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## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Miss D Blyde

AND

Gpea Ltd

**HELD AT:** London Central                      **ON:** 1 and 2 August 2019

**BEFORE:** Employment Judge Russell (Sitting Alone)

***Representation:***

**S**

**For Claimant:** Mr W Brown, Solicitor

**For Respondent:** Ms S Ismail, of Counsel

### JUDGMENT

The Judgment is that the Claimant's claim for constructive and unfair dismissal fails and is dismissed.

### REASONS

1. The Claimant was represented by Mr Brown, a solicitor, and the Respondent by Ms Ismail, of Counsel.
2. The Claimant was employed as a graphic designer from 11 June 2014 to 15 October 2018 a Line Manager at all material times was Ms Elizabeth Hyde. The Claimant resigned on 15 October 2018 claiming constructive dismissal, a claim that she has now pursued over a two-day Employment Tribunal full hearing together with unfair dismissal. Her claim for arrears of pay was withdrawn by agreement.
3. The principal complaint from the Claimant was that her Performance Development Review (PDR) over a sustained period did not reflect what was said by, in particular, Ms Hyde through a revised PDR for July 2018. The PDR that has caused the Claimant the most concern. By that time, she had

pursued an internal grievance part of which was upheld and she claims that notwithstanding this new revised PDR (revised in the light of her partially upheld grievance) her performance review was worse, rather than improved in terms of the language used. She resigned because of in her words mismanagement over some eighteen months. The PDRs were at the centre of this giving false impressions of her work and commitment to the job.

4. The Respondents, whilst accepting some criticism of the Claimant's Line Manager, present the Claimant as over sensitive and having over reacted and deny any (still less any fundamental) breach of contract in the way that she had been dealt. They also highlighted that the trust and confidence which the Claimant states was destroyed by 10 October, when she first contemplated resignation, clearly continued in place at that time as she had considered staying in an alternative role.

5. After helpful and professional input from the party's representatives and by reference to the agreed list of issues these are my findings.

- (1) The Claimant was committed to her job and well regarded. Some critical comments were made of her and she received a lower work rating than she felt she deserved but her performance did not warrant performance management. Whilst the Respondent briefly contemplated performance management she was not actually put under, nor do I find that there are any grounds for performance management. Had she not resigned there was no suggestion that she was going to be dismissed or was going to be under an internal procedure where the perceived under performance could or would have led to her dismissal.
- (2) The Claimant's concerns are genuinely held and I find her evidence sincere and she was bound to be, and has remained, upset because of the way in which work reviews were managed. Understandably so. As confirmed by her in internal grievances which were at least in part found to be legitimate and well founded.
- (3) On 5 September Mr King, Group Development Manager for the Respondent upheld two of her three particularised grievances. He found the Claimant's Line Manager had taken credit for work undertaken by the Claimant and that she had, through outside work hours, showed dedication to finding a solution to the coffee morning campaign artwork with which she had been entrusted, despite her Line Manager's statement that she had shown a negative attitude to this work. I should stress I am summarising his and her Line Manager comments but this was the essence of Ms Hyde's criticism of the Claimant and in the original PDR also reflects Mr King's comments where he found in favour of the Claimant. In each case where he found for the Claimant Mr King asked the PDR notes and related file notes to be updated.

- (4) My first observation is that Mr King's findings implicit criticise Ms Hyde the Claimant's Line Manager, and rightly so. I return to this point below, but I find one of the main reasons for the dispute getting to a full Employment Tribunal hearing and not being resolved there and then is due to the way in which the Respondent then sought to effect the outcome to the grievance. They asked the same Line Manager Ms Hyde to amend the PDR which she did inadequately and subject to only limited checks by Mrs Clough in HR. I am told that this practice has now been changed but at the time the resulting amended PDR was still critical of the Claimant and certainly not praiseworthy on the points identified by Mr King as ones where she had shown excellent work, in respect to the coffee morning design and the fact that there was still a failure to give adequate credit to the Claimant in respect of the travel campaign work. Mr King said in his evidence that this was clumsy and I regard that as an understatement. The Claimant mentions other concerns, for instance unjustified criticism of her communication skills, but I cannot make a finding on that because there was no adequate evidence given and in any event, it was not part of her grievance. Was she being over sensitive here? Possibly but her ongoing unhappiness was well grounded.
- (5) The third part of her grievance where the Respondent found in favour of Ms Hyde both in the grievance hearing taken by Mr King on 5 September and again in the appeal hearing on that on 3 October 2018 taken by Marcus Hewell, the Respondents CEO, was in respect of a "refusal to do work". This issue has occupied hours of evidence, unfortunate because surely this need not have been this controversial. The Claimant said she was asked by her Line Manager if she was interested in managing the collection magazine. She says that she declined this opportunity as it was not the right career choice for her at the time. Ironically, perhaps, she later did take this on when it was offered to her, again. Because, in her perception, it gave her, at that point, relevant managerial experience. The Respondent says in determining her grievance that she "refused the work" even though it was within the scope of her job responsibilities which if correct, as the Claimant and Respondent rightly highlight is a potential disciplinary matter. It is not clear where the phrase "refuse to work" comes from. The Claimant says it was used by her Line Manager verbally. Mr King seems to state that the Claimant used it first in writing before anyone else did and the Respondent may have continued to use this phrase as a result. The Respondent's representative suggested it may have been the case. I recognise both Mr King and later Mr Hewell were slightly removed from the situation i.e. the day to day working relationship in exchanges between the Claimant and the Line Manager but being accused of refusing instructions is a serious matter. One of the matters that clearly affected the Claimant's wellbeing. And I agree with the Claimant that this is not mere semantics but I also find that the CEO's confusion, i.e. as to whether there was a refusal to obey an instruction/request or whether it was simply an opportunity afforded to the Claimant which she had no

obligation whatsoever to accept, reflected Mr King's initial findings. If Mr King had stated more clearly that it was not actually a request (and in his evidence he accepted that it was more in the nature of being offered an opportunity) the position would have been clearer. The definition of refused and decline are not materially different but even though a decline would have been a fairer phrase to use if the Claimant was asked "would you like to do the work" or similar (again as the Respondent now seems to accept even though Mr King did not put this in his written deliberation) this is a very different matter. Mr King still thought that using the word "refuse" in the context of declining an invitation was appropriate but this surprises me. Saying that someone refused to do something that was within their job speculation is critical of the person involved and the Claimant was justified in asking for that to be expunged in her PDR to make it clear how the rejection of the collection job actually came about. This has led to ongoing happiness for the Claimant but I find that this is the only consequence i.e. the Claimant's disappointment reflected by a subsequent lost appeal on the point. Neither the pay or rating in respect of her performance were directly related to the PDR and in any event she was not by the Respondents senior management criticised for her internal decision not to undertake the collections work. Indeed, both Mr King and Mr Hewell genuinely attempted, and in good faith, to give the Claimant clear and written assurance that she was a valued member of the team. The principal fault here is with Ms Hyde the Line Manager albeit the wording of Mr King's decision on the "refusal" point (in particular) did not assist and in the context of that part of the grievance where he found against the Claimant.

- (6) The Claimant suggested that Mr King should have dealt with more than three particularised complaints but I accept that although he did not deal with wider issues touched on by the Claimant in her grievance of 27 July, some of these related to historical events going back a long way and they were all unparticularised and she was content with the three issues that were dealt with. Nor did she complain later that other issues were not considered.
- (7) Too much relevance was placed on the Line Manager in this process. As a result, the PDR's and subsequent 1 2 1s are open to potential abuse. The Claimant has perhaps been over sensitive to this appraisal process as witnessed for instance by her concerns over the January 2018 PDR (which was largely supportive) although she was justified as being aggrieved at the way she was managed I do accept that there are times in this narrative where she has over reacted, an example of this was how she reacted to as what she perceived as an abuse of copyright (I find it was nothing of the kind) in respect of designs prepared by the Respondent after she had left which the Claimant believed were extremely similar to ones that she had done before, but were not. And although the Claimant was justified in a complaint as to the misrepresentations made in the July 2018 PDR I again ask myself what turns on this. I accept the Respondent's

evidence that PDRs from 2017 onwards at least were not determinative of pay or rating in terms of employer rating. Clearly whatever the commendable objective of twice yearly PDRs supplemented by regular 1 2 1s they were counterproductive in the case of the Claimant primarily due to the management of Ms Hyde. But other than upsetting the Claimant and leading to unnecessary grievance by which I mean she should have not had to make one rather than it was without foundation, the Claimant has not shown any Respondent fundamental breach of contract in this respect.

- (8) Both Mr King (I find he was largely supportive of the Claimant) and Mr Hewell (I found he was also supportive even in his rejection of her appeal) are obviously disappointed the Claimant resigned. I find neither wanted her to do so but nor did her actions justifiably lead her to do so. I find Mrs Clough the Respondent's third witness acted in good faith even though she has had to admit albeit reluctantly, the Respondent's procedures should have been and no doubt will be improved. And although Ms Hyde the Claimant's Line Manager was at fault and has rightly received training as a result and to improve her management skills, I do not find that she had any malicious intent or hidden agenda seeking to undermine the Claimant. Her faults here perhaps due to her own pressures at work as much as under developed management skills were primarily a poor use of language, unfair presentation of the Claimant's work and failure to motivate and nurture the Claimant's creative skills. Although she did not encourage the Claimant sufficiently I do not find that she bullied the Claimant and there is clear evidence of her support of the Claimant's skills and character, for instance on 23 October 2018 she referred to a glowing 1 2 1s. The Claimant points to the fact that unjustified criticism can amount to bullying and harassment and so it can, but at no time did Ms Hyde take it to that level. Employees will often get unfair reviews, it happens on a day to day basis throughout the UK and beyond. Whilst this is undesirable it does not justify the Claimant's constructive dismissal claim even if the slightly unfair appraisal, which is certainly the case in this instance, happened over a sustained period. The Claimant says that her self-esteem has been undermined by Ms Hyde and this might sadly be true but her Line Manager's poor management skills from criticism of the Claimant for sleeping over her lunch hour when she was meditating (and in anyway she was entitled to do what she wanted during her lunch period) to taking credit for someone else's work, do not of itself justify the Claimant resigning and claiming constructive dismissal. In his submissions the Claimant's representative argues that even if I was only to take some of the criticism of the Claimant this would have been enough to show a repudiatory breach that the employer cannot withdraw unilaterally. But I find that when the Claimant resigned she was being given prestigious work, she had most of her grievances upheld, she was not being criticised by her senior managers who were openly supportive of her and attempts had been made to reflect support in a revised PDR even if this was inadequately achieved. She had not been

demoted or suffered a reduction in pay and had reassurances that Ms Hyde was at fault and the Claimant's complaint as to the wording of the PDR was unjustified. But this did not and would not have led to any action against her, a lower grade or lower pay or detrimentally changed her job duties and I agree with the Respondent's submission that the failure to adequately capture Mr King's grievance decision was not so serious an issue as to justify the Claimant's resignation nor in my determination was Mr King's failure, to allow her third grievance relating to the collection magazine, a fundamental breach of the Claimant's contract of employment.

6. The Claimant now widens her complaints beyond actions of her Line Manager. She criticises Ms Hyde's Manager, Ms Despois e.g. her actions in the week of 3 September involving public shouting at and criticism of the Claimant and unfair obstacles to undertake design thinking training, she complains about Mrs Clough the HR Manager, inadequate allocation of work and disparity in pay between her and others who I observe were managing staff unlike the Claimant. These complaints may have substance or they may not but what is clear is that none of these complaints were in her grievance, none were in the ET1 particulars and in respect to the bullying and harassment claims against Ms Hyde these were limited in the ET1 to misrepresentations allegedly made in the PDR. In other words she resigned and claimed constructive dismissal because of Ms Hyde's PDR wording and the failure of the company to in her view adequately amend this. This was the only reason albeit one the Respondents were certainly aware of when she resigned.

7. The Claimant did consider, after reflecting for a week or so, a threatened resignation and constructive dismissal claim and or an alternative role before confirming her resignation. This had lesser responsibilities and the Respondent accepts she was totally justified in declining it but I also find as confirmed in the Claimant's own evidence, that if the Claimant had been offered a more senior role and assurances of improved line management that she would have stayed. This is not consistent with a breakdown in trust and confidence.

8. There was no clear evidence of Emiie Despois or anyone from the HR department including Mrs Clough seeking to undermine the Claimant and or acting in a way that breaches her contract. In particular I find the HR team led by Mrs Clough who gave evidence in the hearing, has acted in good faith. This is not to say that I find the Claimant did not. I have already stated that I find her frustration is justified and her evidence is genuine. However, I have also found that there is no evidence that anyone wanted to drive her out, no evidence that her salary was unilaterally reduced or that she did not get the same percentage salary increase as her co-workers, no evidence of her being asked to do unacceptable or otherwise inappropriate work and no formal criticism of her performance once her grievance had been dealt with. The inaccuracy of the PDR is unfortunate, unnecessary and upsetting but they were only inaccurate in part and there was a genuine wish to correct these inaccuracies following a fair and supporting supportive grievance process

even if the Claimant, with some justification, felt that this had not been properly achieved.

Legal Issues

9. Section 95(1)(c) of the Employment Rights Act 1996 states that an employee who is dismissed by his employer if ... “the employer 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”. So, this is at the heart of the case. Has there been a fundamental breach of the contract of employment entitling the Claimant to resign and claim constructive as a result unfair dismissal. Both representatives rightly refer me to the case of Kaur v Leeds Teaching Hospitals NHS Trust 2018 which follows a long line of authorities but I apply that case to my findings of fact in determining that the act of omissions of the Respondent did not amount to a repudiatory breach of contract. (To include the implied term of trust and confidence). I remind myself this is an objective test and the burden of proof lays with the Claimant to show the absence of reasonable and proper cause for the employer conduct and she has not done so. The Respondent’s misconduct here is not sufficiently serious nor was it calculated or likely to cause material as opposed to some damage to the employment relationship. One reason why the Claimant at least considered a future alternative role with the Respondent. She was legitimately unhappy but was not forced out. The Respondent was at fault principally through the Line Manager’s conduct but even the Line Manager did not act maliciously and I found the senior management remained supportive of the Claimant throughout and she knew of that support before she resigned. I have accepted that the Respondent was fully aware of why the Claimant resigned and of her concerns in the respect of the PDR and Ms Hyde. This was not ambiguous as the Respondents states. As the Claimant’s representative says there is no requirement for her to set out all her objections in writing at the time of resignation, nor do I find a short delay around 10 October was fatal to her claim. However, I also accept the Respondents submission that her continued engagement with the Respondent as to possible future employment does negate any claim that she believed her relationship with the Respondent was irretrievably damaged. So, she cannot say that she resigned in response to any breach because she would have been content to stay for the right job. She left because she was upset by the amended PDR. She was totally entitled to be upset by that but this was not a fundamental breach and her resignation did not amount to a dismissal for the reasons I have given.

Employment Judge Russell

Dated: 22<sup>nd</sup> August 2019

Judgment and Reasons sent to the parties on:

29<sup>th</sup> August 2019

For the Tribunal Office