



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102760/2019

Held in Aberdeen on 29 and 30 July 2019

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Employment Judge J Hendry

Ms Lesley Hall

**Claimant
In Person**

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Anderson's House Furnishers (Inverurie) Limited

**Respondents
Represented by
Mr Clark,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant's application for a finding that she was unfairly (constructively) dismissed does not succeed and is dismissed.

REASONS

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1. The claimant in her ET1 contended that she had been unfairly (constructively) dismissed by her employers. The respondents denied that they had given the claimant cause to resign.

E.T. Z4 (WR)

Issues

2. The issue for the Tribunal was whether or not the claimant was entitled to resign. The claimant's position was that she had been subjected to unreasonable and poor behaviour by her supervisor, Ms P Watt, over a period of time and that this was the cause of her resignation. The Tribunal had to ascertain firstly the factual position and secondly whether or not in law the claimant was entitled to resign on the basis that there had been a breach of the implied duty/term of mutual trust and confidence.

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Evidence

3. Parties prepared a joint bundle of documents (JB1-22) for the assistance of the Tribunal. The Tribunal heard evidence from the claimant on her own behalf and from Ms Pamela Watt, Sewing Room Supervisor and Mrs Lesley McIntosh, former Director of the respondent company.

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4. At the close of the evidence the claimant sought to lodge a written statement by a Ms Diane Dufton. The lodging of the statement was opposed. After considering the matter the Tribunal ruled that the statement should not be received at this late stage as to do so would require the reopening of the case and recall of witnesses.

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Facts

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5. The Tribunal found the following facts established or agreed:

- (1) The claimant had a longstanding interest in sewing and after following various careers started work with the respondent

company on 25 June 2012 as a Sewing Room Assistant. She was issued with a written statement of terms and conditions of employment (JB8). The terms made reference to the respondents' grievance policy and stated as follows:

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“If you have a grievance regarding your employment you should in the first instance speak to Lesley McIntosh. If the grievance is then not resolved to your satisfaction you should refer to the company’s written grievance procedure which may be obtained on application to Pam Anderson.”

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(2) The claimant supported herself through her employment and worked 40 hours per week. Her usual net pay was £1,381 per month.

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(3) Following her resignation, the claimant started new employment which was slightly better paid although she had travelling costs. She started this employment on 4 February 2019.

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(4) The respondents are a large provider of furniture and soft furnishings. They have a Sewing Department which mainly manufactures bespoke curtains and blinds. The claimant enjoyed her role and the camaraderie of working in the department. The Supervisor was a Ms Pamela Watt.

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(5) For some time, the claimant found Ms Watt's manner disconcerting. She would be abrupt. The claimant felt that she did not explain tasks properly to her. She would often become visibly frustrated and have "moods" when she was uncommunicative. The claimant put up with this behaviour as she enjoyed her job. She did not make any grievance either formally or informally to any of the respondent's managers in

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relation to Ms Watt's behaviour nor did she challenge Ms Watt's behaviour directly.

5 (6) The claimant was unwell in June 2018. When she returned to work she found the illness had affected her confidence and that it was difficult for her to ignore her Supervisor's behaviour.

10 (7) In early October the claimant was working with a colleague Diana Morrison when Ms Watt approached them from behind. She heavily dropped a large pair of tartan curtains on the work bench behind the claimant. The claimant could tell from this that Ms Watt was unhappy about something. Ms Watt turned to the claimant and Ms Morrison and told them the curtains were "all wrong" and that she understood that the claimant and Ms Morrison had made them. Both Ms Morrison and the claimant told Ms Watt that they did not think they had made the curtains. Ms Watt said that it was definitely the claimant that had made the curtains and not correctly. The claimant was left with the impression that Ms Watt was blaming her.

20 (8) The claimant was embarrassed. Once Ms Watt had gone for lunch another employee in the Sewing Room, Ms Smith, admitted that she had, in fact, made the curtains.

25 (9) The claimant and other staff keep diaries on what they work on. The claimant checked her own diary of work to confirm that she had not made the curtains. When Ms Watt returned from lunch the claimant approached her and told her that Ms Smith had made the curtains and that she should speak to her. Ms Watt acknowledged this but did not apologise for suggesting that she had made the curtains incorrectly. The claimant was upset about this incident.

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5 (10) On another occasion the claimant and Ms Morrison were given a pair of red wool curtains to make. She made one curtain and Ms Morrison made the other. The curtains were made slightly differently by the claimant and Ms Morrison and as a consequence one was one centimetre shorter than the other. Ms Watt had noticed this as part of her quality control duties. She spotted the claimant across the room and raised her voice telling her that curtain number one was too long and for her to "fix it".
10 The claimant looked at the curtain and noted that it was Diana Morrison that had made this. She told Ms Watt this and she was told her to fix it anyway. Ms Watt did not apologise to the claimant who felt she was being blamed for the error.

15 (11) As part of her functions Ms Watt cuts the fabric used by the claimant and others to make the curtains. A document is prepared with the necessary information in relation to the type of fabric, length etc. At the top of the document the quantity of fabric is mentioned as is the spacing for hooks.

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(12) The claimant was making up voile curtains in about June 2018. The claimant did not know about the "hooking" positions for curtains as this was not her job. The instruction on the written document was to use "3 pocket tape with hooking positions 1 and 2". The claimant proceeded to do this and discovered at a later point that pocket tape is not used for hooking positions 1 and 2 but a different tape called 6 pocket tape.

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(13) It transpired that the designer of the curtains had not noted this problem when completing the instruction sheet for the Sewing Department. Ms Watt had not noted it when cutting the material.

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The claimant was she felt blamed by Ms Watt for not noticing the error. The claimant found this upsetting.

5 (14) Just prior to Christmas 2018 a local upholsterer left chocolates and biscuits for the staff in the Sewing Room. When he was next in the Sewing Room the claimant called him over and thanked him for the gifts. Once he had left Ms Watt shouted to the claimant that she had no business thanking him and it was up to her to thank him. The claimant was upset by the behaviour of Ms Watt.

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(15) One of her friends in the Sewing Department left in about October and the claimant missed her.

15 (16) The claimant did not complain directly to Ms Watt nor to Ms McIntosh. She resolved to resign. She believed that there was a 'blame culture' in the workplace. She tendered her resignation with notice on the 7 January.

20 (17) During her period of resignation an issue arose in relation to curtains. Ms Watt had not given clear instructions to the claimant as to how they should be prepared and the claimant thought that she was being purposely told to prepare the curtains wrongly to look incompetent. She felt unwell and was signed off with stress. She did not return to work.

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Witnesses

6. I found the claimant to be an honest witness. There was no doubt these incidents at work had had an impact on her. I formed the view that she was

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less robust than she had been prior to her illness. In relation to the detail of the complaints she made I found her to be a generally reliable witness and where her evidence conflicted with that of Ms Watt or Ms McIntosh's I preferred the evidence of the claimant. I did not accept that Ms Watt shouted at the claimant. I am sure, however, that it was likely that she raised her voice on occasions to ensure she was heard above the noise of the department.

7. I did not find Ms Watt a particularly persuasive witness. I suspect that she does not have any insight into how her behaviour is perceived by others. Where her evidence conflicted with that of the claimant I preferred the claimant's evidence.

8. Ms McIntosh was generally a credible and reliable witness although in one respect I did not accept her evidence. This related to the meeting she had with the claimant when the claimant had resigned. The witness denied passing any comment to the claimant along the lines of it would be better for the claimant to leave if she was unhappy. I prefer the claimant's evidence in this regard although it is not of any consequence.

20 **Submissions**

9. Mr Clark helpfully gave his submission first. He took the Tribunal through the evidence of the various incidents urging the Tribunal to accept his witnesses' versions of events. In his view the instructions given to fix the curtains and so forth by Ms Watt were lawful instructions and reasonable instructions. The last incident happened before Christmas and he suggested that the real reason the claimant was leaving was that her friend and colleague had left the Sewing Room. The claimant later joined her in a new workplace with a greater salary. He looked at the resignation and suggested that if the Tribunal held that there was no incident before Christmas then the previous incidents which seemed to be in October would be "waived and time-barred".

10. He took me briefly through the law that applied to unfair dismissal and suggested that even if there was a breach the reason for resignation was the new employment that the claimant had secured.
- 5 11. Ms Hall in response went through the various incidents. She believed that she had not been well treated. She said that a number of staff had left all whom had cited to her Ms Watt's behaviour as the reason. There was a "blame culture". Ms Watt had a curt/brisk manner. She did not communicate effectively with staff and blamed them for errors. She shouted at people in the
10 workplace. This had a significant effect on her health and she had been upset by her behaviour.

Discussion and Decision

- 15 12. An employee can in certain circumstances resign and claim unfair dismissal on the basis that the behaviour of the employer, objectively ascertained, entitled them to resign (Section 95(1)(c) of the Employment Rights Act 1996.
- 20 13. It has been firmly established that unreasonable conduct by the employer is not sufficient to constitute constructive dismissal (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221) and that whether there had been constructive dismissal has to be analysed in terms of breach of contract rather than through the concept of unreasonableness. Over time the courts developed the implied term of trust and confidence on which the claimant
25 relied in this case. The genesis for that term can be found in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, where the Employment Appeal Tribunal, presided over by Browne-Wilkinson J, said, at page 670G-671A:
- 30 *"In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to*

5 *destroy or seriously damage the relationship of confidence and trust between employer and employee: **Courtaulds Northern Textiles Ltd v Andrew** [1979] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see **British Aircraft Corporation Ltd v Austin** [1978] IRLR 332 and **Post Office v Roberts** [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: **Post Office v Roberts**."*

14. In the latter case of **Lewis v Motorworld Garages Ltd** [1986] ICR 157 Neill LJ said, at page 13D-G:

15 *"The conduct must therefore be repudiatory and sufficiently serious to enable the employee to leave at once. On the other hand it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee....."*

25 15. This approach was endorsed by the House of Lords in **Malik v BCCI** [1997] ICR 606 in which Lord Nicholls, at page 610F, said:

30 *"In other words, and this is the necessary corollary of the employee's right to leave at once, the bank was under an implied obligation to its employees not to conduct an dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages. Second, I do not accept the liquidators' submission that the conduct of which complaint is made must be targeted in some way at the employee or a group of employees. No doubt that will often be the position, perhaps usually so. But there is no reason in principle why this must always be so. The trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others. The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence*

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the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."

- 5 16. In Meikle v Nottinghamshire County Council [2005] ICR that approach was applied and it endorsed the Employment Appeal Tribunal, who had concluded that the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in his employer.
- 10 17. The Tribunal must take all the circumstances into account in looking at matters objectively and considering whether the behaviour complained about was likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
- 15 18. In the present case there are a number of important factors that are present which must be considered. Whilst bearing in mind that the focus is on the employer's behaviour it has to be noted that the claimant did not complain to her employer about the behaviour of Ms Watt and by doing so allow them to investigate and possibly resolve the difficulties. The incidents relied on are relatively few in number and cover a long period of time. It also seems clear from the evidence that the claimant was more sensitive about Ms Watt's behaviour after her illness and that she felt more vulnerable and isolated when one of her colleagues left to get other employment. The respondent's managers were also not alerted to these matters although to be the claimant may not have realised herself how the illness or the loss of her colleague had affected her.
- 20 25 19. In assessing the evidence, it is also apparent that the claimant can only point to a small number of incidents and this seems to point to the fact that Ms Watt's behaviour, in so far as it upset the claimant, was periodic. I accepted Mrs McIntosh's evidence that there was no history of complaints about Ms Watt either formal or informal as the claimant seemed to suggest. While not
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making excuses for rude behaviour Ms Watt was no doubt under pressure as well as the other staff in the department and I was left with the strong impression that the customers were generally very demanding as they were no doubt entitled to be given the cost of the items being made.

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20. It is understandable that the claimant felt upset at the incidents she experienced but looked at objectively they seem relatively minor. For example, the claimant was never wrongly disciplined for mistakes either that she had made or which had been made by others. Although she spoke of a 'blame culture' and Ms Watt having moods there does not appear to have been daily or even monthly difficulties with her that were serious enough to be recollected.

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21. In the round the various incidents appear to be minor and examples of what could best be described as being occasional poor (unreasonable) behaviour. In certain circumstances if such behaviour had been more commonplace and perhaps carried out when the perpetrator or employer was aware of how upsetting it was or alternatively if the behaviour was clearly upsetting then these circumstances could amount to a material breach of the implied duty. In the present case the number of incidents, the long gap between some of the incidents and their relatively minor nature lead the Tribunal to conclude that that there was no material breach.

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22. Even if the assessment made above is wrong the incidents occurred some-time before the claimant resigned. The last incident prior to resignation being the one that occurred at Christmas and before then one in about October. The final incident is not sufficient on its own to constitute a material breach and the earlier incidents must as Mr Clark submitted must have been waived or acquiesced through the passage of time.

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23. As indicated in the oral Judgment had the claimant lodged a formal grievance she would have put her employers on notice that a problem existed and have

been in a much stronger position to resign and claim unfair dismissal if the issues had then not been properly investigated and addressed. That was, however, not the situation here and the claim for unfair constructive dismissal is rejected for the reasons I have given.

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10 Employment Judge: James Hendry
 Date of Judgment: 20 September 2019
 Date sent to parties: 23 September 2019

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