EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Monica Phillips	**v**	**Coral Racing Limited**

Heard at: Amersham **On**: 9 and 10 October 2019

Before: Employment Judge Andrew Clarke QC (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Ms Sarah Keogh, Counsel

JUDGMENT

1. The claimant was not constructively dismissed by the respondents, hence the claim for constructive unfair dismissal is dismissed.

2. The respondent is ordered to pay to the claimant £17.27, being the holiday pay due to her in respect of holidays not taken as at the date of her resignation on 31 August 2018.

REASONS

Background

1. The respondent's business includes a large number of licenced betting shops and has approximately 28,000 employees. The claimant was, at all material times, a shop manager, initially at shop 2097 and latterly at shop 1835, both located in High Wycombe. She claims constructive dismissal. She resigned by letter dated 31 August 2018, received by the respondent on 3 September. Her claim form sets out various matters (mainly concerning the handling of a grievance) which post-date her resignation letter. However, at a preliminary hearing on 2 September 2019, the claimant accepted that she had resigned by letter of 31 August 2018 and that this was what brought her employment to an end.

2. Despite that earlier acceptance that she had resigned, thereby ending her employment, in her witness statement the claimant asserted that her resignation had been withdrawn by agreement with the respondent and

that she was dismissed by the issuance of her P45 at some time after her grievance was heard in September 2018.

3. The respondent objected to the claimant running that case on the basis (accepted by the claimant) that this matter had been considered at the preliminary hearing and the claimant had there accepted that she had resigned on 31 August and that resignation had never been rescinded.

4. After hearing from both parties, I concluded that the claimant should not be allowed to change her case in this way for the following reasons:

   4.1 This matter had been thoroughly debated at the preliminary hearing and the claimant had abandoned any reliance on this way of putting her case.

   4.2 Her contention that she withdrew her resignation was based on her letter of 7 September 2018 from which she said that this withdrawal was to be inferred. Leaving aside the issue of the respondent's position, the letter does not withdraw the resignation. Indeed, it does not mention it.

   4.3 The respondent was unprepared to deal with the way of putting the case which had already been abandoned. To deal with it would have required further evidence and this would have involved either an adjournment of this hearing, or the real possibility of it going part heard.

5. In the circumstances, I considered that the interests of justice required me to proceed with the case and dealing with the issues as carefully delineated at the preliminary hearing.

6. Having heard all of the evidence, I accept that the hearing of the grievance after the resignation did no more than keep alive the possibility that the parties might agree to the resumption of the claimant's employment. However, that never happened.

7. I heard evidence from the following people.

   7.1 The claimant.

   7.2 Mr Simon Ross, the claimant's area manager from mid-2017, being before and after her transfer to shop 1835.

   7.3 Ms Samantha Woffindin, a regional operations manager who heard the claimant's grievance on 27 September 2018.

   7.4 Mr Nicholas Henderson, latterly a market place manager, being a shop manager (like the claimant) who towards the end of her employment had responsibility for a small cluster of shops, including that managed by the claimant and who at all material times assisted

other managers by organising recruitment open days and in other ways.

7.5 Mr Danny Mannucci, the HR officer who received the claimant's resignation letter and then sought a copy of her grievance and organised the hearing of that grievance.

7.6 I also read the evidence of Mr Jameson who the Claimant proposed to call. The first paragraph of his witness statement was uncontroversial and the second contained general allegations of no relevance to this claim.

8. The claimant alleges that she was constructively, unfairly dismissed. The conduct on the part of the respondent on which the claimant relies was identified at the preliminary hearing as follows:

8.1 Mr Ross not supporting the claimant concerning staff shortages.

8.2 Transferring the claimant to shop 1835 in November 2017 without discussion or notice.

8.3 Unreasonably subjecting the claimant to an unwarranted performance review on 2 July 2018.

8.4 Failing to deal with the claimant's grievance which the claimant asserts was submitted on 26 July 2018.

9. The claimant also alleges a failure to pay her outstanding holiday pay. I will deal with that issue discreetly at the end of these reasons.

Findings of fact

10. The claimant was thought, by Mr Ross, not to be coping well at the busy shop 2097 and, for that reason, he transferred her to shop 1835 in November 2017. The claimant fought against that transfer. This included raising a grievance relating to the manner of its being carried out and other matters. That grievance succeeded as regards the handling of the transfer, it being found that it had not been sufficiently explained to the claimant. Allegations that Mr Ross had manipulated performance figures and had failed to support the claimant were rejected in a reasoned letter from a regional operations manager of 31 December 2017, which the claimant received in early 2018. He also found that Mr Ross should, in future, have one-to-one meetings with the claimant every four to six weeks in order to establish what further support the claimant might need.

11. Thereafter, Mr Ross met with the claimant to explain the reasoning behind the move to her. She later told him (and later again Mr Henderson), that she had been wrong to fight against the move which she could now see had been a sensible one. She reiterated that to me in evidence. Mr Ross also offered to hold the meetings which had been recommended as part of the outcome of the grievance, but the claimant declined this saying that

she did not wish to be micro-managed, but would seek help when she needed it.

12. At this point in time, some few weeks after the transfer to the new shop, that shop was fully staffed. Indeed, it had a cohort of staff whose contracts provided more hours than the shop actually needed. It was the claimant's responsibility to maintain appropriate staffing levels at the shop. This was a shop manager's job and that this was the case was stressed repeatedly to all managers. When Mr Ross became area manager, he sent out an e-mail to all of his shop managers (some 30 of them) making a number of general points of which this was one. He repeated that point to the claimant from time to time.

13. The claimant was not popular with all staff who worked for her. This and other matters led to requests for transfer from her shop from some and as time went on that and other problems led to her having insufficient staff to crew the shop. Mr Ross discussed these difficulties with the claimant and offered advice.

14. The staffing situation at the claimant's shop deteriorated rapidly in the period up to the beginning of May 2018, by which time she was significantly understaffed and having to work long hours herself to cover for this. On 19 May she e-mailed Mr Ross seeking help in this regard.

15. In her evidence she placed most, if not all, the blame for this situation on Mr Ross (for not organising staff for her), Mr Henderson (for not properly organising matters whilst she was on holiday, accepting the transfer to his shop of some of her staff who had applied for this and generally not helping her sufficiently) and others (for a general lack of assistance).

16. I am satisfied that Mr Ross, Mr Henderson and other managers did help with advice, with the "loan" of staff from other branches, with encouraging staff at those branches to do overtime at her shop and with organising recruitment activities across the local branches. It appears to me that the claimant did little to help herself, partly (no doubt) because her time and attention was largely devoted to running the shop day-to-day with reduced staff. The situation was not helped by the fact that existing staff wanted to move elsewhere and when she was offered an experienced staff member returning from maternity leave she did all she could to avoid taking that staff member. This was because she considered her unsuitable, partly because she believed that the lady question would need refresher training and partly because she herself had been involved (as notetaker) in an historic disciplinary concerning that staff member.

17. The claimant and Mr Ross did not meet to discuss the situation until 2 July (dealt with below). That was not due to any lack of effort on Mr Ross's part, but the claimant stated that she was too busy to meet at times when he was available. However, they did communicate between the May e-mail and this meeting and Mr Ross (with Mr Henderson) was supporting the claimant by loaning staff from elsewhere and advising on recruitment. Mr Ross and Mr Henderson discussed the matter from time to time and did

all they could to encourage staff at other shops to help the claimant, including by paying travel expenses for those who might be persuaded to do overtime at her shop.

18. The 2 July 2018 meeting (which I have referred to above), was not a formal performance review meeting, but a response to the claimant asking for assistance by her e-mail of 19 May. The meeting discussed various issues which had been raised before, such as the timely completion of rotas and recruitment and also considered the claimant's failure to adhere to the respondent's policies to identify those who might not be gambling responsibly, or might be seeking to launder money by gambling. An action plan was agreed in outline, it was also agreed that the claimant would write up this action plan, which she failed to do. The claimant did not raise complaints about loan working, targets and the lack of risk assessments. Mr Ross did not shout at the claimant at this meeting (as she alleges) and I find that she was not crying throughout the meeting. She was obviously stressed by the situation in which she found herself, she said so and Mr Ross noted this in the notes that he made contemporaneously at the meeting. In rejecting the claimant's account of that meeting, I also bear in mind that the claimant's e-mail to Mr Ross and others written shortly after the meeting makes no mention of her crying throughout it (or at all) or being shouted at.

19. Mr Ross's response at this meeting (and generally) to the claimant's concerns and her performance as a manger were appropriate and the kind of response to be expected from a manager to a subordinate who appeared to be struggling with aspects of her job. He was particularly concerned by her statement, that despite her lack of staff, she had been too busy to chase HR about this, when they were there to assist her in that regard.

20. On 5 July 2018, the claimant submitted a sick note which stated that she was unfit for work due to "low mood". The subsequent sick note described her condition as "mixed anxiety and depressive disorder".

21. On 26 July 2018 the claimant sent a letter to the respondent's human resources department in London addressed "to whom it may concern". It said that she wished to raise a grievance against Mr Ross. She alleged that his actions had "caused me personal injury, victimised me throughout and made my position within the organisation untenable". There is no dispute that this grievance was sent and delivered, but it was not logged in the respondent's systems and dealt with as it should have been.

22. As the result of her submission of sick-notes an area manager (Ms Helen Grieve) tried to contact the claimant to arrange a welfare meeting. Eventually, contact was made and a meeting fixed for 23 August 2018.

23. At that meeting the claimant told Ms Grieve of the existence of her grievance. Ms Grieve was unaware of it and an enquiry she made there and then established that no such grievance appeared to have been received. Ms Grieve asked the claimant if she would talk to her about it,

so that it could be investigated, but the claimant declined and asked that it be dealt with through the usual process. The claimant made that decision against the background of her having set a deadline for the grievance to be dealt with of 24 August, which deadline she reiterated to Ms Grieve. She was asked to re-send the grievance letter, which she said she would consider doing. She eventually did so, but only after further prompting by Mr Mannucci after receipt of her resignation letter. Both Ms Grieve (see below) and Mr Mannucci wrote to the claimant asking her to re-submit her grievance and each sent a pre-paid envelope in which a copy could be submitted.

24. Ms Grieve summarised their meeting (including the matters referred to above) in a letter of 29 August. The claimant received this letter before sending her resignation letter. I reject the claimant's assertion that the respondent was determined not to deal with her grievance. It is clear that once the respondent became aware of it, efforts were made to learn of its' content and to address it. Eventually, in cross-examination, the claimant did accept that Ms Grieve did all she could to advance the consideration of that grievance.

25. Despite that, the claimant chose to resign. Mr Mannucci suggested that she might withdraw her resignation and have her grievance heard. She pressed to have the grievance heard but did not withdraw her resignation. I am satisfied that thereafter both parties proceeded on the basis that the hearing of the grievance might repair relationships so that her employment could continue, but any decision on her future employment must await the outcome of that grievance.

26. The grievance was heard on 27 September 2018 by a regional manager who had no previous involvement in the matter, Ms Woffindin. She carefully considered the claimant's grievance as more fully articulated at the hearing. It is right to note that there are differences between what the claimant said there and what she now alleges, but I do not consider these to be of particular significance. Over six closely typed pages, Ms Woffindin dismissed almost all aspects of the grievance on 26 October 2018. She was concerned that it had taken so long for the meeting of 2 July to occur after receipt of the May e-mail, but accepted that Mr Ross had sought to deal with it earlier. She also highlighted what she considered to have been errors of communications, being matters where Mr Ross could have put his points across better, but she rejected each of the central planks of the claimant's complaint.

27. Thereafter, lawyers became involved for the claimant but no resolution was found. The claimant had appealed against the grievance outcome, but did not take that appeal forward after an agreed pause whilst lawyers discussed the matter.

The law

28. The law is straight forward and uncontroversial.

27.1. All contracts of employment contain the implied term as to trust and confidence.

27.2 Breach of that implied term is repudiatory of the contract.

27.3 If an employee accepts that repudiatory breach by resignation, the contract thereby comes to an end.

27.4 The employee can reply upon a single act or upon a cumulative series of acts to establish the repudiatory breach. No single act (let alone the final act) need of itself amount to a repudiatory breach of contract, it is the cumulative effect that needs to be considered.

27.5 That the employee continues an employment after conduct relied upon either as repudiatory in itself, or as part of a cumulative series of acts, may amount to an affirmation of the contract and/or may be powerful evidence to show that the impact of the conduct was not as the employee now characterises it.

29. The respondent asserts that if there was a dismissal, the reason was the statutory permissible reason of capability. Were I to find that there was a dismissal in this case, I would have to consider whether that was the case and if it was, then I would need to consider the reasonableness of the dismissal under section 98(4) of the Employment Rights Act.

30. If I was to find that there had been an unfair dismissal, then I would need to consider whether the claimant caused or contributed to that dismissal in a manner which would justify reducing the basic and/or compensatory awards and, if so, by how much.

Applying the law to the facts

31. I now turn to consider each of the four matters relied upon as amounting to repudiatory breaches of contract. I will deal with each in turn and then consider their cumulative effect.

32. I turn first to the assertion that Mr Ross did not support the claimant with regard to staff shortages. I am satisfied that the claimant was helped by Mr Ross (and by Mr Henderson and others) to address staff shortages which arose in the period from spring 2018 onwards. They arose and continued because of various matters as set out above, including failings on the claimant's own part. Mr Ross sought to assist the claimant to address those failings and (assisted by others) took steps (such as arranging the loan of staff or encouraging overtime working) to deal with the immediate difficulties. He would have offered her more support in the early part of 2018 had the claimant let him, but she was adamant that she did not need it and the shop was then doing well and fully staffed. There is no breach of contract revealed here.

33. I turn next to the issue of transferring the claimant to shop 1835 in November 2017. The transfer was not handled as it should have been. That much was established by the grievance which the claimant raised shortly thereafter. She had not been given appropriate notice and the relevant detailed discussions with her which should have taken place had not. However, that was all in November 2017 and the claimant soon came to accept that the transfer was an appropriate one. Mr Ross's conduct in November 2017 might have amounted to a breach of contract, albeit not a breach of the implied term as to trust and confidence and not a repudiatory breach. However, any such breach was long in the past at the time of the resignation and the claimant had accepted Mr Ross's apology for how he acted and by early 2018 saw that the move was, for the reasons that he had given, a good one for her.

34. I turn then to the assertion that the claimant had unreasonably been subjected to a performance review on 2 July 2018. There was no such performance review. Instead, there was a meeting to address the concerns raised by the claimant and they were addressed in what I find to be a positive and helpful way by Mr Ross and the claimant. Hence, there can be no breach of contract here.

35. Finally, I turn to the alleged failure to deal with the claimant's grievance submitted on 26 July. The claimant did submit such a grievance and the respondent did initially fail to deal with it. It lost it and those responsible for dealing with such matters did not know it existed. However, before she resigned, the claimant knew this and Ms Grieve had offered, both orally and in writing, to consider the matter herself if the claimant would provide the details of the grievance. She declined and did not even send a copy of it to the respondent until prompted again after her resignation. There was no breach of contract here.

36. Does the respondent's conduct in those four respects amount, when taken together, to a breach of the implied term as to trust and confidence? I am satisfied that it does not. The only breach of contract (or unhelpful conduct) is that in November 2017 relating to the transfer between shops and that was long in the past and the claimant had accepted that the transfer was a good thing. Any such breach of contract was not repudiatory and, in any event, any such breach was long since waived and the contract affirmed by the time of the resignation. The failure appropriately to deal with the grievance was relied upon as a "last straw" in this case. However, as I have found, the grievance was appropriately dealt with as soon as those responsible realised that it existed.

37. In those circumstances I do not need to consider whether the dismissal (as there was no dismissal) was fair, or whether there was contributory fault.

38. I now turn to the claim under the Working Time Regulations. The respondent accepts that the claimant was not paid all accrued holiday pay to which she was entitled at the time when she resigned. The claimant (in her witness statement) asserts that she is owed £255.27. No supporting calculation was provided in that statement, but from the material in the

bundle of documents it is clear where that figure came from. Mr Mannucci set out the respondent's calculation in his witness statement (also by reference to documents in the bundle). It shows that the claimant is owed £17.27.

39. Having considered the matter, it is clear to me that the difference in approach is because the parties have taken a different final date for the ending of the claimant's employment. The correct date is that taken by Mr Mannucci. In those circumstances his calculation is correct and the appropriate sum is £17.27.

Conclusion

40. In those circumstances, the claim for constructive unfair dismissal is dismissed. There will be an order that the respondent pay to the claimant the sum of £17.27.

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Employment Judge Andrew Clarke QC

Date: 1 November 2019

Sent to the parties on: 6 November 2019

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For the Tribunal Office