriously damages or destroys the trust and confidence between the employer and employee. Both sides are expected to absorb lesser blows (*Croft v Consignia Plc* [2002] UKEAT 1160_00_3009).

Unfair dismissal

35. In relation to ordinary unfair dismissal is contained in section 98 of the Employment Rights Act 1996. Section 98 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

....

(b) relates to the conduct of the employee,

....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

36. In applying section 98(4) the Tribunal are not to substitute their own view for that of the employer. The question is whether the employer's decision to dismiss fell within the range of reasonable responses open to the employer, or whether it was a decision that no reasonable employer could have made in the circumstances.

Conclusions

Was the Respondent in fundamental breach of contract?

37. Neither party referred to it expressly in submissions but the question is whether the Respondent breached the implied term of trust and confidence. This is set out above in paragraph 33. The question is whether the Respondent, without reasonable and proper cause, conducted itself in a manner likely to seriously damage the relationship of confidence and trust with the Claimant. The

Claimant in evidence pinpointed the actions she considered to be a fundamental breach and that forced her to leave without completing her notice were:

- 37.1 being ignored after she put in her first resignation with notice;
 - 37.2 the desk move and the manner that was carried out;
 - 37.3 not being listened to and Mrs Newing's laughing at her in the meeting on 21 March 2018.
38. Although I find that Mr and Mrs Newings may not have spoken to the Claimant in the open office after she put in her resignation on 19 March 2018, they both met with her twice over the three day period in question. Firstly they met on 19 March 2018, in a meeting she accepted was amicable, to discuss the concerns she had raised and to ask if she would reconsider. Secondly, there was a meeting on 21 March. Although the Claimant's conduct was discussed in that meeting the overall intention of the meeting was to find out what was wrong and to reassure her they wanted her to work her notice. She was invited to come back and discuss her notice period at the end of that meeting and again after she confirmed she was not to return. Ms James also had discussions with the Claimant on 20 March 2018. Taking the Respondent's actions overall I don't find that Mr and Mrs Newing were ignoring the Claimant. Instead, they were reacting to her behaviour and evident unhappiness, seeking to find out what was wrong and how she could be supported.
39. Turning to the desk move. I find this was discussed in private first and the Claimant agreed to it. It is not unreasonable for an employer to move a person's work station. She was to remain in the same open plan office with her colleagues, just at a different desk. The reason was because the Claimant and Ms Short's behaviour was becoming disruptive and the Respondent wished the Claimant to concentrate on certain tasks before she left. The Claimant herself caused it to come to the attention of her colleagues because she made comments during the move. I do not find that this is conduct likely to seriously damage trust and confidence. Moreover the Respondent had reasonable and proper cause for it.
40. I find that although the Respondents may have discussed the Claimant's behaviour in the meeting, the overall aim of the meeting on 21 March 2018 was to find out what had happened to change the Claimant's behaviour, to reassure her they wanted her to work her notice period but also to open a discussion if she did not want to do so. The Respondents liked the Claimant and were surprised by her conduct and her resignation. I do not accept that they were not listening to her. They wanted to understand what was causing her conduct. I also do not find Mrs Newing was laughing at the Claimant during the meeting. I do find that Mrs Newing made the comment set out at paragraph 25 above

and may have laughed as she did so. Whilst it may not be the most constructive way to have made the point it was a response to the Claimant's comment that she was working her notice out of respect for her colleagues, whereas the notice obligation is an obligation to the business, not the Claimant's colleagues. In this context I do not find it conduct likely to seriously damage trust and confidence.

41. Looking at the conduct together, at most the Newings did not speak to the Claimant in the open plan office over a brief period (20 March 2018) when they were also meeting with her privately over the period 19-21 March 2018; Ms James instructed her to move desks within an open plan office, and Ms Newing laughed and said she should have respect for them as owners of the business, when the Claimant said she wanted to work her notice out of respect for her colleagues. I do not find this behaviour separately or together amounts to behaviour that would destroy or seriously damage trust and confidence between employer and employee. I do not even consider it could damage trust and confidence. However, even if it could, I consider it the type of behaviour an employee is expected to "take on the chin" as per the decision in *Croft v Consignia Plc* (paragraph 34).

42. It follows that I do not find the Respondent in fundamental breach of contract and the claims do not succeed. It is not therefore necessary to deal with the other issues but I do so briefly in any event.

Did the Claimant resign in response?

43. I do not need to consider this, having found there was no fundamental breach, however for the avoidance of doubt I find the Claimant left in response to the Respondent moving her work station. This is what was referred to in her email on 21 March 2018 saying she was leaving with immediate effect.

Was there a potentially fair reason for dismissal? Was dismissal within the range of reasonable responses?

44. It is not necessary to address this in detail but I do not find the Claimant's conduct sufficiently serious to justify dismissal, and indeed the Respondent did not dismiss her for it.

What was the claimant's entitlement to notice/compensation?

45. I don't find in favour of the Claimant but it is worth recording the value of the Claim, had she been successful. The Claimant left on 21 March 2018 and

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started new employment on 26 March 2018 therefore a further issue was how much should be deducted from the Claimant's notice pay to reflect her mitigation of loss. The Claimant was entitled to two weeks' notice from 22 March if the Respondent dismissed her. This is £683.82. However, she earned 8 days' pay at the rate of £8 per hour for 7 hours, amounting to £448. Therefore, if the Claimant had been successful the damages for breach of contract (constructive dismissal without notice) would be £235.82, subject to any adjustments if tax was paid on the sum earned. If she was unfairly dismissed she could have claimed the whole notice period she was due to work. Based on her monthly take home pay, pay for the remainder of the notice period was £1344.84 net. She earned £560 over ten days from 26 March. So after mitigation of loss this would leave £784.84, subject to any adjustments if tax was paid on the sum earned.

Employment Judge Corrigan

13 May 2019