



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Jackson

**Respondent:** Burton's Foods Ltd

**Heard at:** Cardiff  
**On:** 5 June 2018 (and 28 June and 6 August 2018 in Chambers)

**Before:** Employment Judge S Davies (sitting alone)

**Representation**  
**Claimant:** Mr M Puar, counsel  
**Respondent:** Mr J Hassells, solicitor

## RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claim is dismissed.

## REASONS

### Claim

1. The Claimant brought a claim of constructive unfair dismissal.

### Applications to amend

2. The Respondent produced a list of issues at the outset of the hearing, however, this was not an agreed document and the Claimant took issue with the nature of the fundamental breach of contract identified and wished to rely on a matter that was not pleaded. Additionally, the list of issues contained matters which had not been pleaded by the Respondent (including whether there was a fair dismissal, if there was a finding of dismissal).
3. Neither party produced written details of the amendments sought, so an

adjournment was necessary for them to provide amendment applications in an appropriate format. After the adjournment, I considered the applications to amend pleadings from both parties. The Respondent's application was unopposed and granted (page 28a). The Claimant's application was opposed to a limited extent and was granted save for paragraph 4 (page 15a and b).

4. Dealing with these applications delayed the start of the hearing until 11:30am, with the consequence that I was unable to give judgment on the day and had to reserve my decision. Due to lack of time I determined that the hearing would deal with the question of liability only.

## **Hearing**

5. The parties produced an agreed bundle of documents and references to page numbers in this judgment are to pages in the bundle.
6. I heard oral evidence from the Claimant and from Mr John James, regional secretary of the Bakers Food and Allied Workers Union on the Claimant's behalf. For the Respondent, I heard from Mr Nathan Lloyd Samuel, Area Operations Manager Llantarnam factory and Ms Natasha Neill, HR adviser.
7. I heard oral submissions from both representatives and reserved my judgment for the reasons given above.
8. In Chambers on 28 June 2018, I considered that a point had not been put to Mr Lloyd Samuel in cross examination, accordingly I directed, by letter dated 29 June 2018, that the parties be requested to comment. Following further correspondence, and with the consent of both parties to deal with the matter without listing a further hearing, Mr Lloyd Samuel provided a written response, in the form of a witness statement (dated 25 July 2018 and sent on 27 July 2018) signed with a statement of truth, to questions posed by the Claimant in a document dated 5 July 2018.

## **Issues**

- a. Was the Claimant constructively dismissed?
  - i. did the Respondent breach the implied term of mutual trust and confidence, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant? The last straw occurring at a meeting on 18 September 2017 when the Claimant's request for leave was refused at a time that she was signed off as unfit to work by her GP;
  - ii. alternatively did the Respondent breach the implied term that it had a duty of care in respect of the Claimant's health and safety? In particular with regard to alleged comments made by Martin Hatcher at a meeting on 18 September 2017;

- iii. If so, did the Claimant "affirm" the contract of employment before resigning? (ie act in a manner that indicates the Claimant remains bound by the terms of the contract.)
  - iv. If not, was the breach of contract the effective cause of resignation (ie was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?
- b. The Respondent asserts that the Claimant resigned voluntarily and there was no dismissal;
- c. If the Claimant was dismissed:
- i. what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and, in particular, did the Respondent in all respects act within the "band of reasonable responses"?
  - ii. Was there any unreasonable failure by the Claimant to follow the ACAS code of practice in relation to disciplinary and grievance?
  - iii. Was there any failure by the Claimant to mitigate her losses?
  - iv. Should compensation be reduced to take into account contributory conduct, the application of Polkey or on a just and equitable basis?

### **Factual background**

9. The Claimant was a long serving employee of the Respondent, with more than 21 years continuous service, working on a production line in their biscuit manufacturing factory. The Respondent employs around 700 employees.
10. The Claimant was represented by her trade union, the Bakers Food and Allied Workers Union, at the relevant meetings referred to in this claim.

### **Holiday requests**

11. The Claimant's contract of employment (page 37 – 43) provides that "all annual holiday dates must be agreed in advance with your manager".
12. From May 2009, the Respondent implemented a system to regulate staff holidays in respect of production operators. This system capped the number of operators permitted to be on holiday at any one time at 10%. The reason for introducing this system was that high levels of holiday at particular times of the year were negatively affecting production. This approach to holidays was set out in a written communication (page 34) which states "the Labour control department and shift production

management teams will not authorise any holidays once the maximum of 10% is reached.”

13. Periods of time that were not available for holidays to be booked were displayed in the workplace on the “holiday full list” for staff information (examples at page 44 and 45).
14. Employees of the Respondent were required to complete a written request for holiday (the Claimant’s request is at pages 52 and 53).
15. The Respondent operated a system known as “block and copy” in circumstances where holiday was declined. The Respondent’s witnesses explained that this system allowed them to retain and monitor declined holiday requests, and if production requirements changed, enabled them to revisit declined requests and offer them to employees, should they still wish to take the period as holiday.

### **Sickness absence**

16. The Claimant underwent surgery in June 2017 due to issues with her neck and shoulder. For recuperation purposes, the Claimant was absent from work throughout the summer months, returning to work on 4 September 2017. Shortly after her return the Claimant attended an appointment, at the Respondent’s request, with occupational health. The report produced (page 64) confirmed that she should work light duties until she was able to take the advice of her consultant, as the symptoms of her neck and shoulder had not abated.
17. On her return to work, the Claimant was placed on light duties; collecting chocolate fingers missed by the robot on a production line. The Claimant usually worked as a packer on the Jaffa Cake production line.

### **The Claimant’s holiday booking**

18. As a surprise, on 7 July 2017, the Claimant’s partner booked a holiday abroad for them both during the period 19 to 26 September 2017. Unbeknownst to the Claimant, this period fell at a time where holidays for production operators had reached 10% and were blocked (and had been since February 2017).
19. The Claimant requested the holiday via a colleague, who took the holiday request forms into the factory on the Claimant’s behalf during her period of sick leave (to avoid the Claimant having to change into protective clothing to enter the factory). The holiday request was refused and ‘blocked and copied’, as it fell within a blocked period.
20. After the holiday had been refused, when taking a sick note to the factory, the Claimant bumped into Mr Lloyd Samuel and raised the issue of the holiday with him. There was initially a dispute as to the date when this chance meeting occurred, but the Claimant conceded that she had misremembered dates and it must have been on 7 August 2017. At Mr Lloyd Samuel’s request, the Claimant put her concerns in writing with details of her holiday booking (page 56) on 8 August 2017.

21. The Claimant was invited to a meeting to discuss her holiday, but there was an error on behalf of the Respondent in that the letter was sent to an incorrect address for the Claimant. The meeting was rescheduled and took place on 30 August 2017 with Mr Lloyd Samuel and a HR adviser. At the meeting Mr Lloyd Samuel confirmed that he could not permit the Claimant to take the holiday requested as it fell in a blocked period.
22. Following her return to work, the Claimant raised the issue of her holiday request with Jane Williams, Labour Controller on more than one occasion and was told “not to worry as (she) was top of the list for holiday requests” (paragraph 12 and 15 Claimant’s witness statement). Ms Williams remains in the Respondent’s employment but did not give evidence at the hearing; I accept the Claimant’s evidence about these conversations.

### **Meeting of 14 September 2017**

23. The Claimant also raised the issue again with Mr Lloyd Samuel. On 14 September 2017, the Claimant and her union representative met with Mr Lloyd Samuel and an HR assistant. There are no notes of this meeting. Mr Lloyd Samuel confirmed that the holiday could not be approved and the Claimant became upset. The Claimant asserts that Mr Lloyd Samuel suggested she could not book holidays whilst on sick leave (paragraph 15 of the Claimant’s witness statement). This assertion was repeated by Mr James in a meeting on 18 September (page 69) and recorded in the notes contemporaneously, I accept the Claimant’s evidence that this was what she was told.
24. Mr James’ evidence (paragraph 6 of his witness statement) was that the Claimant contacted him after the meeting of 14 September 2017 in distress as her holiday had been refused. This was Mr James first involvement with the issue. He states that the Claimant said she had been told that a further review would take place on 20 September 2017, the day after she was due to fly on holiday. The notes record that Mr James referred to this during the meeting with Mr Hatcher on 18 September 2017 (page 70) “on Thursday she was told it would be reviewed again on Wednesday. Unfortunately, I think this guy is taking the Mickey”. Mr James confirmed that the ‘guy’ was Mr Lloyd Samuels (although he disputes that he used the term ‘guy’).
25. The Claimant’s evidence is not consistent with that of Mr James, she says she was told a review would take place on 20 September, during the meeting on 18 September with Mr Hatcher (this account appears in the ET1 and the Claimant’s witness statement). The Claimant’s resignation letter does not make reference to this issue (page 76).
26. There are no notes of the meeting on 14 September 2017. Mr Lloyd Samuels evidence as to the content of the meeting appears in paragraphs 37 and 38 of his witness statement. In the statement of 25 July 2018 Mr Lloyd Samuels denies telling the Claimant that a review would take place on 20 September 2017. He explained that based on production plans there was no spare labour, in fact they were short of labour, and the Claimant was told that her holiday could not be approved.

27. Taking into account the all the evidence, I find that Mr Lloyd Samuel did not say that the holiday request would be reviewed on 20 September 2017; the weight of evidence supports this finding, in that both the Claimant and Mr Lloyd Samuel who were present at the meeting on 14 September 2017 are in agreement that it was not said. Mr James evidence reports what he was told later by the Claimant, but he was not present at the meeting himself.

#### **Fit note**

28. The Claimant visited her doctor and obtained a fit note for the period 15 to 28 September 2017 that she was unfit for work, citing “stress at work”. The Respondent sent a letter of 15 September 2017 (page 66) calling the Claimant to a meeting on 18 September 2017; the Respondent noted its concerns as to the timing of her fit note, which coincided with the refused holiday, and warned that should the Claimant go on holiday without the Respondent’s approval she may be subject to disciplinary action, with one possible sanction being dismissal.

#### **Meeting of 18 September 2017 and resignation**

29. The Claimant attended the meeting on 18 September 2017 with Mr James. The meeting was held with Mr Martin Hatcher, Area Operations Manager (who has since left the Respondent’s business) and Ms Neill, HR adviser. Notes of the meeting, which are not verbatim, appear at page 69 – 71. The Claimant does not accept the notes as accurate suggesting that they omit certain parts of the discussion.

30. At the outset of the meeting, Mr James acknowledged that the timing of the fit note ‘looked bad’ for the Claimant.

31. There is a dispute between the parties as to what was said and meant by Mr Hatcher about a production trial. Mr Hatcher did not attend to give evidence on behalf of the Respondent. Mr James asserts that Mr Hatcher indicated that a trial on one of the production lines that afternoon might mean that the Claimant could take holiday, but later in the meeting the suggestion was retracted, saying he would only be able to let the Claimant know if she could take her leave on 20 September 2017, the day after her flights were due to leave (paragraph 9 of Mr James’ witness statement). The Claimant also asserts that Mr Hatcher said the decision on whether to grant leave would not be made until 20 September 2017 (paragraph 21 Claimant’s witness statement). Ms Neill disagrees that Mr Hatcher suggested the trial on the Jaffa production line could offer the opportunity for the Claimant to take holiday, nor that the outcome would not be known until after her flights had departed. Ms Neill said Mr Hatcher was giving an example of how production requirements can change and that was the reason refused holiday requests were kept under review. Ms Neill’s evidence is that Mr Hatcher did not say the Claimant could have her holiday at any point during the meeting, whether pending a trial of production, on 20 September or otherwise.

32. The Claimant and Mr James allege that when asked what would happen if she went on leave, Ms Neill told the Claimant she would be dismissed (paragraph 22 Claimant's witness statement and paragraph 11 Mr James' witness statement). Ms Neill denies saying this (paragraphs 2-6 Ms Neill's witness statement). The allegation does not appear in the ET1, which states 'The Claimant was provided with an ultimatum, if she went on holiday this would be considered an act of gross misconduct and dealt with accordingly...' (page 14).
33. Where there is a dispute as to what was said, it can be instructive to consider the contemporaneous documentation to test the reliability of the oral evidence on either side.
34. The notes of the meeting indicate that Mr James' approach was that the Claimant had been given false hope that she should be permitted to take a holiday. The notes state (page 69/70):

*"John – Nathan been telling June he would keep looking at it. Nathan said I'll have another look.*

*MH – the situation with labour subject to change, for example we are hoping Jaffa will be up and running again end of the week but we are reviewing decision later, that would have a knock-on effect for labour.*

*John – can you imagine stress that causes. Feel Nathan messed her around.*

*MH – he could have said no, no, no but instead he agreed to revisit it.*

...

*MH – can't change rules, have had to turn down a number of other holiday requests. If you do go on holiday and don't come into work then this will be considered a disciplinary issue and potential gross misconduct."*

(my emphasis in underline)

35. As for what was said by Mr Hatcher, having read the notes of the meeting in full I am satisfied that the reference to the Jaffa production line was an example given to illustrate why refused holiday requests were kept under review pending changes in production requirements. In particular, I note the words 'for example' underlined above. I accept the evidence of Ms Neill, that Mr Hatcher did not suggest the Claimant could potentially take her holiday only to retract the offer later on in the same meeting. The notes appear to me to reflect an explanation being given rather than an indication that leave could be granted. In the context of the reasons why the meeting was called (letter of 15 September page 66 – 67) it appears to me, on the balance of probabilities, unlikely that Mr Hatcher would have made such an offer in any event.

36. The Claimant had been warned in advance that if she went on her holiday she might be subject to disciplinary proceedings with a possible dismissal sanction as the outcome (page 67). I reject the assertion that Ms Neill told the Claimant that she would be sacked if she went on holiday without permission. I note that this allegation does not appear in the ET1, which is surprising because of its seriousness and relevance to the claim. I note that decisions by the Respondent to dismiss are taken by managers rather than HR (paragraph 4 and 5 Ms Neill's supplemental witness statement). The fact that the minutes of the meeting are not a full account of all that was said is noted, and is a common approach in such circumstances; even in summary form they provide a indication of the content of the discussion overall. I take into account the approach taken by the Respondent to similar circumstances in another employee's case (letter of 11 January 2018 attached to Ms Neill's supplemental statement); this letter provides some support for Ms Neill's assertion that dismissal was not an inevitable outcome, had the Claimant gone on holiday without approval.
37. The Claimant was very upset during the meeting on 18 September 2017; she was unwell, wanted to go on holiday, risked losing money paid for it and had received a letter warning her that going on holiday without approval could possibly result in her dismissal (page 67); this risk was no doubt in her mind. In preferring the evidence of Ms Neill I take into account that her upset may have clouded her memory of what was said during the meeting. On balance of probability I find Ms Neill's account more reliable than that of the Claimant and Mr James.
38. The resignation letter from the Claimant (page 76) dated 18 September 2017 states:
- "I am writing to you to give formal notice of my termination of my employment with Burton's foods, I feel that I have no choice due to the treatment I've received over the past several weeks.*
- After giving 21 years of good service to the company it seems that management have no intention of looking after the welfare or well-being of the workforce, over the years I have given my best to the company's cause often doing tasks over and above my remit as a packer always willing to take on those tasks, I have always worked overtime when needed and helped out whenever and wherever possible, so it is with great sadness that due to the stress and anxiety caused by the treatment and unfairness I received I have to leave my employment."*
39. The resignation letter is a typed document handed to the Respondent following the meeting with Mr Hatcher and Ms Neill. Presumably prepared in advance, it does not contain reference to what happened during the meeting of 18 September 2017 but is signed and dated with that date.
40. The Claimant asserted that a team leader had been granted holiday during the period she wished to go on leave; this point is referred to in the evidence of Ms Neill, who explained that a different leave system is in place for team leaders as opposed to production operators.



41. On 29 September 2017 the Claimant contacted Ms Neill to enquire about getting her job back. Ms Neill advised her to write in to that effect, but the Claimant did not do so.

## **The law**

### **Section 95 and 98 Employment Rights Act 1996**

#### ***Section 95 Circumstances in which an employee is dismissed***

*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only 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.*

#### ***Section 98 General***

*(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.*

*...*

*(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.*

The test for constructive dismissal has three parts:

- a. was there a fundamental breach of contract, which can be either be a one-off action or a course of conduct with a last straw;
- b. what was the effective cause of resignation; was it the fundamental breach of contract?
- c. whether there has been 'affirmation' of contract; that the Claimant has acted so as to indicate she considers she continues to be bound by the contract.

## **Conclusion**

42. The Claimant's holiday request was never approved by the Respondent at any point. The contract of employment requires holidays to be approved in advance. The terms of the holiday policy appear to be absolute in that managers 'will not authorise any holidays once the maximum of 10% is reached'. The period in question had been blocked for many months prior to the Claimant's request.
43. Following her informal approach to him, Mr Lloyd Samuel invited the Claimant to make representations about her holiday booking. Mr Lloyd Samuel said that he wished to hear from the Claimant personally and see if there were any exceptional circumstances that meant the holiday should be granted; he did not believe there were. In rejecting her request Mr Lloyd Samuel referred to the need for consistency of treatment between employees in a large workforce. The Claimant may well have had 'hope' that her request would be granted but it never was. I accept the submission of the Respondent that Mr Lloyd Samuel now faces criticism for holding a meeting which gave the Claimant 'hope', in circumstances where he might equally have faced criticism if he had not held one.
44. On return to work the Claimant was placed on light duties and would have been on them for the entirety of the period of her holiday request. Although not on her usual production line, she was engaged on productive duties. The Claimant continued to approach managers about her leave when she returned to work, speaking with Ms Williams and Mr Lloyd Samuel. She was given some reassurance by Ms Williams that she should not worry about her holiday but Mr Lloyd Samuel confirmed again on 14 September 2017, after a review of production requirements, that leave could not be granted.
45. Mr James acknowledged that the timing of the fit note 'looked bad' for the Claimant. The Respondent quite properly invited the Claimant to discuss its concerns on 18 September 2017; no issue was raised with that course of action. It is submitted that Mr Hatcher's comment, noted at page 70, was to the effect that the Claimant was required to return to work whilst in possession of a valid sick note: 'If you do go on holiday and don't come into work then this will be considered a disciplinary issue and potential gross misconduct'
46. I reject the submission that, with this statement, Mr Hatcher required the Claimant to return to work whilst sick (a suggestion which is absent from the ET1). I interpret the comment as referring to the consequences of the

Claimant going on holiday; the phrase 'and don't come into work' does not appear separate from, but rather is linked to, the action of going on holiday with the use of 'and'. I do not interpret this is a requirement to return to work or face disciplinary action.

47. The resignation letter refers to the Claimant's welfare and well-being. It was submitted on behalf the Claimant, that this was a reference to Mr Hatcher's comment during the meeting on the 18 September 2017, however I reject the submission. I have found that the resignation letter was typed in advance and so cannot have included this phrase in reference to comments by Mr Hatcher during the meeting.
48. I note that following her return from holiday the Claimant contacted Ms Neill to enquire about getting her job back. Although she did not follow up on this approach as suggested, the fact that she made the approach indicates to me that the Claimant's trust and confidence had not irreparably broken down with the Respondent.
49. I do not consider that the Respondent's actions are sufficient to amount to a breach of the implied term of trust and confidence on an individual or cumulative basis. The Claimant's holiday leave was never approved, in accordance with its contractual or policy requirements, and even if meetings with Mr Lloyd Samuel raised hope in the Claimant, I do not consider that is a sufficient basis to conclude that was action 'calculated or likely to destroy or seriously damage the relationship of trust and confidence'. Further I do not consider that Mr Hatcher's comments were such, that they breached the duty of care in respect of the Claimant's health and safety. There was no fundamental breach of contract by the Respondent and the Claimant's claim of constructive dismissal fails.
50. After 21 years of service, it is a great shame that an employment relationship came to an end over the issue of granting of holiday and I have considerable sympathy with the level of upset the Claimant experienced. However, for the reasons given, the claim is dismissed.

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Employment Judge S Davies

Date 7 August 2018

JUDGMENT SENT TO THE PARTIES ON

.....7 August 2018.....

.....  
FOR THE TRIBUNAL OFFICE