



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Carrington

**Respondent:** Next Retail Plc

**Heard at:** Bristol **On:** 4 and 5 September 2019

**Before:** Employment Judge Livesey

## **Representation**

**Claimant:** Mr Riddle, solicitor

**Respondent:** Mr Ho, solicitor

**JUDGMENT** having been sent to the parties on 23 September 2019 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### 1. The claim

1.1 By a Claim Form dated 20 April 2018, the Claimant brought complaints of constructive unfair dismissal and discrimination on the grounds of disability, although the latter complaint had been dismissed before the final hearing.

### 2. The evidence

2.1 Witnesses gave evidence in the following order;

- On behalf of the Claimant; The Claimant herself;
- On behalf of the Respondent; Mr Bennett; Area Manager, Mid-Counties;  
Miss Bowers; Area Manager, Western Counties and Avon

2.2 The Respondent also relied upon the written statement of Ms Evans who did not attend to give evidence in person.

2.3 The following documents were produced;

- C1 A case Summary;

- C2 A chronology;
- R1 The agreed hearing bundle;
- R2 The Respondent's closing submissions;

### **3. Background**

- 3.1 It was clear that the case had not been prepared well. Employment Judge Roper had issued a number of orders on 3 December 2018, four of which had been made on an 'unless' basis. He also listed a further preliminary hearing on 17 January 2019 to address a number of issues. At that hearing, and as a result of the Claimant's failure to comply with the December Orders, Employment Judge Harris determined that the claims of disability discrimination had been struck out by operation of the earlier 'unless' order.
- 3.2 The Claimant then applied to have that decision set aside. Employment Judge Maxwell heard that application on 4 March 2019 and rejected it. The effect was that the constructive unfair dismissal complaint was all that remained.

### **4. The issues**

- 4.1 The claim had been through three Case Management Preliminary Hearings on 20 July 2018, 3 December 2018 and 30 April 2019. In addition, there had been the two further Preliminary Hearings conducted by Employment Judge Harris and Employment Judge Maxwell referred to above.
- 4.2 The remaining issues in the complaint of constructive unfair dismissal had been identified and recorded by Employment Judge Street in paragraph 4 of her Case Management Summary of 30 April 2019. The Claimant relied upon the implied term of mutual trust and confidence. She asserted that the term had been breached in nine respects (paragraphs 4.1.1 to 4.1.9 of the Case Management Summary). In terms of causation, the Respondent alleged that she had resigned because she had obtained other work. The Respondent also ran a positive case on affirmation or waiver but it did not argue that any constructive dismissal, if found, had been fair under s.98 (4).
- 4.3 At the end of the evidence, however, in light of the fact that many of the allegations had not been covered in the Claimant's witness statement nor in the cross-examination of the Respondent's witnesses by Mr Riddle, he was asked how many of the nine allegations were still pursued. The answer was just two, including that which was said to have been the final straw (paragraph 4.1.9). Instead, Mr Riddle sought to rely upon a different and new final straw, the ramifications of which have been dealt with below.

### **5. The facts**

- 5.1 The following factual findings were reached on the balance of probabilities on the matters which remained in issue between the parties.

- 5.2 Any page references provided within these Reasons are to pages within the agreed hearing bundle, R1, unless otherwise stated and have been cited in square brackets.
- 5.3 The Respondent is a well-known clothing retailer. The Claimant commenced her employment with it on or around 31 July 2003. She started as a Sales Consultant in the Filton store, Bristol. She then became a Sales Manager at the Imperial Park store in Bristol in 2009. In 2012 she moved to cover the Bath and Trowbridge stores as the Deputy Store Manager and then she became Store Manager at the Chippenham branch in 2013.
- 5.4 From March 2017, Mr Bennett was the Area Manager for the Mid-Counties region, covering Chippenham. He was succeeded by Miss Bowers in July 2017.

Misconduct allegation in 2017

- 5.5 When the Claimant was covering the Witney store for a period in 2017, it was alleged that she had taken and spent a £300 gift card which had been sent to the store for a staff incentive scheme. It was found to have been spent against the Claimant's staff number.
- 5.6 An investigatory meeting was conducted by Mr Rose on 3 April 2017 [70-83]. The Claimant alleged that she made Mr Rose aware that she had been suffering with from stress and was '*not herself*'. The notes reflected the fact that she had found the work at Witney stressful because she had considered it to have been "*firefighting*". That said, there was nothing which reasonably flagged up any serious medical condition which may have impacted upon her ability to do her job at that stage.
- 5.7 A disciplinary hearing then took place on 6 April [85-97]. Mr Bennett was in the chair and Mr Cooper attended (another Store Manager), together with a representative from HR and the Claimant. The Claimant was unable to explain how she had possession of the card and was only able to say that she may have picked up by mistake. She accepted responsibility for her actions and agreed that she had made "*a massive error*" which could have led to her dismissal. She further stated:  
*"I want to rebuild my reputation strive to do the best I can. Made a massive error stop took my eye off the ball."*
- 5.8 The Claimant referred to having suffered stress because of her relationship with her Deputy Manager, Mr Butler, which she said she had been trying to control. No specific medical condition or treatment was mentioned, save reflexology which she said that she had used to assist her relaxation. Mr Bennett asked if she had been to the doctors, which the notes broadly supported [93]. She said that she had, but that the doctors had not wanted to prescribe any medication. She also referred to personal issues including her mother's health, her identity theft, a road traffic accident and issues with her domestic situation [95].
- 5.9 Again, there was nothing said during that meeting which ought reasonably to have alerted the Respondent to any significant or debilitating medical condition. The problems appeared to have arisen from life events and the Claimant did not flag up any serious continuing incapacity.

- 5.10 She was issued with a final written warning because Mr Bennett concluded that her actions, whilst not deliberate, had demonstrated a lack of control and care within the store. A confirmatory letter was sent on 7 April [98]. She did not appeal, other than to raise issues around that disciplinary process within her later grievance in July 2017.
- 5.11 On 12 April 2017, the Claimant claimed to have spoken to Mr Bennett over the telephone and to have told him about various medical conditions (see paragraph 20 of her witness statement). Mr Bennett said that there had been a discussion; that she had said that she had seen her GP and that he had therefore asked if she had wanted any help or support. In reply, Mr Bennett stated during his evidence that “*she was clear that she absolutely did not need adjustments and was fine to continue at work*”. His evidence was forthright and reliable. The Claimant’s evidence was inconsistent in other respects, as set out below.
- 5.12 It was clear that, in May 2017 and beyond, the Claimant had been treated for depression ([100], [116-7], [169-170] and [335-6]). In her witness statement, she said that she had given some or all of those documents to her managers. In cross examination, however, she said that she had *not* done so, but had told them about the contents of the earlier documents ([335-6] post-dated the Claimant’s resignation). Although Mr Bennett agreed that he had been made aware of the Claimant’s diagnosis of hyperthyroidism at the end of May, he had asked her about her fitness to work and she had replied that “*she was very clear that she was fine to work and that her doctors had said so*” (his evidence in cross-examination).

June 2017 grievance

- 5.13 In June 2017, Mr Shreh, a Sales Coordinator in the Claimant’s store, raised a grievance against her, Mr Butler (the Deputy Manager) and Ms Wrigley (a Sales Manager). He claimed to have received no support, to have been called a liar, to have been asked inappropriate questions about his epilepsy and to have been berated in front of colleagues [104-7]:  
“*Alice has been an unsteady, unpredictable force in the workplace. But the attitude and support the store manager should give, is severely lacking.*”
- 5.14 Mr Butler was subsequently dismissed in July 2017 as a result of similar allegations which were made against him by a young female member of staff in May.
- 5.15 On 9 June, Mr Bennett met Mr Shreh to ask him about his allegations in more detail. He then discussed them with five other members of staff. It was clear that he was initially somewhat circumspect about the grievance; he described Mr Shreh as a “*difficult individual*” who had raised grievances before.
- 5.16 Mr Bennett conducted a meeting with the Claimant on 3 July at which, according to him, she was somewhat hazy about the events and attributed her poor memory to ill health [118-140]. Mr Bennett was immediately very concerned that her demeanour was very different from how she had previously presented to him. As a consequence, she was referred to

Occupational Health and it was decided then that a risk assessment should have been undertaken [140-4].

5.17 The investigatory meeting with the Claimant was reconvened on 5 July [144-166]. Mr Bennett listened to what she told him about the allegations. There was a brief adjournment after which, having considered all of the other evidence, he informed her that he was going to uphold Mr Shreh's grievance [162].

5.18 Mr Bennett then took the view that a temporary relocation of the Claimant was in everyone's best interests. He felt that she had been struggling to keep control, Mr Butler was then off sick (pending his disciplinary hearing) and the store was described as having been in a "*difficult place*", part of the reason for which was attributed to the Claimant's management style. Mr Shreh's grievance had been upheld. He explained the reasons as follows [164]:

*"Having considered all of this I now suggest that we transfer you to a different store where you can work alongside another manager who will be supporting you in completing all the tasks. Furthermore I believe it's reasonable to do so considering you have now been referred to OH. We will support you as much as we can.."*

The Claimant was noted to have responded 'OK' and she then said that she did not want anyone to know. In cross examination, the Claimant said that it was not clear to her whether the move was to have been temporary or permanent. The Claimant then asked what was going to happen next. She was told that the application of the disciplinary process was going to have been considered because of the findings that had been made in Mr Shreh's favour. Her Chippenham store keys were taken from her. That was done, according to Mr Bennett, because it was understood that she was going to work elsewhere and because the other keyholder, Mr Butler, was off work sick. Although the Claimant maintained that they were spare keys, in cross examination she accepted that, if someone left a store, even temporarily, it would have been expected that they would have surrendered their keys

5.19 The Claimant was informed over the telephone later that day that her move was to have been to Cribbs Causeway. That choice, which had been made by Mr Bennett and Miss Bowers together, was made because there were many experienced senior staff in the store who would have been able to have supported her.

5.20 The Claimant later complained that travelling to Cribbs Causeway would have been onerous. That complaint was not raised with Mr Bennett over the telephone on 5 July, nor with him subsequently. The store was not as far as Witney, which she had covered earlier that year.

5.21 The Claimant was due to start at the Cribbs Causeway store on 7 July but she phoned in sick. She did not, in fact, ever work there.

#### Disciplinary process and the Claimant's grievances

5.22 As a result of Mr Shreh's grievance having been largely upheld, the Respondent's attention turned to the Claimant's culpability. However, before anything happened in that regard and whilst she was off work sick, she lodged a grievance in July 2017 [108-115]. The focus was on Mr Bennett

who, she claimed, had ignored her medical issues and did not trust or support her. During her evidence, she accepted that she would not have raised the grievance had Mr Shreh's grievance not been raised against her.

- 5.23 Miss Bowers, who had by then succeeded Mr Bennett as the new Area Manager, handled the grievance. A grievance meeting was held with the Claimant on 21 July at which she complained about her move to Cribbs Causeway, the removal of her keys and a combination of things with Mr Bennett. She stated that she had had difficulties in her private life since May 2017 but she had not been off sick and she claimed to have been capable of doing her job. The Claimant's concerns about Cribbs Causeway were addressed by Miss Bowers; she said that she could go to Swindon, Trowbridge or Bath instead. The Claimant chose to go to Trowbridge [180-222].
- 5.24 On 21 July, an Occupational Health report was produced [177-9]. It was therefore written two weeks into the Claimant's sickness absence. The report indicated that:  
*"Ms Carrington stated over the past 8-9 months she had been experiencing inexplicable symptoms that included anxiety, feelings of panic, fatigue, poor concentration and also losing her thoughts when communicating with others."*  
She had been diagnosed with hyperthyroidism which caused fatigue, sluggishness, impaired memory and concentration. Medication had been prescribed to restore her normal thyroid levels. The condition was 'readily cured' in that way.
- 5.25 Occupational Health took the view that the Claimant would probably not have returned to work until the grievance process had been concluded. Two adjustments were proposed; that she received visits from management and that consideration was given to a closer store because of the perceived travel difficulties.
- 5.26 Miss Bowers interviewed Mr Bennett in relation to the Claimant's grievance on 27 July [233-252]. His account of his interactions with the Claimant was very different from her own. She then provided the Claimant with a grievance outcome on 11 August [255-7]; her complaints were rejected.
- 5.27 She then appealed on 16 August [256-260]. Ms Evans handled that process and she interviewed Mr Bennett again on 24 September [269-280]. An initial grievance appeal hearing, which was due to have been held in late September, was postponed because the Claimant attended without representation and said that she had not wanted to proceed without it [281-3].
- 5.28 In the meantime, Miss Bowers and the Claimant met to discuss her return to work on 18 August. Miss Bowers was, of course then, armed with the recommendations of the Occupational Health report. A supported, phased return was put in place [261-2]. The Claimant then returned to work at the Trowbridge store on 4 or 5 September. A risk assessment was undertaken by the manager at the store before she did so [263-7].

- 5.29 On 4 October, the Claimant was invited to the anticipated disciplinary hearing on 24 October in relation to the outstanding issues concerning Mr Shreh's grievance [284].
- 5.30 She then lodged a further grievance on 9 October. That complaint concerned a recording which one of her managers, Mr Butler, had made of the investigatory meeting which she had attended in July with Mr Bennett ([296] and [331-2]). Mr Butler had taken the recording by secreting his mobile telephone into the meeting room. He disclosed the recording to the Claimant on 26 September after he had been dismissed. He had managed to capture pieces of conversation between Mr Butler and the member of HR, Ms Campbell, in which some doubts had been expressed about the voracity of the Claimant's stated condition. The comments had been made in the Claimant's absence and she alleged in her grievance that the investigating officers had been negligent in allowing the recording to have been made.
- 5.31 The disclosure of the recording had been the "*final nail in the coffin*" which had caused her to leave, she said repeatedly in cross-examination. It was noted, however, that she did not resign for another month. She also accepted that her managers had not been complicit in Mr Butler's conduct.
- 5.32 On 13 October, the Respondent stated that the Claimant's concerns about the recording could have been considered at the grievance appeal hearing [297].
- 5.33 On 24 October, Miss Bowers chaired the disciplinary hearing at which the Claimant's interactions with Mr Shreh were considered [300-4]. The impact of her health upon her behaviour was discussed and the outcome was that the Claimant was provided with counselling and retraining as a supportive measure. There was then further discussion about her health during which she stated that her thyroid condition was under control and that her decision-making was no longer impaired. The Claimant had no complaint about that meeting and/or its outcome. It was a compassionate outcome, particularly given the existence of the final written warning.
- 5.34 On 26 October, the Claimant resigned, giving four weeks' notice [305]:  
*"Due to several events of the last year I feel that my professional career has been damaged beyond repair and I contributed to a unreasonable breach of contract on Next's part [sic]. I feel that the disciplinary proceedings on 24/10/2017 which were manifestly unreasonable further highlights the poor treatment to myself by Andy Bennet. This has been a very upsetting time for me and I now feel that I cannot continue working at Next and this is directly due to the way I have been treated."*
- 5.35 The Claimant had been offered a role at Tesco's on 24 October [342]. She said that she had applied, through a friend, after she had received the recording from Mr Butler in late September. It was noteworthy that the Claimant still works at Tesco's Eastville store, a similar distance from her home as Cribbs Causeway.
- 5.36 On 17 November, the rescheduled grievance appeal hearing nevertheless went ahead with Ms Evans in the chair [307-330]. The recording was

discussed, but the Claimant sought to diminish its relevance at the start [309]. She did not raise it again, although Ms Evans did briefly. Instead, she appeared to attribute the '*final straw*' to have been her allocation to Cribbs Causeway [321]. When she was invited to say whether she had anything else to add, she said:

*"No malicious intent here I would have been happy to meet Andy in some mediation setting. Some things weren't handled well. I just want that to be recognised. I don't detest the guy - I just want some acknowledgement and recognition."*

5.37 The Claimant's grievance appeal was rejected in an outcome letter dated 22 November [333-4].

## **6. Conclusions**

### Legal principles

- 6.1 The implied term of trust and confidence was not breached if an employer behaved unreasonably, although such conduct could have pointed to such a breach evidentially. The term was, however, breached if an employer participated in conduct which was calculated or likely to have caused serious damage to, or the destruction of, that relationship (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] 1 AC 20). Breaches must have been serious. Parties were expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851).
- 6.2 The approach to that test that was taken by the Court of Appeal in the case of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131 was to ask whether, looked at in the light of all of the circumstances objectively, the party's intention was to refuse further performance of the contract (paragraph 27, per Kay LJ), although intention was not an essential ingredient; an objective analysis of the likely effect was required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8).
- 6.3 It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term.
- 6.4 The Claimant put her case on the basis that the events, looked at together, amounted to a breach of the term as in *Lewis-v-Motorworld* [1986] ICR157. As such, I had to consider whether the last straw itself had contributed to the breach of trust and confidence in at least some material way. It needed to have been something more than merely trivial (*Omilaju-v-Waltham Forrest LBC* [2004] EWCA Civ 1493). In *Kaur-v-Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach:  
*"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*  
*(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*  
*(2) Has he or she affirmed the contract since that act?*  
*(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*



(4) *If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*

(5) *Did the employee resign in response (or partly in response) to that breach?"*

6.5 The breach relied upon did not need to have been the only cause of the employee's resignation in order for the claim to have succeeded; *Wright-v-North Ayrshire Council [2013] UKEAT/0017/13/2706*. It was sufficient for it to have been *an* effective cause.

6.6 A claimant could not rely upon a breach of contract which she had been taken to have affirmed. Affirmation can have been express, but it can also have been implied by inaction and delay, although simple delay was rarely likely to have been enough. In *Chindove-v-Morrisons* UKEAT/0201/13/BA, Langstaff J said this (paragraph 26):

*"He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time..... It all depends upon the context and not upon any strict time test."*

#### Conclusions

6.7 Each of the breaches set out within paragraph 4 of the Case Management Summary of 30 April 2019 was considered:

4.1.1 Failing to conduct a risk assessment on or around 6/07/17 as requested by Senior HR officer Natali Campbell on 3/07/17;

This allegation was not covered by the Claimant in her witness statement or by Mr Riddle during his cross-examination of the Respondent's witnesses. It was said to have emanated from a line in the minutes of the meeting of 3 July in which it was recorded that 'Andy' was to 'complete risk assessment' [140]. The Claimant alleged in cross-examination that the risk assessment ought to have been completed *then*, yet she was off work between 7 July and 5 September and the risk assessment was completed upon her return to work at the Trowbridge store.

It served no purpose for the Respondent to have prepared a risk assessment at an earlier point than the Claimant's return to work. The condition could have changed in the interim, so too could the circumstances of her return as, in fact, it did (at that point, she was due to have returned to work at Cribbs Causeway). No breach of the implied term had been demonstrated in that respect.

4.1.2-5 These allegations were not pursued at the conclusion of the case;

4.1.6 Andy Bennett failing to provide adequate support with the result that referral to Occupational Health was delayed;

Mr Bennett had, on his own admission, been aware of the Claimant's visits to her doctor in April and of the diagnosis of hypothyroidism in May 2017. However, on her clear assurance that she was fine to work and that no adjustments had been necessary, he had reasonable and proper cause not to have referred her to Occupational Health then. There was nothing raised in the April disciplinary process, beyond some temporary workplace pressures associated with her time at Witney, which would reasonably have set alarm bells ringing.

At the meeting on 3 July, however, the Claimant presented very differently to Mr Bennett. Accordingly, he considered that there was a need to instruct OH, which was what then happened immediately.

Again, the Claimant was not able to demonstrate any breach in that respect;

4.1.7-9 These allegations were not pursued either.

- 6.8 The final straw or '*nail in the coffin*' for the Claimant was the disclosure by Mr Butler in late September, following his dismissal, of his covert recording of the investigatory meeting which she had attended. That allegation was not even *one* of the alleged breaches relied upon at the hearing, let alone the final straw. Although the Claimant had referred to it in a meeting with Ms Evans on 17 November, she had stated that it had not been the '*main focus*' [309].
- 6.9 As was pointed out to Mr Riddle, there had been a number of recent decisions of the High Court in which it had been said that Tribunals were not expected to deal with more than the issues that had been presented as agreed (most recently in *Mervyn-v-B W Controls* UKEAT/0140/18/BA). Mr Ho referred to others in his closing submissions (*Scicluna-v-Zippy Stitch Ltd* [2018] EWCA Civ 1320, *Land Rover-v-Short* [2011] UKEAT/0496/10/RN and *Parekh-v-London Borough of Brent* [2012] EWCA Civ 1630). Accordingly, I was not required to consider the new assertion of breach and the alleged final straw. I nevertheless considered what might have happened *if* I had done so.
- 6.10 Was it a breach of the implied term? It was an invasion of the Claimant's confidentiality to have had the meeting covertly recorded. It was done by an employee who was employed when he had made the recording and it was undertaken at his place of work and in the course of his employment. The Respondent was therefore vicariously liable for it since it met the test set out in the case of *Catholic Child Welfare Society* [2012] UKSC 56. The fact that it was disclosed by Mr Butler *after* his employment had come to an end did not affect that.
- 6.11 It was not, however in my judgment, an operable cause of the Claimant's resignation. It was not part of the case that she put before the Tribunal until she was cross-examined. It was not considered as an issue of significance in November [309]. She had raised no complaint about it for nearly two weeks between 26 September and 9 October and she did not

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resign for a month after the disclosure. When she did resign, Mr Bennett had long since ceased being her manager and any concerns that she may have had that she had lacked credibility in his eyes would not have been relevant or operative. The issues that had been raised in the Claimant's second grievance grievance were not pursued or made out at the hearing, namely negligence on the part of the investigators or the dissemination of the recording to a wider number of colleagues. In relation to the former, the Claimant accepted in cross-examination that the Respondent had not condoned or been in any way complicit in the recording. Her employers could hardly have been expected to have swept the room for such devices before the meeting. As to the latter, there was no evidence whatsoever of any wider dissemination of the recording. Far greater importance had been attached to the issue, ex post facto, that it had at the time.

- 6.12 Accordingly, and for those reasons, the complaint of constructive unfair dismissal was dismissed.

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Employment Judge Livesey

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Date: 11 October 2019