



**THE EMPLOYMENT TRIBUNAL**

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE TRUSCOTT QC

**BETWEEN:**

**Claimant** Mrs A Herbert

AND

**Browns Cake and Pies Ltd.** **Respondent**

**ON:** 12 and 13 June 2019

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr T Chaudhry solicitor

**JUDGMENT**

The claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is well founded.

The case will be listed for a remedy hearing.

**REASONS**

**PRELIMINARY**

1. The claimant has brought a claim for constructive unfair dismissal. She relies on alleged breaches of the implied duty of mutual trust and confidence by the respondent.

2. The claimant gave evidence on her own behalf and represented herself. The respondent was represented by Mr R Chaudhry, solicitor, who led the evidence of Mr Hugo Nisbet and Mr Maria Talaska.

3. There was one volume of documents to which reference will be made where necessary.

## **ISSUES**

4. The issues for the Tribunal, as identified by the respondent, were:

- a. Was C unfairly dismissed in accordance with s95(1)(c) ERA 96?
- b. Did C contribute towards her dismissal?
- c. Did R or C fail to adhere to the ACAS code of practice?

5. The Tribunal decided that these did not correctly reflect the legal structure and added after (a), "If so, did the respondent establish a reason for dismissal?" and "If so, did the respondent act reasonably in all the circumstances?" Due to shortage of time, the Tribunal addressed only the first four issues, the remaining issue will be addressed at a remedy hearing.

## **FINDINGS of FACT**

6. The claimant commenced work with the respondent as a chef on 2 November 2002. The respondent is a manufacturer of cakes, pies, sausage rolls, quiche and other pastry products.

7. Mr Hugo Nisbet purchased the business with effect from 4 September 2017. Mr Nisbet is responsible for the overall running of the company including payroll, HR, customer relations as well as the majority of the deliveries.

8. During the period prior to the purchase, Mr Nisbet spent time with the claimant in order better to acquaint himself with the business. They had a good relationship at that stage. Mr Nisbet had been a regular customer of the respondent for approximately seven years.

9. On 4 September, Mr Nisbet met with the claimant and explained his plans for the future. This involved but was not limited to creating new pies with new fillings.

10. On 11 September, the delivery van broke down and the cost of fixing it angered Mr Nisbet. He started shouting at the claimant that the company that he was sold was a dud. He demanded to know why the claimant earned so much per hour, why she didn't inform him before hand and that it could destroy the company. Because of this incident, the claimant started to keep a diary [36-124].

11. On 20 September, Sebastian, a customer, called to reduce his standing order for cakes by leaving a message on the answer phone. The claimant retrieved the message and amended the order book/diary. When Mr Nisbet delivered the order, they told him they had cancelled entire order for cakes. Mr Nisbet became very angry and started shouting at the claimant. As she had deleted the message, he accused her of not understanding and called her a liar. He wanted a disciplinary hearing and wanted to know how she would pay for the loss of income to the company. She put the cakes in the freezer. The following day Sebastian called and changed his mind and wanted the order. Mr Nisbet called the claimant several times in the morning but she didn't hear her phone. When she saw the missed calls, she called him back. He let her know he wasn't happy that she didn't answer

when he first called. The claimant explained it was Saturday and her day off and she was asleep. He demanded to know where the cakes were as Sebastian now needed them. She told him she had put them in the freezer so they could use them again. He shouted at her that they were useless in the freezer as they couldn't be used that day and the disciplinary hearing would be on Monday. On Monday, the claimant asked what was happening and Mr Nisbet said to leave it, that he may have overreacted. Again, he queried why she was paid so much when she was only a chef. He asked her not to sit down when she was working, something she was previously allowed to do as she had a bad back. He told her she was lying as there was no record of it on her file, she looked fine and the previous owner hadn't said anything. He told her he wanted to get someone better than her to run the kitchen and that as she was only a chef, not management material, she would have to go back to being a just a chef.

12. The claimant used to be paid in two instalments, £1,000 on the 24<sup>th</sup> of the month and the balance 2 or 3 days into the next month. On 26 September, she received a £100. When she queried the amount with Mr Nisbet, she was told she was wrong and when she tried to raise it again, Mr Nisbet became very angry and the discussion was closed. On 27 September, the claimant received £900, with no comment from Mr Nisbet. During the week commencing 2 October, she repeatedly asked Mr Nisbet for the balance and payslip and was told he had paid her everything he owed her. On 9 October, she received £730.16 and on 13 October, she received £54.18. She still felt this was short. She received her payslip on 19 October and saw that her tax code had changed to an emergency code which explained why her pay was much less than she expected. She understood that Mr Nisbet forgot to get the payroll data from the previous owner, She was also missing 1.5 hours. When she queried this, Mr Nisbet said it was a lot of money for a small business, the claimant told him it was a lot for her too [39 and 176]

13. During October, Mr Nisbet blamed the claimant for the business the company was losing, frequently referred to her rate of pay and her being petty about a missing 1.5 hours. He often became angry with the claimant and told her that he needed someone better than her. He was undermining her authority with the staff and reverted to Maria Talaska as if she was in charge. He asked Maria to speak with the claimant about her negative attitude and whether this position in the company was right for her.

14. On 25 October, the claimant went to the hairdresser in the evening. She told her that she was losing big chunks of hair and should see a doctor. On 26 October, the claimant called the doctor's surgery before she started work and they arranged for a doctor to call her back. The doctor called the claimant back shortly after 8am and she explained her symptoms and that she also had a problem with her voice/throat. The doctor asked her to come to the surgery straight away. Mr Nisbet observed that she was on the phone and started shouting at her. The claimant explained that the doctor had called her and requested that she come to the surgery straight away. Mr Nisbet asked what was wrong and when she told him, he said there was nothing wrong with her, she sounded alright and her hair looked fine. The claimant had to wait over thirty minutes for him to contact his external HR advisers for their approval for her to leave before she left. He told her that she was unprofessional and if she went, it would affect the company as there were orders to fulfil. At the doctors, the claimant was signed off to 19 November and referred for further tests. She texted Mr Nisbet with her fit for work note that day and later posted it recorded delivery to him [125].

15. The claimant was paid on 31 October however her wages were still short by the previous 1.5 hours and Mr Nisbet had deducted the time she worked on the 26<sup>th</sup> [177].

16. Mr Nisbet decided to appoint a head chef and advertised both internally and externally [126-128]. At the time the role was advertised, the claimant was on sick leave, however he sent the advert to her by email and letter. She replied by email stating that she did not wish to apply for the role as she wanted to focus on her health [129].

17. The new head chef was appointed on 13 November 2017. He was responsible for overseeing the work of the kitchen staff and managing the staff generally, the claimant would have been working under his direction, as were all other staff members. The job description of the head chef [127-128] and that of the claimant [143] are not the same but a number of the duties are the same. When she returned from sick leave on 20 November, the claimant met with the new head chef, Matt, and was invited to a return to work meeting. Mr Nisbet conducted the meeting with Matt and made notes. Mr Nisbet reiterated the emergency phone procedure and the claimant raised the issue of her outstanding hours [23-25]. Mr Nisbet asked her to sign the document, the claimant told him she couldn't read what he had written as she didn't have her glasses. He told her it was just an accurate version of what they said and she should sign. She requested a copy which he said he should be able to provide but needed to confirm with the HR company first. She got this on 23 November [137-138]

18. After this meeting, there was a meeting with the rest of the employees at 9am, where Matt laid out the new rules and standards. They were told no radios, no phones, no drinking tea or coffee, they had to ask to use the toilet or wait till he offered, and lunch breaks were to be shortened to 20 minutes maximum and the claimant wasn't allowed to sit during work. Matt said to the claimant afterwards that as she was so expensive, she was only permitted to work 8 hours maximum and that, by law, she wasn't entitled to a break but could, as gesture of goodwill, break just to eat with the others albeit for less time.

19. On the same day, the issue of the claimant's holiday arose. The claimant had booked a holiday for one day on 1 December in August and paid for the flights. She was informed by Matt and Mr Nisbet that the holiday procedure had changed and that as Mr Nisbet's wife was due to give birth on the same day, she couldn't go as she had not followed the new procedures [132 and 139]. She told them that she had already booked the flight. Matt told her he was unhappy with her attitude about this and that a warning would be placed on her file.

20. Matt finished working with the company on 1 December and together he and the claimant worked nine days. In that period, she received warnings from him for the following:

- |                           |   |
|---------------------------|---|
| 20 <sup>th</sup> November | Disregarding new holiday system [para19 above].   |
| 20 <sup>th</sup> November | 17:08 Asked about 30 sausage rolls he needed but she didn't know anything about them and told him. He told her she should be aware in the future. |
| 23 <sup>rd</sup> November | Matt had reorganised the kitchen and gave her a warning as she didn't know where anything was and was taking too much time finding things.        |

23<sup>rd</sup> November

Quality of pastry that Matt changed.

28<sup>th</sup> November

The driver overslept, Mr Nisbet and Matt both blamed the claimant.

On 22 November, the claimant finished work at 1505hrs and went to change, afterwards she was accused by Matt of defrauding the company as she was changing before she signed out. She had never signed out before getting changed before. Matt also informed her that Mr Nisbet was not happy that she had a coffee break the day before as he felt she was taking too many breaks.

The parties were agreed that on 23 November, the claimant received a verbal warning about cross contamination. Matt claimed he did not see her wash her hands. These warnings did not form part of the disciplinary process that was undertaken later.

21. On 27 November, the claimant's holiday request was approved [140].

22. On 29 November, the claimant's husband called her. He had been in hospital for a week, and the claimant was told that she wasn't allowed to accept or make calls to him. She told Matt of the situation who told her that he had informed Mr Nisbet and that the rule allowing phones was not to be relaxed. When her husband did call, they spent several minutes deliberating whether they should relax the rule. The claimant was permitted to return his call as his call had already gone to voicemail. Matt stayed with her while she made the call instructing her to be short and to the point.

23. The claimant was paid on 6 December along with the other employees. Mr Nisbet apologised and the claimant accepted his apology.

24. During December, the business was very busy. The claimant worked over 210 hours often starting before 6am and finishing late as she had also assumed the role of the cleaner.

25. On 22 December, the claimant asked Mr Nisbet if she could be paid on time in December as she had commitments. She sent an email on 31 December asking when she would be paid as she hadn't received her wages [142].

26. On 2 January, on returning to work Mr Nisbet discussed the business with the claimant and he informed her it was not going well. The claimant asked when she would be paid, he told her he was very upset with her email and it spoilt his Christmas holiday. In the evening of 2 January, she got paid by faster payments. The payroll bureau had been closed and their first day back was 2 January [176-180].

27. On 5 January, after the claimant finished the cleaning, she said goodbye but Mr Nisbet said he wanted a chat. There were some pies Maria had made that were not cooked properly and the pastry was undercooked. He asked the claimant what she thought of the pictures. She told him that she hadn't seen them and would not have let them go if they were like that. She asked if he was sure they were the ones from that day. The claimant offered to call the customer, as she knew them, but Mr Nisbet didn't want her to. They discussed the pies and what could be done to rectify the situation going forward. The claimant suggested that he reinstate her supervisory status and she will double check and retrain the staff. Mr Nisbet

expressed his financial concerns at losing two customers, buying a new van for £25k and his large wage bill. The claimant was unaware that it was an investigation meeting until she was asked to sign the notes [143-4].

28. Mr Nisbet held an employee meeting on 9 January and issued new contracts to all employees. The claimant asked to take hers home to read [7-35]. She had queries concerning her new contract [165] so they arranged a meeting to discuss these.

29. On 11 January, Mr Nisbet informed the employees that the company had lost their biggest customer and asked if they could let him have any ideas to save the company. The claimant offered to work only four days the following week and he agreed.

30. On 15 January, Mr Nisbet informed the employees that the new business strategy would only be to make sausage rolls, pork pies and quiches and that the business only had 4 to 6 weeks left. He also made reference to the layoff clause in the contract. When she got home, the claimant checked the layoff clause and found there was a time limit of 4 weeks before she could receive a redundancy payment.

31. The next day, Mr Nisbet said that he would not invoke the lay off and there would be no redundancies. Also on 16 January, an issue arose concerning leaking pies.

32. On 18 January, when the claimant started work, Mr Nisbet gave her a letter asking her to attend a meeting at 4pm the following day [149]. The letter calls the claimant to a disciplinary meeting in relation to what had occurred on 4 January (paragraph 26 above) and in relation to 16 January. The letter states "If you are unable to provide a satisfactory explanation for the matters of concern set out above, your employment may be terminated in accordance with our disciplinary procedure."

33. On 19 January, Mr Nisbet asked the claimant to postpone the meeting to Monday as he wanted to go early and he didn't feel he was in the right frame of mind. The claimant asked for it be done earlier as she didn't want this looming over her weekend. The meeting proceeded at 2pm. There is a full agreed transcript of the meeting [186-193]. Mr Nisbet said that there will be no definitive outcome as the purpose is to gather information about the two allegations. In relation to the 4 January complaint the claimant said that this had already been dealt with on 4 January. There was a lengthy discussion about egg yolks and overcooking. In relation to the second incident, the claimant was not present when the pies were cooked. She was not responsible for checking pies which had been made and lidded up by Tony. Mr Nisbet told her his final decision would be made on Monday.

34. Mr Nisbet sent the claimant an email regarding the new contract and new terms 19 January. On 22 January, she wrote to him asking for closure on the disciplinary and queried terms in the new contract, including the start date [164-165].

35. On 23 January, Mr Nisbet he called the claimant into his office to discuss the contract. Mr Nisbet said that although she was signing the contract this year, it would still take into account her full employment with the respondent and that she

would not need to be on probation. The claimant asked if he could then terminate her agreement under the termination clause with no notice, he said yes but to trust him as he wouldn't do that to anyone. The claimant asked for this in writing but he said he wasn't allowed to as instructed by his HR company and that they should trust each other. The claimant asked about the disciplinary process and he said he couldn't conclude until the new contract was signed as his HR advisors told him so.

36. On 26 January, one of Maria's pies was broken and undercooked, Mr Nisbet got very angry with the claimant because of this.

37. On 26 January, just before she was finishing her shift, the driver ran out of battery in the electric van and couldn't complete the deliveries. The claimant called Mr Nisbet who lost his temper at her for not checking the power beforehand despite her never have done this before.

38. On 28 January, the claimant resigned in a detailed letter explaining why and gave immediate notice [166-169]. She refers to Mr Nisbet's failure to conclude the disciplinary process. She does not know if she was going to be dismissed although in evidence Mr Nisbet said she would not have been. She refers to the contractual changes being imposed on her which are detrimental to her. She then refers to a number of matters including the disciplinary procedure threatening dismissal. [168].

39. Mr Nisbet wrote to the claimant after her resignation suggesting she air her grievances in front of an independent mediator, saying that if she did and did return to work, he would conclude all disciplinaries straight afterwards [170]. The claimant declined stating she felt she would be retracting her resignation in order for him to dismiss her immediately [171-172]. Mr Nisbet sent a further letter to the claimant accepting her resignation and acknowledging the fact that she did not wish to pursue the formal grievance procedure [173].

## **SUBMISSIONS**

40. The Tribunal heard oral submissions from the claimant and had written submissions from the respondent.

## **LAW**

41. An employee is dismissed by her employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c) of the Employment Rights Act 1996 (ERA 1996)).

42. The test of whether there has been a repudiatory breach of contract is an objective one, see **Leeds Dental Team Ltd v. Rose** 2014 ICR 94 EAT.

43. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v. Sharp** [198] ICR 221 CA, the employee "must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". An employee may continue to perform the employment contract under protest for a period without

necessarily being taken to have affirmed the contract. There comes a point, however, when delay will indicate affirmation.

44. In **Kaur v. Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 CA, the Court of Appeal listed five questions to ask in order to determine whether an employee was constructively dismissed:

- 1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- 2) Has he or she affirmed the contract since that act?
- 3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- 4) If not, was it nevertheless a part (applying the approach explained in **Waltham Forest v Omilaju** [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- 5) If so, did the employee resign in response (or partly in response) to that breach?

45. To establish constructive dismissal, an employee must be able to show that they resigned in response to the relevant breach. In **Nottinghamshire County Council v. Meikle** [2004] IRLR 703 (applied by the EAT in **Abbycars (West Horndon) Ltd v. Ford** UKEAT/0472/07) the Court of Appeal held that the resignation must be in response to the employer's repudiation. It need not be the sole reason, but it must have "played a part" in their leaving.

46. In respect of 'last straw' cases, in **Waltham Forest v. Omilaju** [2005] ICR 481 CA, in which the Court of Appeal gave the following guidance:

- 1) The final straw must contribute something to the breach, although what it adds might be relatively insignificant, it must not be utterly trivial.
- 2) The act does not have to be of the same character as earlier acts complained of.
- 3) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
- 4) An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

47. If a constructive dismissal is established, the issues of reason for dismissal and reasonableness of dismissal arise.

## **DISCUSSION and DECISION**

48. There was a clear conflict between the evidence of the claimant and Mr Nisbet from a point shortly after Mr Nisbet took over the business in relation to how he conducted himself towards her. Mr Nisbet denied that he had behaved in the manner described by the claimant. The evidence of Maria Talaska was



superficially supportive of Mr Nisbet but not on any detailed matter other than a reference to the claimant's negative attitude. The Tribunal accepted the evidence of the claimant as it was detailed, consistent with her communications and largely reflected in her diary although some key days were not (see 23 January 2018 page 108). The main basis for finding the evidence of the claimant to be credible and reliable is the transcript of the disciplinary hearing on 19 January. It is an agreed account of the meeting and it demonstrates Mr Nisbet's attitude towards the claimant. The Tribunal is doubtful that there should ever have been a disciplinary hearing involving the claimant far less one which threatened the loss of employment. The questioning by Mr Nisbet in relation to the second incident appears aggressive and unnecessary. He seems to want to blame the claimant for Tony's errors. The claimant says "...because I am accused of everything. Whether I have done it or not." [190] This is consistent with the general tenor of her evidence. Mr Nisbet's approach in the disciplinary hearing is inconsistent with his evidence that he was unaware of any issues with the claimant.

49. It is not clear why Mr Nisbet formed the view that the claimant was too highly paid and was to blame for the decline in the business. Mr Nisbet had acquired a new business and his wife was pregnant. These would be stressful but do not justify his behaviour towards the claimant. The respondent must have been able to observe the increasing concern that the claimant had with Mr Nisbet's behaviour towards her. Although she confirmed during her return to work interview that she had symptoms of ill health a couple of months prior to 26 October 2017, before the respondent had taken over the business, the behaviour she was subjected to cannot have benefitted her health. Instead of reflecting on his behaviour after the claimant returned from illness, he and the head chef increased the frequency of complaint about her.

50. The respondent is responsible for paying employees on time. The failure to respond satisfactorily to the claimant's concerns does constitute a breach of the implied term of trust and confidence.

51. For a business which was not doing particularly well financially to have two chefs employed at different levels whose duties overlapped would not be sustainable in the future. Mr Nisbet decided to recruit the head chef while the claimant was off work ill. It is unlikely that the business could have sustained both employees for any substantial period. Even after the head chef left, Mr Nisbet did not act as though he wished to retain the claimant in employment. The head chef cannot have been acting on his own initiative when he issued so many warnings to the claimant. The behaviour of the head chef and Mr Nisbet constituted a breach of the implied term of trust and confidence.

52. The respondent imposed new contract terms on all employees. In relation to the claimant, certain of the terms were detrimental to her, such as payment dates, period of lay off and restrictive covenant. Mr Nisbet seemed to expect the claimant simply to agree and/or take him on trust. To take an example, the claimant asked why her period of continuity of employment was not shown on her new contract. It should have been. There was no reason Mr Nisbet could not have written the date in. He did not do so. The imposition of new less favourable contract terms, the failure to consult and seek agreement was a breach of the implied term of trust and confidence.

53. Mr Nisbet's use of the disciplinary procedure against the claimant over two relatively minor incidents which may not even have involved her was a breach of the implied term of trust and confidence. There was no reason to threaten dismissal when plainly the charges would not sustain it and Mr Nisbet said, at worst, a warning might be issued. This constituted a breach of the implied term of trust and confidence.

54. There had been an investigation of sorts of the 4 January incident and the disciplinary hearing seemed more like an investigation of the 16 January incident. There was no reason to delay coming to a conclusion to the extent that he did and informing the claimant. Mr Nisbet delayed and sought to link the contract changes to the disciplinary result. This was a breach of the implied term of trust and confidence.

55. The letter of resignation sets out in detail why the claimant was forced to leave. She is, in essence, correct in the incidents and the breaches she relies upon.

56. The respondent criticises the diary written up by the claimant because it was not shown to the respondent at any time during her employment but that would not be expected of the claimant. A more substantial point is that the diary was not referred to in either the claimant's email of the 22 January 2018 or her resignation letter. This is correct. The respondent submits that the document has been created after the claimant's employment ended in order to strengthen her employment tribunal claim. The Tribunal accepted the claimant's evidence that it was written up around the time of the dates in the diary.

57. Mr Nisbet says that he was not aware of the concerns of the claimant until her email of the 22 January 2018 and her resignation letter 28 January 2018, The Tribunal finds that he was and indeed had orchestrated the incidents causing the claimant concern.

58. The respondent says he did not have time to address the claimant's concerns after the resignation but his behaviour was such that the claimant should not have been expected to put up with further. Mr Nisbet did not want her to remain in his employment despite what the carefully drafted letters on his behalf say. The claimant was correct to have no confidence in the respondent's offer of an independent grievance hearing. She was also likely to be correct in her view that if she returned, she would be dismissed anyway.

59. The Tribunal finds that the claimant was constructively dismissed. The respondent has not established a reason for dismissing the claimant. Even if there had been a reason established, the actions of the respondent fell outwith the band of reasonable responses as the behaviour was continuous, deliberate and culminated in a disciplinary procedure which was unreasonable as was the delay in issuing a result. The claimant's claim of unfair dismissal is upheld.

60. The claimant sought to assist Mr Nisbet from before he became the owner throughout her employment with him and made every effort to assist him, working extended hours when necessary and working reduced hours to suit the business. The claimant did not contribute to her dismissal at all.

61. The case will be listed for hearing on remedy when the issue of the Code of Practice will be addressed.

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**Employment Judge Truscott QC**  
**Date 4 July 2019**