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EMPLOYMENT TRIBUNALS

Claimant: Mrs J Heasman
Respondent: Autoprotect (MBI) Limited
Heard at: East London Hearing Centre
On: Thursday 18 and Friday 19 July 2019
Before: Employment Judge Allen (sitting alone)

Representation

Claimant: In Person (assisted by lay representative Mr S Rowley)
Respondent: Mr R Bhatt (Counsel)

JUDGMENT having been sent to the parties on 24 July 2019 following the oral reasons given at the conclusion of the hearing; and written reasons having been subsequently requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 This is the hearing of the Claimant's claim for constructive unfair dismissal. The issues were identified at the outset of the hearing and are addressed in detail in the conclusions to this set of reasons. In outline the issues were:

1.1 Was there a fundamental breach of contract? The Claimant relies upon:

1.1.1 The alleged bullying by Ms Cannon prior to 25 October 2018: exclusion from meetings; and the Claimant not being allowed to do the work of a team leader.

1.1.2 The decision to suspend the Claimant on 25 October 2018 and the failure to deal with her complaint about that;

1.1.3 The second suspension on 1 February 2019;

1.1.4 Disparity of treatment compared to Mr Oropo; Ms Wareham; and Mr Adegbuyi.

1.2 Did the Claimant resign in response to the alleged breaches of contract?

1.3 Did the Claimant waive any of the breaches and therefore affirm her contract of employment?

2 The Tribunal had an agreed bundle of documents running to page 228 and on the second day of the hearing, received two additional documents from the Respondent dated 28 December 2018 and 11 March 2019.

3 The Tribunal heard from the Claimant and from Karen Cannon, Mark Goggins and Carla Bush on behalf of the Respondent. Both parties had the opportunity to make oral submissions and in the Respondent's case, Mr Bhatt supplemented those with written submissions.

4 The Claimant was employed by the Respondent from 4 May 2016 until her resignation on 4 February 2019. From 1 March 2018 she was a team leader in the Guaranteed Asset Protection (GAP) Team. Hannah Wareham was appointed as team leader at the same time as the Claimant, although she was absent on maternity leave until about the end of August 2018. Other team members, including George Petty, had applied for the team leader role but were unsuccessful.

5 The Claimant's line manager was Mark Goggins, Claims Supervisor. He reported to Karen Cannon, Claims Manager. She reported to Michael McVeigh, Operations Director. Mr Goggins in his witness statement at paragraph 3 stated: *"I had no personal issues with the Claimant and generally we enjoyed a positive working relationship. I never had any issues with her work ethic or the performance of her team but she could be difficult to manage at times as her management style could be quite forthright. I tried to guide and train her in respect of her communication skills as she had upset members of her team previously with what was perceived to be an aggressive or hostile management approach."*

6 The Claimant returned to work on 17 October 2018 having been off work with a combination of sick leave and holiday relating to her having got married. She considered that, on her return in particular, she was prevented from doing her full range of team leader duties and that she was excluded from work and informal meetings by Ms Cannon including meetings with Ms Cannon, Mr Goggins and Ms Wareham, her fellow team leader.

7 On 24 October 2018, the Claimant went to see Carla Bush, the senior HR business partner to explain the difficulties that she was having with Ms Cannon which she considered amounted to bullying and/or harassment.

8 I find that Ms Cannon saw the Claimant go to that meeting with HR and that Ms Cannon would have presumed that this was about her relationship with the Claimant and in any event, the evidence before the Tribunal was that Ms Bush spoke to Ms Cannon immediately after speaking to the Claimant about the Claimant's concerns.

9 On that same day, the Claimant emailed Ms Cannon and Mr McVeigh to request a move to another department. After speaking to Ms Bush, Ms Cannon told the Claimant that a performance improvement plan may be put in place which would include an identification of training needs.

10 On the next day 25 October 2018, according to Ms Cannon, Hannah Wareham relayed concerns to her that the Claimant had been overheard making comments to the effect that the Respondent was trying to push the Claimant out of the business and the Claimant allegedly said, *"if they want me to quit, I'll quit"* and referred to Ms Cannon picking on her. Ms Cannon was upset at hearing these comments. The Claimant, not unreasonably, looking back on this, regards Ms Wareham's relay of these comments as being suspicious.

11 It is at my finding that Ms Cannon's subsequent actions were mistakes. Ms Cannon herself in oral evidence and Ms Bush in her evidence agreed, that as the subject of the alleged comments, Ms Cannon should have passed the matter on to someone else. It was wrong for her to have dealt with it herself. In fact, what she did do was that, following a discussion with Mr McVeigh, she suspended the Claimant as set out in a suspension letter dated 26 October 2018.

12 Ms Bush gave evidence that this is not what she would have advised. That evidence was not surprising to the Tribunal. Ms Bush is correct. The Respondent's disciplinary policy permits suspension in cases of suspected gross misconduct and the allegations against the Claimant came nowhere near that level. The suspension lasted until after the Claimant was interviewed as part of the disciplinary investigation into her alleged comments and she did not return to work until 1 November 2018. Ms Cannon's explanation for the suspension was that it had occurred in order that she could obtain information from other team members, who might have been reticent during any period in which the Claimant was in the work place. However, that did not require suspension for that length of time.

13 The disciplinary outcome on the 17 December 2018 was that the Claimant was given a first written warning for "vocalising negative comments about senior management in an open setting". The Claimant does not include that as one of the matters alleged to be a breach of contract. Meanwhile, the Claimant had brought a grievance on 30 October 2018 complaining about Ms Cannon's treatment of her, including the suspension. This was investigated in an exemplary fashion by Ms Bush save in respect of one area. Ms Bush failed to make any findings on the suspension - which she did not deal with either in her investigation report on 26 November 2018 or the outcome letter on 3 December 2018. This was despite the Claimant having raised it again at the grievance hearing on 5 November 2018.

14 In that respect alone, the grievance outcome was inadequate. Ms Bush said that she could not remember why she did not include the suspension in her findings but that it may have been because she did not wish to tread on the disciplinary matters which were being investigated in parallel. Had that been the case, the grievance investigation outcome could, of course, have waited for the outcome of the disciplinary before being issued. In any event, the grievance was rejected but some useful recommendations were made by Ms Bush to help improve the relationship between the Claimant and Ms Cannon. Ms Cannon in her witness statement at paragraph 26 says that she took those

recommendations on board. However, there was little or no evidence of any implementation of, for example, a training or coaching plan; or clarity provided on the Claimant's role; or any file notes on positive or negative behaviour after this date, despite Ms Bush's helpful recommendations.

15 The Claimant did not appeal either the disciplinary or grievance outcomes. In relation to the grievance she stated that she had decided to let it go. As stated above, the Claimant returned to work and got on with things in a professional manner.

16 The Claimant drew comparisons between her treatment and that of other employees including Sikiru Oropo, Hannah Wareham and Victor Adegbuyi. Ms Wareham and Mr Oropo were not suspended in relation to alleged inappropriate behaviour at work and in relation to Mr Adegbuyi, the Claimant points to him not having been reported to the appropriate authorities in relation to a serious matter which had led to his dismissal.

17 I accept the Respondent's explanation that suspension was neither appropriate nor necessary in the cases of Mr Oropo and Ms Wareham and also that in relation to Mr Adegbuyi, that his case is too different from the Claimant's for any useful comparison to be made. The fact however remains that the Claimant was suspended and she should not have been and that her complaint about suspension was not investigated and it should have been.

18 On the 31 January 2019, Hannah Wareham raised another complaint about the Claimant and the specific terms were as follows "this morning while I was trying to finish my daily plan, Jo [the Claimant] was standing at her desk chatting and asked me if we had employed anyone for the new Smart UK positions. I said no and she said well have they interviewed anyone yet? I said that I am aware that Karen and yourself have had a few interviewed to fill John Joe's position but I am not sure. Jo asked why I have CV's on my desk this week. I advised that Karen asked me to go through them. Jo then said that she feels that we should not employ young people at all as they do not work as hard as older people. She carried on to say that people of Michelle's age are better as they do not cause trouble, do the work they are given and work hard. Jo said that young people are lazy and do not want to work. She said that look at the ones we have and the ones that have left. During this time George did not have his headphones on and Jo was loud."

19 The complaint goes on to say "it is complete discrimination and is one of the protected characteristics of the Equality Act 2010. The company is going to be the one that ends up in hot water if something is not done. I am telling you because the next time I hear something this inappropriate come from Jo I will be walking into HR myself". This was all contained in an email from Ms Wareham dated 31 January 2019 to Mr Goggins.

20 This time, Ms Cannon was not involved. Mr Goggins spoke to Ms Bush in Human Resources and on her advice, he made initial enquiries and there was some limited support from Mr Petty for the account given by Ms Wareham. Based on that Mr Goggins took the decision to suspend the Claimant on 1 February 2019.

21 Whilst not agreeing with much of the detail of Ms Wareham's email, the Claimant accepts that she had made a comment about differences in work ethic between people of different ages in general albeit that she drew attention to there being good work ethic amongst certain younger members of the team in the Respondent's work place. The

Claimant also accepts that Ms Wareham having raised this point, it was appropriate and reasonable of the Respondent to investigate it and the Claimant accepted in oral evidence that discrimination could amount to potential gross misconduct and therefore that suspension was not inappropriate in itself.

22 The Claimant's point was that suspension in the context of the previous suspension left her feeling that she could not work with the management team and that she had no faith in fair procedure and could not put herself through another disciplinary, given the actions that had happened at the end of 2018.

23 On being suspended and then being invited to a disciplinary fact finding meeting due to take place on the 5 February 2019, the Claimant resigned by email dated 4 February 2019, having made enquiries of an ex employer and got an offer for a temporary position on lower wages.

24 The Claimant's resignation email, having raised a number of points, stated "*I will not be attending the investigation meeting on the 5th. I would also like to advise that due to the company putting me in a position where I cannot work alongside Hannah Wareham due to the second victimisation, harassment and bullying within the past 4 months, I will be seeking to advise ACAS to file a complaint for constructive dismissal. I have attended meetings where it has been advised by Michael McVeigh that if the management are unhappy with sickness etc then they would be managed out of the business. This statement amounts to constructive dismissal, which I feel is what has been happening here. Only four months ago I put in a grievance regarding this same treatment which in my opinion was not handled correctly.*" The Claimant then went on to make reference to situations that the Claimant felt were comparable involving Mr Oropu and Ms Wareham. She stated that she felt that this was a clear case of victimisation, bullying and harassment by the Respondent, that she felt totally let down by Autoprotect after the previous incident involving the same employee, Hannah Wareham, and this was despite her having shown great character and professionalism in the way that she had come back to work and continued doing her job - in the view of Mr Goggins.

25 Since the Claimant's resignation, the Respondent has not replaced her as team leader and Ms Wareham has been team leader for both teams.

The legal framework

26 Section 95(1)(c) Employment Rights Act 1996 states:

(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—*

...

...

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

27 If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed.

28 Suspension will not be a breach of the implied term of trust and confidence where there was a 'reasonable and proper cause' for suspension (*Gogay v Hertfordshire Council* [2000] IRLR 703). Lord Justice Singh in the Court of Appeal in *Lambeth v Agoreyo* [2019] I.R.L.R. 560 at paragraph 99 stated that "There can be no doubt that, in some cases, the act of suspension will not be reasonable and so may amount to a breach of contract. The court may consider the wider circumstances beyond the fact and manner of the suspension including events preceding the suspension and the extent to which the suspension was a knee-jerk reaction . . .".

29 As Lord Justice Singh went on to state at paragraph 101 of *Agoreyo*, at the end of the day each case must turn on its own facts.

30 It is only in very limited cases that disparity of treatment will be relevant to the question of unfair dismissal (*Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352).

Conclusions

31 Firstly, in relation to the specific matters said to amount to a breach of contract.

31.1 The alleged bullying by Ms Cannon: there are two aspects: exclusion from meetings; and the Claimant not being allowed to do the work of a team leader. It is my conclusion that there is insufficient evidence before the Tribunal for me to conclude that Ms Cannon bullied the Claimant prior to the inappropriate suspension on the 25 October 2018. It is notable in this regard that the Claimant asked very few questions of Ms Cannon in relation to this period during cross examination.

31.2 The decision to suspend the Claimant on 25 October 2018 and the failure to deal with her complaint about that: undoubtedly these amount to a breach of the implied term of trust and confidence and therefore a breach of the Claimant's contract of employment.

31.3 The second suspension on 1 February 2019: the second suspension in itself was not a breach of contract on the Claimant's own evidence. The Claimant said, in answer to a question from the Tribunal, that she would not have even complained about that if it had happened in isolation.

31.4 The comparisons with others: these do not, in my conclusion, amount to breaches of contract in themselves, but they did serve to highlight that the first suspension and failure to deal with the grievance about it amounted to a breach of contract.

Did the Claimant resign in response to the alleged breaches of contract?

32 The most recent act triggering the resignation was clearly the second suspension, which happened a matter of days prior to the resignation. Had the Claimant resigned after the first suspension and / or after the grievance outcome - which failed to deal with the first suspension, this would be an easy case. It would be a case in which there would be a finding of constructive dismissal.

33 However, by February 2019, if I looked only at those 2018 events, I would have found that the Claimant had affirmed her contract since then: by returning to work; as she put it - by 'letting it go'; and by getting on with her work in a professional manner. She was not entitled to resign and claim constructive dismissal in February 2019 solely in relation to matters which had occurred in 2018.

34 The Respondent accepts that there had been no affirmation in the few days after the second suspension and so the key question in this case was whether that second suspension was part of a course of conduct which viewed cumulatively amounted to repudiatory breach of trust and confidence.

35 A final act need not be a breach of contract in itself if it is a final straw. But if it is a final straw, must be capable of contributing to what is seen as a series of acts with those earlier matters. If it is entirely innocuous, it is not necessary to investigate the earlier matters because it is not capable of amounting to part of that series. So, what is innocuous?

36 My attention was drawn by Mr Bhatt to paragraph 75 of the Court of Appeal authority of *Kaur v Leeds Teaching Hospital NHS Trust* [2019] 1 ICR 1 in which Lord Justice Underhill stated ". . . I believe the Judge was right to find . . . that what occurred in this case was 'the following through in perfectly proper fashion on the face of the papers, of a disciplinary process'. Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitutes such a breach. The employee may believe the outcome to be wrong but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee."

37 This tells me that following a proper and fair disciplinary process, or a part of one, cannot contribute to a series of acts which cumulatively amount to a breach of contract.

38 The Claimant said that the final straw was that she could not work with the management team, had no faith in fair procedure and couldn't put herself through a second disciplinary. Ms Cannon was not involved in the second suspension and therefore, there is no link that I can draw there. There is a suggestion by the Claimant, which is included in her resignation letter, that Ms Wareham's involvement is a sufficient link between the two matters and I did give that careful consideration. However, that suggestion is not part of the Claimant's pleaded case but more importantly, Ms Wareham was not the decision maker in either regard.

39 I am therefore, driven to the conclusion that the resignation was not in response to

a live breach of contract or in response to a matter that can be linked to the earlier breach of contract and therefore, that the Claimant's claim fails.

40 The Claimant's claim of constructive unfair dismissal therefore fails and is dismissed.

Employment Judge Allen

Dated: 28 October 2019