



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms B Park

**Respondent** Coral Racing Limited

**HELD AT:** Carlisle

**ON:** 3, 4 and 5 June 2019

**BEFORE:** Employment Judge Batten (sitting alone)

## REPRESENTATION:

For the Claimant: Mr G Williams, trade union officer

For the Respondent: Ms C Millns, Counsel

## RESERVED JUDGMENT

### The judgment of the tribunal is that:

The claim of constructive unfair dismissal is not well-founded and is dismissed.

## REASONS

1. The claimant claimed unfair dismissal. A claim of age discrimination also brought by the claimant under case number: 2413729/2018 had been dismissed on 15 January 2019 upon withdrawal by the claimant. The hearing of the unfair dismissal claim took place over 3 days. The evidence of the parties and submissions were completed only at the very end of the third hearing day. Accordingly, Judgment was reserved.

**Evidence**

2. An agreed bundle of documents was presented at the commencement of the hearing in accordance with the case management Orders. An updated schedule of loss was inserted. References to page numbers in these Reasons are references to the page numbers in the agreed Bundle.
3. The claimant gave evidence from a primary and supplementary witness statement. In addition, she called: Mr Paul Warren – trade union official; and Ms Gillian Gunn – former manager of the claimant. The respondent called: Ms Hayley Gallacher – Area Manager. All witnesses gave evidence from written witness statements and were subject to cross-examination.

**Issues to be determined**

4. The Tribunal discussed with the parties the issues to be determined by the tribunal. It was confirmed that the issues to be determined were: -
  - 4.1 Did the claimant terminate the contract in circumstances in which she was entitled to do so by reason of the employer's conduct (i.e. was she constructively dismissed under section 95(1)(c) of the Employment Rights Act 1996 ("ERA"))?
  - 4.2 Was there a fundamental breach of contract on behalf of the respondent? Specifically:
    - 4.2.1 was the respondent in breach of the implied term that they would not make unjustified complaints?
    - 4.2.2 was the respondent in breach of the implied term that the claimant would not be subject to insensitive or offensive conduct by a supervisor?
    - 4.2.3 was the respondent in breach of the implied term that they would not, without proper cause, act in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence?
    - 4.2.4 if the last incident about which the claimant complained does not in itself amount to a fundamental breach of contract was the claimant entitled to treat it as a 'last straw' in view of the entirety of the respondent's conduct?
  - 4.3 If so, did the claimant resign in response to that breach?

- 4.4 Did the claimant affirm the breach by virtue of her conduct and/or delay?
- 4.5 If the claimant was constructively dismissed, was the claimant's dismissal for a potentially fair reason and, if so, was the dismissal fair under section 98(4) ERA?
5. Within a draft list of issues prepared for the case management preliminary hearing on 13 December 2018, there was reference to a claim of unfair dismissal for health and safety reasons pursuant to section 100 ERA. The claimant's representative confirmed that such a claim was not in fact pursued by the claimant.

### **Findings of fact**

6. Having considered all the evidence, the tribunal made the following findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues which have been determined are as follows.
7. The claimant started working for the respondent on 5 October 1985 in one of its betting shops in Carlisle, as a Saturday cashier. She was promoted and in 1992 became Deputy Manager, rising to Betting Shop Manager in 2000. The respondent uses key performance indicators (KPIs) to monitor the performance of individual shops and the managers are given procedures to follow and targets to achieve.
8. In 2013, the respondent opened a new shop on English Street in Carlisle and the claimant was sent to run the new shop, against her wishes. The following year, a new area manager called Stephen Kennedy visited and, on 30 April 2014, he issued the claimant with a 'letter of concern' about placing the claimant on a performance improvement plan. At the time, the claimant was experiencing a number of personal problems and found this period very difficult.
9. By 2017, the claimant had moved to manage the respondent's Warwick Road shop. At the time, there were a number of changes in the respondent's management arising from the merger of the Ladbrokes and Coral businesses. Ms Gallacher was appointed as Area Manager and on 30 October 2017, she called the claimant in for an informal chat about standards and staffing issues. The claimant was given objectives and expectations to meet over the coming weeks and Ms Gallacher said that she needed to see consistent improvement in a number of areas.

10. On 8 December 2017, the claimant attended a meeting with Ms Gallacher to review her performance. In the course of the conversation, the claimant mentioned Mr Kennedy and said that she had had problems with him in the past which had made her ill. The claimant commented that she was scared of what he was capable of. In response, Ms Gallacher made it clear to the claimant that she was now the Area Manager and that Mr Kennedy would not be involved in monitoring the running of the claimant's shop.
11. At the end of 2017, the claimant qualified for a £2,000 bonus based on a financial report of the shop's profit which is based on the size of pay outs on bets, a matter outside of the control of an individual manager.
12. On 5 January 2018, Ms Gallacher met again with the claimant to review her performance as Ms Gallacher was becoming concerned at the lack of improvement in performance and the general untidiness of the shop. Ms Gallacher formed a view that the claimant was not addressing the concerns that had been highlighted.
13. In early February 2018, Ms Gallacher visited the shop to speak to the claimant about a grievance that had been received alleging that the claimant had spoken negatively about another employee. A meeting took place, attended by the claimant and her trade union officer. The grievance was not upheld.
14. On 7 February 2018, the claimant was interviewed as part of the respondent's 'Think 21' policy, following a report that she had failed to ask for age verification from a customer. No formal disciplinary action resulted but the claimant was warned that a repeat occurrence in the next 6 months would result in disciplinary action.
15. On 23 February 2018, the claimant was invited to a formal Stage 1 Performance Improvement meeting with Ms Gallacher. The letter inviting the claimant to the meeting said that the purpose of the meeting included to issue an Action Plan.
16. The meeting took place on 6 March 2018. The claimant attended with her trade union officer, Mr Warren. The claimant said that she thought the shop's performance had improved but Ms Gallacher disagreed and pointed to a number of areas where cash-handling procedures had not been followed. and she said that improvements had not been consistent. Ms Gallacher talked about how she could support the claimant to improve and said that the claimant should not be afraid to pick up the phone to her. In response, the claimant commented that she felt that, no matter what she did she was never going to be good enough and the claimant mentioned that she was receiving counselling. In the course of the

meeting, the claimant's trade union official, Mr Warren, commented that "We can get through it".

17. Following the meeting, the claimant was issued with a 6-point Action Plan, with an expectation that 80% of the plan would be implemented within 6 weeks (an extension to the usual 4 weeks under the respondent's Performance Improvement Policy because the claimant had been called for 2 weeks' jury service commencing 12 March 2018). A formal review meeting was set for 17 April 2018. The claimant was also advised of the respondent's Employee Assistance Programme, to support her with any personal issues outside of work.
18. On the afternoon of Saturday 10 March 2018, just before the claimant was due to commence jury service, she emailed a colleague about filling the shop's staff rota for the week commencing 26 March 2018. The claimant had been unable to complete the rota and asked her colleague to look at it for her.
19. Just after 6.00pm, the claimant emailed Ms Gallacher asking for her help to cover shifts, saying that she was "really stressing [her]self over this". That evening, Ms Gallacher visited the shop shortly before closing time and spoke to the claimant. Ms Gallacher put together a summary of the meeting which included key strengths and areas for development.
20. On 23 March 2018, the claimant completed her jury service and was signed off work sick, with stress. She did not return to work.
21. On 25 April 2018, the claimant wrote to Ms Gallacher to resign giving notice to leave on 10 May 2018. In her letter of resignation, the claimant said that she felt she was being victimised and that, due to her mental health she felt unable to return to work her notice.
22. On 27 April 2018, the respondent's HR department wrote to the claimant to ask her to reconsider and retract her resignation. The claimant was invited to a meeting on 7 May 2018, to discuss the grievances that she had raised in her resignation letter.
23. The claimant's employment ended on 10 May 2018. The respondent's invitation to discuss matters was repeated in a letter dated 14 May 2018, but the claimant did not take up the offer.

### **The Law**

24. A concise statement of the applicable law is as follows.

*Constructive dismissal*

25. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract without notice by reason of the employer's conduct.
26. The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 provides that the employer's conduct that gives rise to constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themselves as discharged from any further performance under the contract, and if the employee does treat themselves as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer's breach, the employee may be taken to have affirmed the contract and, if so, may lose the right to claim that they have been constructively dismissed.
27. A course of conduct can, cumulatively amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident even though the last straw does not by itself amount to a breach of contract, as held in the case of Lewis -v- Motorworld Garages Ltd [1985] IRLR 465. However, the last straw must contribute in some way to a breach of the implied term of trust and confidence.

*Unfair dismissal*

28. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal.
29. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) of the Employment Rights Act 1996, namely whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.
30. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the

decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

31. The Tribunal considered a number of cases to which it was referred by the claimant's representative in submissions. The cases were:

Walker –v- Josiah Wedgewood & Sons Limited [1978] IRLR 105  
Hilton International Hotels (UK) Ltd –v- Protopapa [1990] IRLR 316  
Malik –v- Bank of Credit and Commerce International SA [1997] IRLR 462  
London Borough of Waltham Forest –v- Omilaju [2005] IRLR 35  
Harvest Press Ltd –v- McCaffrey [1999] IRLR 778  
W E Cox Toner (International) Ltd –v- Crook [1981] IRLR 443

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

### **Submissions**

32. The representative for the claimant tendered a skeleton argument and made a number of detailed submissions which the tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: the claimant had long service and had not resigned on a whim; rather she resigned because of unjustified complaints and insensitive offensive comments by Ms Gallacher; that the respondent had knowledge of the claimant's mental health and failed to provide the claimant with the support she needed; that the claimant did not delay in resigning because the effect of her mental health condition made it not reasonably practicable for the claimant to resign sooner.
33. Counsel for the respondent tendered a skeleton argument and made a number of detailed submissions which the tribunal has considered with care but do not rehearse in full here. In essence it was asserted that: the respondent was not in fundamental breach of the claimant's contract and that the claimant's perception that the respondent was "out to get her" from 2014 was not borne out by the facts of the case; it was submitted that the claimant had failed to understand that Ms Gallacher was trying to support her to improve; that the claimant resigned when she was ill and started a new job within a few days of her notice period ending.

### **Conclusions** (including where appropriate any additional findings of fact)

34. The tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.
35. Dealing first with the question of whether the respondent was in fundamental breach of the claimant's contract, the claimant complains that the process of performance management, going back to the 'letter of

concern' issued in 2014, was designed to remove the claimant from the business. It was also suggested, but not argued forcibly, that Mr Kennedy had such an objective. The claimant relied on the statement of Ms Gunn as to comments made in 2013 and 2014. However, the Tribunal could not find any evidence of a causal link between the actions of Mr Kennedy in 2014 and the performance improvement plan instituted by Ms Gallacher in 2018, over 3 years later. In any event, such an argument is not consistent with an employer that makes efforts to ask an employee to reconsider and retract their resignation.

36. It was apparent that Ms Gallacher had identified a number of concerns about the performance of the shop that the claimant managed in 2017 - 2018, its appearance and the attitude of the claimant and her staff to procedures including compliance policies. The Tribunal considered that, in such circumstances it was not unreasonable of Ms Gallacher to embark on informal discussions with the claimant about performance issues and, when the claimant did not make improvements, to formalise that process. The complaints were not unjustified - the comment by the claimant's union official in response to the concerns raised is telling: "we can get through this" rather than arguing that what was raised was not sufficient to warrant a performance process. Likewise, having received a grievance about the claimant, Ms Gallacher was bound to investigate matters and ultimately that grievance was not upheld. If the employer was intent on removing the claimant, it might be expected that such a grievance would have had a different outcome.
37. It was argued, for the claimant, that the actions of the respondent and Ms Gallacher constituted a course of conduct against the claimant which was unjustified in light of the bonus awarded at the end of 2017. The Tribunal did not accept that contention and accepted the respondent's evidence that the bonus was based on pay-outs and therefore not an accurate reflection of a manager's performance. Indeed, the claimant struggled to explain precisely what she had done to be awarded the bonus. In submissions, the last straw was said to be the continued lack of support by the respondent despite promises up to late March 2018. In her witness statement, the claimant cites events on 10 March 2018, when she was unable to complete the rota and suggests that her manager did not then support her. However, she had not turned to her manager when the problem first arose but had emailed another manager asking for help, only referring to Ms Gallacher at the end of the day. In light of the evidence the Tribunal concluded that the claimant had not made efforts to cover the rotas until late in the day on her final day of work before she departed on jury service, leaving little time for anybody to help her. In those circumstances, the claimant was not entitled to treat the events of 10 March 2018 as the last straw.



38. The test of whether an employee's trust and confidence has been undermined is an objective test. An entirely innocuous act by an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as destructive of their trust and confidence in the employer. In this case, the Tribunal considered that the claimant had reacted adversely to criticism and sought to blame others rather than take action herself to rectify matters. The claimant was the shop manager and had overall responsibility for performance and staff at the shop. The respondent's conduct in setting up a formal performance monitoring plan was reasonable and justifiable in accordance with its Performance Improvement Policy. Once the plan was formalised, the claimant was signed off work with stress and then resigned and did not return to address the matters raised.
39. Much was made of the fact that Mr Kennedy was named as the person to whom the claimant should direct any appeal about the decision to put her on a formal improvement plan. Whilst that may have been unwise, given the claimant's comments about Mr Kennedy's actions in 2014, it was not a fundamental breach and could easily have been changed had the claimant protested at the time.
40. The respondent knew of the claimant's long-standing personal problems and mental health issues. It was submitted that the respondent had a duty of care towards the claimant and that it was, in effect, in breach of such a duty by placing her on the improvement plan. The Tribunal did not agree with such an argument, the effect of which would be to prevent a respondent from addressing performance issues with an employee where the employee had alerted them to such difficulties. In the circumstances of this case, Ms Gallacher was aware of the claimant's circumstances and so made several efforts to address matters informally with the claimant, on more occasions than the respondent's policy allowed. In addition, both Ms Gallacher and the HR department repeatedly highlighted the Employee Assistance programme to the claimant.
41. In light of all the above, the Tribunal concluded that the claimant was not constructively dismissed. The respondent was not in fundamental breach of the claimant's contract of employment when the claimant resigned and she did not resign in response to any breach of contract. The claimant acted on her belief that the respondent's actions were designed solely to remove her from the business and her case rested largely on a misapprehension as to Ms Gallacher's motives towards her. The claim of constructive dismissal must therefore fail.

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Employment Judge Batten  
Date 30 September 2019

JUDGMENT SENT TO THE PARTIES ON:

1 October 2019

FOR THE TRIBUNAL OFFICE