



EMPLOYMENT TRIBUNALS

Claimant: Debra Escott

Respondent: Tesco Stores Ltd

Heard at: Cardiff **On:** 17, 18 and 19 June 2019

Before: Employment Judge RL Brace

JUDGMENT having been sent to the parties on 23 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

1. I have heard evidence over the last three days from five witnesses from the respondent and from the claimant and have before me a bundle of some 600 pages in length.
2. I am asked to consider a constructive dismissal claim arising from the imposition by the respondent of a change in the duties of the claimant and the subsequent management of the claimant in relation to, in particular, her concerns regarding the scale of the change.
3. The claimant's refusal to accept change with effect from 25 March 2018 led to her suspension and during the period of suspension, which lasted nearly five months, the respondent considered three grievances and two grievance appeals, as well as investigated some disciplinary concerns held by the respondent regarding the claimant's refusal to work to the new duties.
4. The outcome of the third grievance was the last straw for the claimant and led to her resigning. The claimant claims that the respondent committed a series of breaches which, when taken individually or together amounted to a fundamental breach of contract, in particular the breach of implied term of trust and confidence. The claimant relies on the following:
 - a. The respondent forced a change of contract without her consent;
 - b. The respondent claimed there were minor changes when this was not in fact the case;

- c. It was unreasonable to suspend the claimant;
 - d. The respondent left the claimant on suspension for months without contact or care;
 - e. The respondent failed to properly consider or answer concerns about the changes;
 - f. The management of the grievance process; and finally,
 - g. The respondent unreasonably rejected the grievance and appeal. This was the last straw which led to her resignation.
5. There has been no suggestion that the claimant has affirmed the contract when considering the course of conduct.

The Law

6. I don't intend to set out the law at length but Section 95 states that there is a dismissal when the employee terminates the contract with or without notice in circumstances that he or she is entitled to terminate by reason of the employer's conduct. The leading case in this is Western Excavating v Sharp.
7. The conduct must involve a repudiatory breach of contract and it is for the employee to establish that there was a fundamental breach of contract on the part of the employer. The employer's breach caused the employee to resign and the employee did not delay too long before resigning. A constructive dismissal is not necessarily an unfair one.
8. I put it no longer than that for the purposes of today due to the time.

Findings

9. On 4 July 1989 the claimant was employed by the respondent and, as at the date of termination in August 2018, had been employed by the respondent in the role of Stock Manager at the Caerphilly branch. She had worked previously at other stores over her twenty-eight years at Tesco and had worked at some point for the respondent in a compliance role.
10. On 22 January 2018 Mr Jeffrey commenced his new role as Store Manager for Caerphilly having worked himself for the respondent since 2007. On the same date the respondent announced a 'People Transformation Programme' referred to in this hearing as 'Project Avocado'.
11. By way of background to Project Avocado, work had been undertaken on the programme for some time and I heard evidence from Sally-Anne Marsh who was, prior to July 2018, engaged by the respondent as Organisation Design Account Manager. Her responsibilities were to review, scope and implement changes to management structures within large stores for Tesco.
12. From 2016 there had been a review within the respondent on the People Manager and Compliance Manager roles and a decision was made, in particular, to remove the Compliance Manager role from the respondent structure.

13. When changes were made to roles within the respondent organisation, changes were categorised as major or minor and the following are considered:
 - a. whether role accountabilities, including head count and day-to-day tasks, changed; and
 - b. if there are more similarities than differences;
 - c. any key changes to terms such as location and salary.
14. If not, the change was classed a minor.
15. The respondent undertook the change review with methodology that included stringent governance before implementation of any pilot scheme. In the case of Project Avocado, a conclusion was made that the removal of Compliance would lead to a change in the Stock Manager role. A conclusion was also reached by the respondent that the change was a minor change.
16. A pilot took place in forty-seven large stores and during the pilot concerns were raised regarding proposed changes to the Stock Manager role (now renamed Stock and Admin Manager), in particular for those stores that had night opening, a change which did not in fact impact on Caerphilly store which did not have night time opening hours.
17. The question of whether any change to the role, was a major or minor change, was a business decision at the Operational Design level within the respondent organisation. Whilst there was an ability for local managers to challenge that business decision by challenging the Operational Design team, this was outside the scope of individual grievance.
18. Further, if any individual manager was to consider an individual grievance, from any employee impacted by a change to their role in the grievance would be to clarify the concerns and to implement and deliver the aims of Project Avocado. Managers were to rely on the governance regime, that had been put in place as part of the project, to ensure that the changes were properly classed as major or minor. Managers did not have authority to alter the classification of whether the change was major or minor through the grievance process.
19. As indicated the announcement was made to the Caerphilly store on 22 January 2018. This announcement was made by the previous store manager, Nadine Clarke, who read at the form of announcement which had been documented in advance and was contained in the Bundle, with specific changes being made to the Stock Manager role and dependent on whether the store operated during night time hours.
20. In the claimant's announcement, the claimant was advised the changes were minor and that the Stock Manager role would be renamed Stock and Admin manager.
21. At that meeting held with the claimant, Mr Jeffrey asked the claimant to accept the role. The claimant immediately expressed concerns that the changes did not feel minor to her and that she would want to understand

how the changes were minor. Whilst a documentation known as a 'My Role Pack' had been prepared for the new role, a copy was not available for the claimant at this meeting. A My Role Pack had been provided within the Bundle at page 494, which summarises the main elements to the role. It does not allow for direct comparison between the new Stock and Admin role and the existing Stock Manager role.

22. Mr Jeffrey alleges that the claimant said she wanted redundancy and laughed (paragraph 8 of his witness statement). This is disputed by the respondent. I have reviewed a summary document of the discussion which took place on 22 January (and for the avoidance of doubt the summary document of the 23 January meeting,) and noted this had not been noted or referred to in either document.
23. I therefore find that the claimant did not make this comment based on her verbal testimony in cross examination, where she denied this, and following a review of both documents.
24. Had this been raised by the claimant I would have expected to see this reflected in either document, it was not. In any event even if the claimant had raised this at either the meeting on 22 and 23 January, this would have been at a time when the claimant would not have had any opportunity to consider the My Role Pack, as it had not been provided to her, but had been made in immediate reaction to the announcement.
25. On 23 January 2018, a formal 1-2-1 consultation took place again attended by Gareth Jeffrey and Nadine Clarke. The claimant was shown a copy of the Role Pack for the new role and asked if she accepted the role again. She asked for a copy of the My Role Pack but was told she could not retain that copy. A copy was not provided to her until a few days later.
26. The claimant indicated that she had questions about the new role and provided Ms Clarke and Mr Jeffrey with a copy of the questions that she had (page 66 – 68 in the Bundle). The very first question she asked was for clarity on the difference between 'major' and 'minor' change in the job role. This was repeated later in the document and the claimant highlighted concerns as to her mental health as a result of the process.
27. At that point, neither Mr Jeffrey nor Ms Clarke would answer her queries as they simply did not have the answers for her. Mr Jeffrey promised he would get those answers and he was tasked with getting them to the claimant. This was accepted by Mr Jeffrey on cross examination. The claimant was asked if she wanted to see a list of vacancies at that point but was told she could not apply for them until 7 March 2018 due to the ongoing redundancy consultation exercise.
28. At some point after that 23 January 2018 meeting the claimant was provided with a Role Pack to compare her old role with the altered role and she concluded following that exercise that 93% of the old compliance role was included in the new role, including compliance and legal checks as well as increased management.

29. On 31 January 2018 the claimant fell ill on the way to work and was hospitalised. The claimant was told by the hospital doctor that she was suffering from anxiety related symptoms and thereafter she was absent from work until 11 February 2018.
30. A return to work meeting took place on that day conducted by Mr Jeffrey following which Mr Jeffrey made an Occupational Health referral. At that meeting the claimant confirmed that it was the structured change that was causing her anxiety and repeated again her view which was this change was not a minor change.
31. On 13 February 2018 a second 1-2-1 meeting took place conducted again by Nadine Clarke and Gareth Jeffrey. Mr Jeffrey was still not in a position to answer the claimant's questions but despite this the claimant was again asked if she accepted the Stock and Admin role. She reiterated that she still did not consider this was a minor change and without specific answers to her questions, specifically in relation to her role in Caerphilly, she could not make that decision.
32. Whilst on cross examination Mr Jeffrey could not recollect the following, he accepted that it was possible that he told the claimant that the Stock Manager role no longer existed and that the claimant had indicated that if the role did not exist anymore she should be under consultation. I therefore concluded in light of the claimant's evidence and the equivocal evidence from Mr Jeffrey, that the claimant had raised both issues.
33. What is not in dispute is that the claimant was, at that meeting, given four options of stepping down, look for another vacancy or resign or she accepting the new role was still an option.
34. The claimant has given evidence that she felt under pressure as a result of the three meetings on 22 January, 23 January and indeed the following meeting on 30 January. As corroboration she relies on the interview given, as part of the Kirsty Powell investigation, on 22 May 2018 by her trade union representative, Alison Partridge, that there was a lot of pressure on the claimant to take the role.
35. On the basis that:
 - a. it was accepted by Mr Jeffrey that he asked her on three separate occasions to accept the new role,
 - b. that he accepted there were no answers to her questions at this stage,
 - c. that she was only given four options, none of which included a status quo option;
 - d. the claimant had indicated anxiety as a result of change which had resulted in sick leave and an Occupational Health referral and;
 - e. there was some evidence, albeit hearsay evidence, from the trade union representative about the impact on the claimant

I found that it could be reasonably concluded that the claimant would have felt pressured to accept the role of Stock and Admin manager.

36. In terms of the options available to the claimant at this time, the options listed above were the only four options on offer to her from the respondent. Alterations to the Stock and Admin role was not an option open to Mr Jeffrey. At that point in time Mr Jeffrey did not know why change was considered minor and had not undertaken a comparison of the two roles. He had no understanding or knowledge of the criteria for change but accepted that, as a matter of common sense, the changes were not minor. Despite this he took the change to be minor because of what he had been told by senior management.
37. There is a dispute as to whether after that meeting Mr Jeffrey asked the claimant whether she wanted to go through the Role Pack to discuss the changes. The evidence from Mr Jeffrey was that she declined this offer, as in doing so she would effectively be accepting changes. Mr Jeffrey was not cross examined on this. On cross examination the claimant maintained that Mr Jeffrey never offered to go through My Role Pack. On balance I accepted the unchallenged evidence from Mr Jeffrey.
38. However, notwithstanding this, I also found that Mr Jeffrey did not in fact at any point undertake a comparison of the two roles in order to facilitate a response to the questions from the claimant.
39. At the end of the meeting, the claimant provided a letter detailing her concerns and on 6 March 2018, sent an email to the Chief Executive of Tesco essentially reiterating those concerns. She received a response that an investigating manager would be in touch to update the claimant on their findings.
40. On 7 March 2018 a further 1-2-1 meeting took place again, attended by Nadine Clarke and Gareth Jeffrey. At that meeting she was told she would not be getting answers to her questions and again, the four options that had been articulated on previous occasions were reiterated. Ms Clarke advised the claimant the respondent would not be answering the questions raised by her and, as a result, the claimant submitted her grievance letter that day. I refer to this as Grievance 1.
41. From 8 March – 20 March, the claimant was on annual leave.
42. On 22 March 2018 a telephone occupational health referral took place with the claimant which, amongst other things, advised work related concerns were to be addressed as soon as possible. Whilst the written report from occupational health was dated 22 March 2018, I accepted that Mr Jeffrey did not receive this document until a few days later and, in any event, did not receive it until after the meeting which took place later that day.
43. On 22 March Mr Jeffrey asked to see the claimant again and asked if the claimant was willing to undertake her role as changes were to become effective on 25 March 2018. The claimant confirmed she would not. In response Mr Jeffrey told the claimant that he was suspending her as she was refusing to undertake the Stock and Admin role. The claimant became upset and asked for an adjournment to compose herself which Mr Jeffrey refused. Mr Jeffrey accepts that this was an error on his part.

44. The letter confirming suspension dated 22 March 2018 stated the claimant was suspended pending an outcome into the investigation into allegations of not carrying out a reasonable management request to fulfil her role as Stock and Admin manager at Caerphilly.
45. The suspension was not carried out in a manner that was sensitive. As accepted by Mr Jeffrey, and as I found from my review of the suspension checklist (page 102 – 2014 Bundle) Mr Jeffrey did not carry out the suspension in accordance with company policy, not least as no notetaker was present.
46. At that point in time
 - a. the respondent had not answered any of the claimant's questions, despite having committed to do so; and
 - b. had not dealt with the claimant's grievance of 7 March 2018 beyond communicating to her that they would arrange for a grievance to take place.
47. I also found, following consideration of the evidence given by Mr Jeffrey on cross examination, at that point the claimant should not have been asked to start a role without clarification on her questions posed on 23 January. This was also accepted in principle by other respondent witnesses including Mr Jackson.
48. I therefore found that as at 22 March 2018, at the point of suspension it was not a reasonable management request to ask the claimant to fulfil her role as Stock and Admin manager of Caerphilly with effect from 25 March 2018.
49. The claimant immediately brought a second grievance regarding suspension which was dealt with and I have referred to as Grievance 2.
50. On 3 April 2018, a grievance meeting was held by Nicola McGuinness to consider Grievance 1 and grievance 2 and, following interviews with various personnel, the grievances were not upheld.
51. On 22 April 2018, the claimant appealed and submitted a further grievance which I will refer to as Grievance 3 against the role change being classed as 'minor'.
52. On 4 May 2018, the claimant was told this grievance would not be investigated and she challenged this on 10 May 2018.
53. On 9 May 2018 the claimant attended an investigation meeting regarding her suspension.
54. On 18 May 2018 the claimant attended a grievance appeal meeting on Grievance 1 and Grievance 2 before Ms Powell.
55. A hearing was arranged on 5 June 2018 for the grievance appeal outcome decision which concluded, amongst other issues (as set out at page 304 – 306 Bundle,) that answers to the claimant's questions would have helped her make an informed decision about the role.

56. Despite this finding no action was taken by the respondent to lift suspension. The claimant says that at that point the suspension should have been lifted, but nothing came of it.
57. Despite Ms Powell's findings that answers to her questions would have helped the claimant make an informed decision, I found nothing came of that grievance appeal decision and the claimant remained on suspension without review or further review by Mr Jeffrey.
58. On 13 June 2018 the claimant attended a grievance meeting with Mr McDougal (in relation to grievance 3) and, following that meeting, Mr McDougal interviewed a number of individuals including Mrs Marsh, where she explained to him the differential between 'major' and 'minor' changes.
59. It is accepted by Mr McDougal that he did not record the conversation and we have not seen his notes. Mrs Marsh gave him an overview of Project Apple and the pilot scheme.
60. That Grievance 3 outcome was delivered on 2 July 2018 and concluded the following:
 - a. that there were only fifteen additional checks,
 - b. that it was feasible to manage a head count of eleven,
 - c. there were duplicated checks; and
 - d. on call would be managed within a rota that would be fair.
61. This is in essence of what is contained at page 372. Despite those findings there was no conclusion on the essential complaint from the claimant that the changes were 'major' as opposed to 'minor'.
62. The claimant appealed this decision. This was considered by Mr Nick Jackson. At that point the claimant still had no clear conclusion on whether the changes were considered, or why the changes were 'major', not minor. This is accepted by Mr Jackson.
63. As part of the appeal Mr Jackson interviewed Mrs Marsh on the impact of the change, as addressed and articulated by her in the investigation meeting note at page 419. However, there was still no assessment of how the 'major' versus 'minor' distinction applied to the particular Store Manager role at Caerphilly.
64. Having considered evidence from Mrs Marsh I found that the purpose of the grievance procedure was not to challenge the business decision and that managers had no power to alter the definition of 'major' or 'minor' or the application of those definitions to a particular role within a grievance procedure as that was a business decision.
65. I found that Mr Jackson did not consider this was a decision he could make and that such I find that the claimant could not succeed on her grievance, as on a case by case basis, managers would have no power to change the definition within a particular role.

66. Further, that even though there was a process outside of the grievance procedure to challenge, no manager did challenge this business decision, leaving the claimant with no recourse or redress.
67. The claimant felt this was the final straw and resigned in response to the outcome from Mr Jackson.
68. Finally, for the sake of completeness, I found that save for two phone calls from Mrs Macavaney, in May and either June or July, and some contact via management of the grievance and disciplinary process, no other contact was made with the claimant during her five months' suspension.
69. There is a dispute as to whether the phone call from Mrs Macavaney was made in June or July. The claimant was emphatic that it was July as she related it to her meeting.
70. I found on balance that as a result this was more likely than not to have taken place in July but in any event, I found that the exact date of the call was of no significance.

Conclusions

71. In terms of the contract, I accepted that the respondent by reason of the terms of the claimant's contract was entitled to make changes on notice and that there would be a minimum of four weeks' notice before that change was put into effect. However, even where the contract accommodates changes that can have a detrimental effect on the claimant or employees generally, such a discretion is fettered by the obligation to maintain trust and confidence.
72. In this case I concluded there was a contractual term allowing for variations and that the claimant accepted that the time frames within which the change could be put into effect had been complied with.
73. In isolation I did not consider that the respondent had breached the contract by seeking to oppose a change through the mechanism set out in the contract.
74. However, I did consider that the methodology that the respondent had undertaken, in light of the claimant's concerns about the scale of the change as they related to her role in Caerphilly, was a matter which could give rise to a breach of the implied term of trust and confidence.
75. In terms of the breach of the implied duty of trust and confidence, I am asked to consider a number of instances.
76. The first is the pressure that the claimant would have felt after the three consultation meetings of 22 and 23 February and 7 March 2018. I found that this would have reasonably resulted in pressure on the claimant to accept the change. I accept that it would have been obvious that this would have had that effect on her, particularly in the context of her concerns and what she had clearly stated were major changes, which were unpalatable to her.

77. At no time was there any granular or detailed review of her new role to understand if the concerns held by the claimant were viable.
78. At no time was it explained to the claimant what the changes meant to her specifically.
79. At no time was there any consideration of the queries raised by the claimant.
80. These failings in local management would have started to erode the trust and confidence although at that point in time, was insufficient to amount to a complete breakdown in the trust and confidence in isolation.
81. It is possible that had Mr Jeffrey spoken to Mrs Marsh, or anyone in the Organisational Design team at that stage, the analysis undertaken by that team following their governance review and pilot work, could have been communicated to the claimant and could have reassured her.
82. It was not. Coupled with a lack of any analysis by Mr Jeffrey of the role change, the claimant was effectively left in the dark. This was a case where the information held by the Organisational Design team, which could have clarified the position and could have been communicated to the claimant, was not. This would have avoided a lengthy grievance hearing from the respondent in relation to an employee with a considerable period of service.
83. This is despite Mr Jeffrey agreeing on cross examination that the changes were not 'minor' changes. No thought was given to Mr Jeffrey at that point as to how the changes would impact on that role in Caerphilly, in that store.
84. I concluded that no one at local management seriously engaged with the claimant at that stage regarding her concerns. I found that the failure by her line manager, both by Ms Clarke and Mr Jeffrey, to respond to her concerns raised at each meeting, as Mr Lassey put it formed a slow erosion on the claimant's trust and confidence.
85. Turning now to the meeting of 22 March and the suspension. As I have found and concluded that it was not a reasonable management request to ask the claimant to fulfil her role as a stock admin manager on 22 March the claimant's suspension by Mr Jeffrey on that date was neither an appropriate nor a reasonable response.
86. Whilst suspension is not a disciplinary sanction, in the context of the conclusion that there was no reasonable management request for her to commence her amended role, I have to consider whether there was a reasonable and proper cause for the respondent's action in suspending the claimant.
87. The claimant had been asking since the day of the announcement for information on the new role because of concerns she had. It was accepted by Mr Jeffrey that it was not unreasonable for the claimant to expect answers to her questions before accepting. No one did provide those answers. Had someone done this prior to 22 March, the respondent may

have found itself with a different conclusion from me today. However, no one did or had provided those answers to the claimant by 22 March 2018.

88. No evidence was presented by or on behalf of the respondent that they considered options as alternatives to suspension. The claimant has suggested that she could have been placed on alternative duties in another store pending outcome of her grievances.
89. The rationale from the respondent for suspension is unclear and none have been offered in the context of the respondent's own suspension policy. Notwithstanding that, the claimant's representative has indicated that if there had been a reasonable management instruction, he would have difficulty in challenging that the suspension was not warranted.
90. However, in the context of my findings, that it was not a reasonable management request, I considered that it was a gross oversimplification to conclude that simply because the claimant had concerns regarding the changes to the role and wanted answers to her questions before she accepted that change, that she inevitably had to be suspended.
91. I concluded that the respondent's reaction to the claimant's position was an immediate reaction and it is difficult to believe that an employer the size of the respondent, particularly when dealing with an employee of twenty-eight years' service, should have considered that suspension was an appropriate response.
92. In the context of trust and confidence, there was no reasonable or proper cause to suspend and I concluded that suspending the claimant in March, at a time when she still had no answers to her queries, and additionally no attempt by management to answer her queries, was conduct likely to destroy the trust and confidence in the relationship.
93. Furthermore, despite Ms Powell's finding on her grievance investigation, no action was taken on lifting the suspension despite Ms Powell reassuring the claimant she would 'feed back'. Mr Lassey, on behalf of the claimant, puts that grievance appeal outcome as 'meaningless', as nothing happens in practice. I agree in the context of suspension.
94. I consider that failure to review the suspension at that stage, and/or give proper consideration to lifting it, to be in breach of the terms of trust and confidence. Mr Jeffrey did not even consider the continuation or otherwise of the suspension and that is a fundamental breach of trust and confidence.
95. Whilst the claimant did have some contact with the respondent during her suspension, through the internal management process and the two phone calls made by Ms Macavaney, there was little or no pastoral support for the claimant throughout her suspension.
96. I heard evidence from Ms Macavaney that she contacted her only twice during suspension. Having concluded that there was little or no other contact with the claimant regarding her welfare, taking into account the rationale for the suspension, the length of suspension, the claimant's state of health brought on by the change, the management of the suspension and

the delay throughout the suspension, this all amounted to a breach of trust and confidence entitling the claimant to resign and complain of constructive unfair dismissal.

97. Despite three grievances, two grievance investigations and two appeals, no one, at any stage, did a granular or indeed any analysis of the two roles in order to answer the claimant's concern that the changes represented a minor change to the role.
98. Rather what arose was an acceptance of Organisational Design's position, which was that the change was 'minor'. This may very well be right, but at no stage did anyone feed that back to the claimant with a review of how it applied to the claimant in her role at Caerphilly.
99. It has not been my task to understand whether the changes to the role were major or minor, rather it was to review whether the respondent's management of the claimant, and the concerns she raised were said to amount to breach of the implied term of trust and confidence.
100. In terms of the length of the time for the grievance procedure to conclude, particularly in light of the final findings made by Mr Jackson, which effectively reiterated which Organisational Design had put in place, which failed to analyse how the project impacted on the claimant's specific role, despite Mr Jackson's best efforts was also a breach of the implied term of trust and confidence.
101. The final conclusion of the second appeal, which still did not address the claimant's queries was the final straw. I accepted that as the final straw and I also accepted that it entitled the claimant to resign and claim constructive dismissal. I therefore found that the claimant's claim of constructive unfair dismissal has been well founded.
102. Further and finally, I did not conclude that the respondent has demonstrated that, in the alternative, there has been any fair reason for dismissal.

Employment Judge R Brace

Date 25 July 2019

WRITTEN REASONS SENT TO THE PARTIES ON 26 July 2019

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FOR THE TRIBUNAL OFFICE