



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Connor

Respondent: My Pension Expert Ltd

Heard at: Leeds

On: 26th June 2019 (and in Chambers on 12th August 2019)

Before: Employment Judge Eeley (sitting alone)

Representation

Claimant: Mr H Wiltshire, counsel.

Respondent: Miss H Boynes, solicitor.

RESERVED JUDGMENT

1. The claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant brings a claim for constructive unfair dismissal against the respondent. The issues for determination by the Tribunal were set out as follows in the respondent's list of issues (which was agreed between the parties):
 - 1.1 Has the claimant proved that the respondent committed a repudiatory breach of contract?
 - 1.2 If so, did the respondent have reasonable and proper cause?
 - 1.3 Did the claimant accept the breach or did she affirm the contract by resigning with notice?
 - 1.4 Did the claimant resign in response to the breach?

- 1.5 If the claimant establishes that she was constructively unfairly dismissed, what level of compensation would be just and equitable for the tribunal to award? In particular:
 - 1.5.1 Has the claimant discharged her duty to mitigate?
 - 1.5.2 Should compensation be reduced for any unreasonable failure to follow the ACAS Code of practice?
 - 1.5.3 Should compensation be reduced to reflect any contributory conduct on the part of the Claimant?
 - 1.5.4 Should compensation be reduced pursuant to Polkey v AE Dayton Services Ltd [1987] ICR 142?

2. In order to determine the claim, the Tribunal received written witness statements and oral evidence from the following witnesses:
 - 2.1 The claimant;
 - 2.2 Charlotte Holmes, Sales Team Leader with the respondent.
 - 2.3 James Allott, Sales Team Leader with the respondent.
 - 2.4 Andrew Megson, Executive Chairman of the respondent.
 - 2.5 Bernadette Dunlop, HR Manager and PA to the Executive Chairman.

I was also referred to an agreed bundle of documents which ran to 164 pages. I read the documents to which I was referred by the parties.

Findings of fact

3. The claimant was employed by the respondent as a Retirement Technician from 19th October 2015 until she resigned on 12th November 2018. The respondent is a company operating in the financial services sector which offers independent financial advice to clients at or in retirement.

4. The claimant alleges that in the run up to her resignation there were a number of incidents which made her feel uncomfortable and as if the respondent wanted her to leave the business. She alleged that various colleagues left the business, sometimes without explanation. The claimant asserted that since a new Head of Sales (Jordan Townsend) and Performance Coach (James Selby) had been appointed, she had seen both Team Leaders resign even though they had no job to go to. However, although she notes that colleagues left at this time she does not allege that anything untoward actually caused those colleagues to leave and there is no evidence of that. Without any evidence of the circumstances of their departure indicating that they were in some way mistreated, it is not clear how those departures could have had any adverse effect upon the claimant. They were not relevant to her own situation or her own continued employment. They were effectively neutral as regards the claimant's situation. In any event the claimant's evidence suggests (and I find) that this was not a cause of the claimant's resignation.

5. The claimant asserted that she felt that Jordan Townsend did not speak to her and made her feel uncomfortable. However, she was not able to give specific examples of this and she provided no witness evidence in support of this allegation. Furthermore, she made no contemporaneous complaint and

there were no documents in support of the allegation. She accepted in evidence that she was aware of the grievance procedure and could have used it if it had been appropriate. In those circumstances I am unable to find this allegation proven. In any event, I am without the benefit of any context to explain why Mr Townsend might not have spoken to the claimant. It may well have been reasonably explicable in the business context rather than a case of him deliberately ostracizing her. Furthermore, the claimant accepted in evidence that she thought things would get better and that it did not really bother her that much.

6. It was the claimant's case that on 6th August 2018 she received an email from the Team Leader at the time, Chris Potter. The email stated that she had logged off 4 seconds early. When she questioned Mr Potter about this she mentioned that she had logged on to the system early and had not used all of her breaks. She says that she was told by Mr Potter that he was just following orders from the Head of Sales, Jordan Townsend.
7. I was not provided with a copy of the email in question and so am unable to assess the acceptability of the language used in it. Furthermore, there was no evidence to suggest that the contents of the email were untoward. This was arguably an example of normal performance management by a superior who was checking that the claimant was abiding by proper procedure. Importantly, no disciplinary action against the claimant (either formal or informal) ever resulted from it. This is reflected in the fact that the claimant did not complain about the email at the time. I find that if she had she genuinely found this incident troubling she would have raised some complaint at that time. Most importantly, during cross examination the claimant accepted that this incident played no part in her decision to resign. Consequently, it is of no causal relevance to the legal issues in this case as it does not form part of the alleged breach of contract relied upon by the claimant.
8. The claimant alleges that on 22nd October 2018 James Allott took her into a meeting and issued her with a "strike" for having two minutes extra on her break the previous week. The claimant says that she asked him which day he was referring to and he said that he did not know. She says that she asked if it was during a day when she was stuck in a lift but he did not know. The claimant says that she made it clear that she thought it was unfair but he told her not to worry about it and to just sign the form because others were getting a 'strike'. She alleges that he told her that he had been told to give quite a few people a 'strike'. She says that she ended up signing the form as she felt pressurized to do so even though she felt it was unfair. She confirmed in cross examination that she was not told that the strike had not been recorded. She said that she was told that it would be on her file until the end of the month. Although she was bothered by the strike she did not take matters any further and did not complain about it.
9. James Allott accepted that such a meeting occurred and referred me to the note of the informal discussion at p86 which just states that the reason for the discussion was: *"Running over on breaks and late logging into work over the last week. Strike 1 has been given."* The account of the events leading up to the discussion was that *"yesterday and on other recent occasions, Marie's time keeping has not been up to standard."* The claimant's explanation of events is recorded as: *"Marie tries to track it as best she can with breaks."*

Forgetting to log on in the morning as checking emails first.” The agreed actions resulting from the meeting were that the claimant would log on before checking emails and that James would send updates to the sales floor with break times on. I find that the written record of the discussion is more likely than not to be accurate insofar as it is a contemporaneous document and it would be difficult to have invented the contents of the discussion in the circumstances. James Allott said that the meeting lasted around 5 minutes and that the ‘strike’ was added to the claimant’s file as an informal discussion. He confirmed that that the company removed the ‘strike’ process pretty soon after it was given. Within days the process was no longer used and no more ‘strikes’ were given. He had been asked to give a ‘strike’ to another colleague who was not in work at the time. As a result of this and the withdrawal of the system the claimant was the only person he issued a strike to. He could not recall whether the claimant was told that the ‘strike’ was not recorded. He says that the idea was that a few people were to receive ‘strikes’. There was a ‘log in log out’ report which showed the days when someone had logged in or out late or early. He asserted that the claimant was 7 minutes over on a break the day before which led to him being asked to issue her with a ‘strike’. He could not remember how the claimant felt about signing the form.

10. Taking the evidence in the round I find that a ‘strike’ was indeed issued against the claimant and there is some evidence to show that the respondent had some justification for finding that the claimant’s timekeeping was not up to scratch. There is nothing to suggest that it was issued maliciously or without cause. It was not particularly well handled by the respondent insofar as the consequences of the strike warning were not properly explained to the claimant. However, it is apparent that the ‘strike’ had no material impact upon the claimant going forward, particularly as the system was discontinued. I find that she was not concerned that this would result in future disciplinary action and that she was not as concerned by it as she asserts to the Tribunal, particularly as she took no steps to complain about it at the time.
11. The claimant says that during the last few months of her employment her employers were watching her and some other colleagues closely, ready to jump on any issue, no matter how minor or whether or not there was justification. However, she is unable to give specific examples or explain how she came to this conclusion. She does not say that action was in fact taken against her without justification. There is nothing in the evidence before me to suggest that this was anything more than normal management observation of employees.
12. It is the claimant’s case that on 30th October 2018 she was suffering from stomach cramps and needed to leave work an hour early in order to attend a Doctor’s appointment. On 31st October she was still suffering the symptoms and asked Charlotte Holmes at lunchtime if she could leave work. Charlotte was eating lunch at the time with James Selby who said to Charlotte that if the claimant went home she would lose a month’s bonus. Charlotte therefore suggested that the claimant should lie flat for half an hour in the ‘pod’ to see if she felt better to avoid going home and losing any bonus. The claimant did so and after half an hour she says Charlotte checked on her and she said she was well enough to continue with her shift. Once the claimant was back at her desk she says that James Selby approached her and she assumed that he would ask her if she felt better. Instead, she alleges that he came to

- tell her off stating that she had failed to log off correctly when she went to lie down. The claimant accepted in cross examination that she had failed to log off correctly so to that extent I find that Mr Selby had genuine cause to speak to her. Whilst his approach may not have been the most sympathetic in the circumstances, it did not constitute or form part of a breach of contract.
13. Charlotte Holmes gave evidence to the Tribunal that although she remembered the incident in question she did not remember James Selby saying anything to the claimant about losing her month's bonus if she went home. Charlotte confirmed that the suggestion that the claimant go and lie down was just that, a suggestion. She was not putting pressure on her to stay in work. Again, I do not find evidence of a breach of contract or of something significant enough to contribute to a breach of contract.
 14. The claimant says that on 1st November 2018 her desk was moved to be next to the performance coach James Selby. She says that he did not speak to her and she was intimidated by him. In cross examination she accepted that desk moves were not uncommon but that people would not normally be moved away from their own team. She asserted that she was effectively sitting on her own with James Selby and she felt uncomfortable because he did not even acknowledge her presence there. That said, she also accepted that she never raised a complaint that he was not speaking to her. Whilst it concerned her she expected it to get better and resolve itself.
 15. Again, I find that although this desk move may have been undesirable from the claimant's perspective it cannot be said to be improper conduct on the part of the respondent or the claimant's managers. She was not as concerned by it at the time as she now is and it did not form part of a breach of contract in those circumstances.
 16. The claimant did not raise any formal grievances about the above matters (at paragraphs 4 to 15 above) and in fact did not raise any grievances during her employment with the respondent. Importantly, the claimant accepted in cross examination that whilst she had given evidence about these background issues, they were not the cause of her resignation. She confirmed that there was no other reason for her resignation than that Andrew Megson asked her to resign.
 17. In light of the above the crux of the case surrounds the events of 5th and 6th November 2018. The claimant received an email on 1st November (p88) asking her to attend a meeting with the respondent on 5th November. The purpose of the meeting was said to be *"to make you all aware of the bonus scheme and also the pipeline launch for November, your targets will also be explained....The meeting should remove any uncertainty moving forward and ensure you all know exactly what you are aiming for."* In addition to the stated purpose of the meeting the claimant says that she also expected to be told who the new Team Leader would be because, as far as she was aware, James Allott was only covering until a permanent Team Leader could be appointed.
 18. The claimant's account is that various issues were discussed during the meeting including the new bonus plan. At the end of the meeting Andrew Megson asked if anyone had any questions and a few questions were raised by colleagues. At that point the claimant says that she asked a question

along the lines of *“do you know who our new Team Leader is yet?”* She says that she was told by Jordan Townsend that he felt that James Allott was doing a wonderful job and would hopefully continue until March. Andrew Megson then closed the meeting saying that he would come back to everyone within 24 hours with answers to the questions. The claimant felt that the meeting ended on a positive note. She then says that on 6th November there was an appointment in her diary to attend another meeting at 12.30pm. She presumed that Mr Megson would respond to the previous day's questions.

19. The claimant says that she attended the meeting on 6th November and was taken aback by how Andrew Megson spoke during the meeting. He was shouting and swearing and seemed very angry. She asserts that he opened the meeting saying: *“I am fucking sick of this! I am not here to pay anyone’s gambling debts!”* She says that he went on to say that he had five new starters and no-one in the room was irreplaceable. She says that by this point he was raising his voice and seemed very angry about something. She says that he went on to say that, *“these are my managers and they answer to me!”* She alleges that he thanked two colleagues for their hard work and said they could leave. She asserts that he started to shout at a colleague and to rant about the quality of the leads and the bonus payments being paid to the lead generators being none of the colleague's business. She says that he then told the colleague to get out of the room. As the colleague left the claimant commented *“have I missed something?”* At that point she says that Andrew Megson turned his anger on her and stated *“as for you Marie why don’t you just resign!”* The claimant asserts that she responded: *“Andrew I don’t know what you mean?”* Andrew Megson apparently shouted in response: *“Don’t give me that, I was there yesterday when you said it, just resign! Disrespecting my managers saying when am I going to get a proper manager!”* The claimant says that she was shocked and politely explained that she was only enquiring when they would find out who the new team leader would be. She asserts that Mr Megson shouted that it was none of her business whether James was temporary or permanent and if she was not happy she should just resign. She says that he then ordered her to get out. She says that as she stood up to leave Mr Megson said, *“and if you are not happy go and meet CP again and moan to him.”* She says that she presumed that Mr Megson knew that the claimant had met CP during a lunch break after he had left the respondent's employ and that this had, for some reason, angered Mr Megson. The claimant says that on leaving the meeting she went on her lunch break out of the office but was crying, felt sick and could not eat anything. She says that she returned to work for the afternoon but was unable to concentrate, had palpitations and was emotional. She began to suffer a headache and was extremely anxious. Nobody checked that she was okay. She told Charlotte that she had a headache, was not feeling well and was going home.
20. The claimant was cross examined about whether she was actually able to remember the precise words used. She responded that the words were *“when do we find out who the new team leader is going to be?”* She had not noticed the difference between the words set out in her witness statement and her actual recollection of the words used. She felt that it meant the same thing, just a slightly different wording.

21. The respondent's account of the meetings in question is quite different. Mr Megson's account is that the claimant was negative throughout the 5th November meeting with negative body language, tone of voice and repeatedly rolling her eyes and shaking her head to almost any comment by management. She apparently made it clear she was not impressed by the new plans. He asserts that she lounged back in her chair with her arms crossed, made eye contact with her fellow sales people and mouthed negative messages. She made one verbal contribution which was to say: "*When are we going to get a proper team leader?*" He felt that the tone of the claimant's enquiry was negative and cynical.
22. Mr Megson says that he called the 6th November meeting to address the negativity displayed by the attendees the previous day. He was concerned that such negativity would affect morale on the sales floor and thus affect new business levels. He says that he stood in front of the group and used words to the effect of "*you are my senior sales team, are influential in the wider sales team and can affect the mood of the other sales people; I will not tolerate negativity and poor attitude.*" He says that he made it clear that the group should not think it was irreplaceable. After speaking to and excusing a colleague he turned to the claimant. His evidence is that he pointed out her appalling attitude at the 5th November meeting. He said he mentioned that he had rarely heard anything as rude as asking, "*when are we going to get a proper team leader?*" He pointed out that her attitude was poor in other areas too, for example, regarding training. His recollection is that the claimant expressed her surprise and pointed out that she had not meant to insult James. She said that she was asking when she would have a permanent team leader. He said that it did not come across in that manner. He pointed out that she needed to change her attitude and that if she so wanted she could leave the organization. Mr Megson is clear in his assertion that at no time did he ask her to resign or repeat any such request to resign. The whole point from his point of view was to get the claimant to come back but with a positive attitude. He recalls that he said, "*right now you can leave the meeting*" and the claimant stood up, glared and exhibited very aggressive behaviour towards him by turning her back, stepping forward with an angry expression on her face and leaning forward as if to confront him. She was clearly angry with her anger directed at Mr Megson. Mr Megson repeated to the claimant that he wanted her attitude to change and if she wanted to she could talk things over with her colleague CP who had recently resigned to avoid dismissal for gross misconduct. He finished the conversation with "*look what happened to him*". Mr Megson denies raising his voice or swearing at the claimant but says that he was assertive in order to get his point across.
23. James Allott maintained that at the 5th November meeting the claimant made a number of negative comments. One of the comments was the claimant asking when she would have a "*proper manager*" or words to that effect. On 6th November his recollection was that the words used by Mr Megson were that if the claimant wasn't happy then she would be able to resign. He says that the claimant replied "thank you" and left the room. He said that Mr Megson used an assertive tone at the meeting but there was no "shouting or balling" and he did not remember Mr Megson using swear words at the meeting.

24. Whilst Charlotte Holmes was not present at the 5th November meeting she did hear people talking about it in the office. She was told that the claimant had said something about James not being a proper manager and that this had spread across the sales floor. Charlotte was invited to the 6th November meeting by Jordan Townsend who said it was about the negative remarks in the meeting the day before and about the atmosphere on the sales floor. She says that Mr Megson said, in effect, that as a team he did not expect them to be negative about changes and should anyone have any problems with the proposed changes they should deal with it in a professional manner and not loudly discuss it on the sales floor where negativity could spread. She says that when Mr Megson turned his attention to the claimant he asked her if she understood what he was saying and explained that he was trying to get them all on the same page. Her recollection is that the claimant was very aggressive in her response and said *"I don't think that I am doing anything wrong."* She described the claimant as being very snappy and asserted that she did not appear to be sincere in her responses. She was apparently very agitated and looked like she was so angry she wanted to cry. Charlotte also gave evidence that Mr Megson spoke to the claimant about her comment in the previous meeting about James not being a 'proper manager'. He asked her if she thought it was appropriate to say what she had said when they had given James the role which they trusted him to do and he had completed all his exams. The claimant apparently responded by defending herself and said that she did not mean it like that and that she was sick of having different managers. Charlotte's view was that she still did not come across as sincere. Whilst Charlotte accepted that Mr Megson was annoyed during the meeting he was no more annoyed at the claimant than at anyone else. In fact, her view was that he appeared to be more annoyed at the claimant's male colleague than with anyone else. Charlotte's clear recollection was that Mr Megson said to the claimant words to the effect of, *"if you're not happy with your work then you can leave."* She was clear that he did not tell the claimant to resign and did not shout although he was "stern but calm".
25. Bernadette Dunlop was able to give evidence that Jordan Townsend had informed her that the claimant's attitude had become very negative and that she had walked out on role-playing that had been arranged to improve sales team performance. She was not in attendance at the 5th November meeting but did attend the 6th November meeting. She recalls that Mr Megson advised the claimant that her attitude at the meeting the day before had been very poor and that she had rolled her eyes at other colleagues during the meeting. He quoted the claimant as having said *"when are we going to get a proper team leader?"* Ms Dunlop said that it was an appalling statement to make particularly as James Allott (the team leader in question) had been present at the meeting. Her recollection was that Mr Megson said words to the effect that *"unless your attitude changes you are welcome to leave the business"*. He commented that the claimant was welcome to speak to a former team leader (CP) who had resigned whilst being investigated for gross misconduct. He stated words to the effect of *"if you are not happy you can go and talk to CP."* He then advised her that the meeting was over and she could leave the room. The claimant apparently stood up, turned around and very sarcastically said, *"thank you"*. Ms Dunlop says that the claimant stopped briefly and stared very aggressively at Andrew Megson. She confirms that he did not raise his voice or swear.

26. In cross examination the claimant accepted that if she had said the words alleged by the respondent about a “proper manager” then that would have been rude and she would have expected James to raise it and she would have apologised. She says that it was just her being nosey as to whether either of the two internal candidates had got the job. The claimant, in cross examination, asserted that Megson was lying about her negative behavior in the 5th November meeting. The claimant denies respondent’s assertion that on leaving the meeting she stopped, turned around and exhibited aggressive behavior towards Mr Megson. She says in fact she was on the verge of tears and was not aggressive. The claimant denies the respondent’s witnesses’ account of the 6th November meeting and asserts that they are lying when they say there was no swearing or shouting on the part of Mr Megson. It was put to the claimant in cross examination that Mr Megson saying that *“if you’re not happy you can resign”* is not the same as telling her to resign. The claimant accepted this and said that *“anyone can resign if they are not happy. The issue is with him telling me to resign.”*
27. The respondent says that the claimant’s attitude had changed prior to the November meetings and that it had worsened. It was asserted by Charlotte Holmes that in the three weeks prior to the November meetings she had noticed that the claimant, in a number of meetings, had been sat with her arms folded looking angry. The meetings were about general minor changes to targets, system changes, workflow and sales processes. She asserts that on at least two occasions the claimant had stood up in the meetings and walked out saying that she could not deal with the stress of the change of working environment....It was asserted that her sales performance fell away, something which the claimant denied. Mr Megson’s evidence was that her attitude started to turn negative when he was forced to investigate her team leader CP following complaints of homophobic, racist and sexist language in the office. CP resigned on 15th August and the claimant’s attitude changed immediately. Megson’s view was that she was openly negative in the office and actively hostile to members of the sales team who she thought had raised the complaint against CP. He asserts that the negativity was then directed at the Head of Sales, Jordan Townsend. Mr Megson was also made aware of the claimant’s refusal to take part in training and role playing, refusing to adopt a revised script for sales team members and openly displaying negative body language across the office. He also asserted that her sales performance had started to fall away, although no specific evidence of this was presented to the Tribunal. The claimant denies the respondent’s assertion that Mr Megson had raised queries about her attitude in previous meetings and that she had refused to do a role play and walked out of the meeting. She asserts that if this were true she would expect it to be documented in her monthly coaching sessions.
28. On balance I prefer the respondent’s evidence as to what took place in the run up to and at the meetings on 5th and 6th November. I find that that the claimant’s attitude at work had indeed started to deteriorate following the investigation into CP’s conduct. I accept that she had displayed a negative attitude at the 5th November meeting and that she did in fact say words to the effect of *“when are we going to get a proper team leader?”* Whilst it is not possible to be certain of the precise words used this was certainly the sense conveyed by the claimant’s comment, a fact which was picked up by all the witnesses to the comment and which became the subject of discussion in the

office following the meeting. The respondent's witnesses were consistent on this point whereas the claimant could not be sure of the precise words she had used. It may not have been what the claimant intended to communicate but it is the effect of what she communicated and it was apparently critical of her team leader's abilities at a meeting which he attended. This was inappropriate in all the circumstances and something which the respondent, through Mr Megson, was entitled to raise with her.

29. On balance I accept the respondent's account of what was said at the 6th November meeting. Reference was made to the claimant leaving her role if she was not happy. However, this was not a request or instruction that she resign. Rather, it was pointing out that her behaviour was inappropriate and that it would have to change. The other option was that she could choose to leave the job. It was not, on balance, a threat to the claimant or an instruction to resign. It is of a request or instruction to resign that the claimant complains and which she says forms the breach of contract, not the wider circumstances and events of the meeting.
30. Insofar as Mr Megson may have made the point that "no one's indispensable" I accept that he was trying to point out that the attitude of the team needed to improve and that he was concerned about the impact of their attitude upon the wider sales team. This was his reason for holding the meeting: an attempt to reset the team and get back to a positive attitude and influence upon others at work. I do not accept that he was in any way saying to the claimant that she could either resign or be dismissed. I conclude that Mr Megson probably did raise his voice somewhat but do not accept that he was swearing or shouting.
31. Over the days following the meeting the claimant says that she felt extremely upset by what had happened. On 7th November she contacted her Team Leader to say that she would not be coming into work. She was too upset to telephone and speak with her employer. The claimant says that on 8th and 9th November she telephoned and spoke to her Team Leader briefly to confirm she was still too upset to come into work.
32. The claimant attended a back to work interview on 12th November 2018 and informed James Allott that she intended to resign and handed him a resignation letter. She confirmed that she was willing to work her four week notice period. James left the meeting and came back a few minutes later to say that Mr Megson and Mr Townsend had asked him to put her on garden leave and escort her off the premises.
33. The claimant's resignation letter (page 91) made it clear that she was resigning as Andrew Megson had requested at the meeting on 6th November, which had left her feeling extremely humiliated, upset and anxious. Whilst the wording of the letter suggests that the claimant was under the impression that she had been told to resign this does not mean that this is what Mr Megson actually said at the meeting. Either the claimant has been confused or misinterpreted what was said to her (as she was angry or upset at the time) or she had already decided that she would claim unfair dismissal by that point and worded her letter accordingly.

34. The claimant asserts that she offered to work her notice period purely because she did not want to be criticized for breaching her contract by failing to offer appropriate notice. She does not accept that by offering to work her notice period she was waiving the respondent's breach of contract. She points out that she had no job to go to and she was approaching the Christmas period, which is often a financially pressurized period for families. She does not accept that offering to work notice is inconsistent with her having been shouted at on 6th November. She asserted that she thought she would be fairly treated once she had resigned. She thought that she had to give four weeks' notice and did not understand constructive dismissal at the time. I conclude that the claimant offered to work her notice because she had resigned without a job to go to at a financially onerous part of the year. I am not convinced that she thought that she had to work her notice but I do not find that offering to work four weeks' notice is determinative as to whether Mr Megson in fact behaved inappropriately at the meeting on 6th November or not. In the circumstances it could be consistent with either side's account of the 6th November meeting.
35. Mr Megson's evidence is that the claimant was put on gardening leave to avoid any negative influence upon other individuals within the organization and also because she had felt unable to attend work for several days as she was too upset and anxious. He therefore felt that it was in her best interests to allow her to leave with immediate effect and pay her notice period in full. I accept his explanation.
36. The claimant asserts that she did not enter a grievance after 6th November because her complaint was about Andrew Megson and she knew that any grievance would not be dealt with properly when it related to a Director in such a position of power and control. She felt any grievance would be pointless.
37. There is no clear evidence that the claimant had got a job to go to before she decided to resign.

The Law

38. The issues in this case were as agreed between the parties and as set out at paragraph 1 above. The claimant asserts that she was constructively dismissed as defined at section 95(1)(c) of the Employment Rights Act 1996. Section 95(1)(c) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The employer's conduct giving rise to the constructive dismissal must be a repudiatory breach of contract. There must be something more than mere unreasonable conduct by the employer (*Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*)
39. In order to succeed in her claim, the claimant must establish that the respondent committed a fundamental or repudiatory breach of contract; that this was the cause of her resignation and that she did not affirm the contract or waive the breach by waiting too long before resigning. Once a constructive dismissal has been established it is for the respondent to establish that the dismissal was for a potentially fair reason. In this case the respondent has not contended that any constructive dismissal was in fact for a fair reason.

Nor has it asserted that any dismissal would have been fair within the meaning of section 98(4) of the Employment Rights Act 1996. It has not contended that any dismissal would be within the 'band of reasonable responses.'

40. In this case the claimant relies upon a breach of the implied term of mutual trust and confidence between the parties. This is an implied term that neither party will *"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 employer and employee."* (See Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL). Any breach of this implied term will be considered a repudiatory breach as it necessarily goes to the heart of the contract (see Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT). There are two questions to be asked when determining whether the term has, in fact, been breached. These are: was there 'reasonable and proper cause' for the conduct? If not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'? There is no scope to consider the so-called band of reasonable responses when determining whether there was a constructive dismissal to start with. The band of reasonable responses test is to be applied when determining whether any dismissal was in fact fair within the meaning of section 98(4).
41. In the event that I conclude that the claimant was constructively dismissed I am asked to consider whether there should be any reduction in compensation on the basis of the claimant's conduct pursuant to sections 122(2) and 123(6) of the Employment Rights Act 1996. Pursuant to section 122(2) a reduction to the basic award may be made where *'the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent'*. Section 123(6) states: *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."* To make any such reductions to compensation I would need to identify culpable and blameworthy conduct on the part of the claimant and that, for the purposes of s123(6), such conduct had contributed to the decision to dismiss the her.
42. Section 207A(2) TULR(C)A provides that: *'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'*

The potential for adjustment to the compensatory award under S.207A only applies if the employer's or employee's failure to comply with the provisions of the Code is 'unreasonable'. This means that an employment tribunal may only consider adjusting the compensatory award once it has made an express finding that a failure to follow the Code was unreasonable.

Adjustment does not automatically follow from a breach of the Code (see Kuehne and Nagel Ltd v Cosgrove EAT 0165/13).

43. In the event that a procedurally unfair dismissal is identified I am asked to consider whether, if the respondent had followed a fair procedure, it would have been able to dismiss the claimant fairly and, if so, at what stage. This follows the line of case law established by Polkey v AE Dayton Services Ltd [1987] ICR 142.

Conclusions

44. At the conclusion of the evidence it was apparent that, although the claimant made wider complaints about her treatment by the respondent prior to 6th November, she was not saying that these constituted (either separately or cumulatively) a fundamental breach of contract. Instead, her case hung on the assertion that she had been “told to resign” by Mr Megson at the meeting of 6th November. She saw the breach of contract as being the instruction or request to resign rather than any other factors about the way the meeting was conducted or whether the meeting should have been conducted on a ‘one to one’ basis. She did not say that she resigned because of a “dressing down” or a critical discussion but rather because the respondent went one step further and asked/told her to resign.
45. In light of the findings of fact above I have found that she was not asked or told to resign. That was not the nature, meaning or context of the words used. Rather, the claimant was reminded that she had this option if she was not happy with the way her work was going. The nub of it was that the respondent wanted her attitude to improve but if she was not happy about that then she did not have to stay in her job. Given this finding of fact I am unable to find that this constituted a fundamental breach of contract. It cannot be said, in the circumstances, that the respondent, without proper cause, acted in a way which was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between the parties. The respondent had reasonable and proper cause for its actions namely addressing the claimant’s negative attitude and her comments during 5th November meeting. Whilst Mr Megson’s comments will not have been welcome to the claimant I do not find that they were calculated or likely to destroy or seriously damage mutual trust and confidence.
46. This is not to say that I have no concerns about the way the 6th November meeting was conducted. It was perhaps inadvisable to admonish the claimant in a public meeting. Arguably, a one to one would have been more appropriate. However, it is clear that Mr Megson wanted to address attitudinal issues across a team of employees and he felt that the best way to do this was to have a group meeting to express his views, encourage positivity and reset the attitude of the team as a whole. This may not have been the most effective way to achieve the desired changes in attitude but I cannot say that it was done without reasonable and proper cause or that it was calculated or likely to breach the implied term of mutual trust and confidence. It was one of a range of legitimate management techniques which could have been deployed in the circumstances. Likewise, the reference to CP’s departure was perhaps ill advised as it could cause offence but the claimant stated in cross examination that it was not the reason she resigned. She maintained that it was the request/instruction to resign which

led her to leave employment and was the fundamental breach of contract. On that basis any other criticisms which can be made of the meeting are not strictly causally relevant to the resignation.

47. In light of the above I do not find that the respondent committed a repudiatory breach of contract.
48. It cannot be said that the respondent acted without reasonable or proper cause. Although the precise words used by the claimant on 5th November are a matter of dispute I have found that there is sufficient consistency between the witness to show that the claimant did in fact refer to whether she was going to get a “proper manager”. This was clearly a derogatory reference to the acting team leader who was present at the meeting and it was inappropriate. The claimant accepted that, if said, it would have been rude. Added to this is the evidence, from several witnesses, of the claimant’s negative attitude and body language both at the November meetings and indeed a negative change in the weeks leading up to the meeting. Faced with this behaviour the respondent had reasonable and proper cause to call the meeting and to address the issue with the claimant during said meeting.
49. In light of the above finding the other legal issues fall away. There was no breach of contract for the claimant to resign in response to. Had I been persuaded that there was a fundamental breach of contract, I would not have found that the claimant had waived any such breach by delaying her resignation or offering to work her notice. A constructive dismissal within the meaning of section 95(1)(c) can be with or without notice. The fact that the claimant felt able to offer to work her notice does, however, indicate that Mr Megson’s attitude and conduct at the 6th November meeting was not as bad as it has been portrayed. The claimant still felt able to return to work even after his comments at the meeting even though she had had a few days off work because of the upset experienced at the meeting.
50. Had there been a constructive dismissal I would not have been able, on the evidence available to me, to find that it was fair within the meaning of section 98(4) ERA 1996. There is a big difference between being justified in addressing conduct or disciplinary issues with an employee and being justified in dismissing for that reason. Having said that, the claimant’s actions would probably amount to contributory fault in any event and, had her claim succeeded on the other limbs of the test, I would have been persuaded that a significant reduction in compensation on grounds of contributory fault would have been appropriate.

Employment Judge Eeley

Date 16th August 2019