



THE EMPLOYMENT TRIBUNALS

Claimant: Ms Alison Fergie

Respondent: TUI Retail UK Limited

Heard at: Manorview House **On:** Wednesday 26th September &
Thursday 27th September 2019

Before: Employment Judge Speker OBE DL sitting alone

Members:

Representation:

Claimant: James Postings of USDAW

Respondent: Mr Bayo Randle of Counsel

RESERVED JUDGMENT

The claimant was not constructively dismissed and accordingly her claim is unsuccessful and is dismissed.

REASONS

1. This case of alleged constructive unfair dismissal is brought by Alison Fergie against her former employer TUI Retail UK Limited trading as Thomsons Travel in Berwick upon Tweed. The claimant gave evidence on her own behalf and called one witness, Diane Eke a former employee of the respondent for over sixteen years. She had been the claimant's assistant manager. The claimant also produced two unsigned statements by Eilidh Jones and Leonie Taylor both former employees of the respondent at the same store.
2. The respondent called three witnesses namely Deborah Crannage, Retail Manager and Retail Operations Expert who carried out an investigation into disciplinary offences; Julie Guthrie, Senior Retail Manager who was the disciplinary officer; Gail Smithson Regional Sales Manager who investigated the claimant's grievance submitted following her resignation.

3. I was provided with a bundle of documents running to two hundred and seventy-two pages and a list of issues which were said to have been agreed by the parties before the hearing date. A cast list was also provided with details of all of the fourteen employees who were named during the case which I found of assistance.
4. The issues in the case on liability were whether the incidents relied upon by the claimant amounted to a repudiatory breach of contract namely a fundamental breach of contract and entitled the claimant to resign. The four issues were:
 - (a) the respondent's approach to the booking of the claimant's holidays;
 - (b) the respondent's approach in relation to maternity leave cover for Margaret Attard;
 - (c) the respondent's management of the disciplinary process;
 - (d) the respondent's approach to the claimant's action plan and audit (this being described as the last straw).

The respondent's case was that if this amounted to a dismissal then it was fair.

5. I found the following facts:
 - 5.1 The respondent is a large international company and one of the world's leading leisure holiday companies operating in one hundred and eighty countries with more than thirty million customers in thirty-one key source markets. The respondent company employees sixteen thousand employees in the UK.
 - 5.2 The company operates on a regional basis. In the Newcastle region there are twenty-four shops which are graded A to D. One of the shops is in Berwick upon Tweed and is a D branch. This grading determines the ranking of seniority of its managers. The claimant was employed at the Berwick store from 1987 until December 2018, a total of thirty years and for the last twelve years she was the retail manager of the store.
 - 5.3 The claimant clearly enjoyed her job and was proud of her work record. She referred to her branch having been Shop of the Year in 2017 and she having been twice nominated as Manager of the Year.
 - 5.4 Prior to January 2018 the regional manager and the claimant's line manager was Sandra Morgan. It appeared that the claimant had no difficulties when being managed by Sandra Morgan. In December 2017 Sandra Morgan left the company.
 - 5.5 Early in 2018 following a short period of management cover of the region by Gail Smithson, a new regional sales manager was appointed namely Stephanie Curson (referred to throughout as Steph Curson). Initially the claimant and Steph Curson enjoyed a good relationship. However the claimant maintained that this changed and ultimately her case was that it was the treatment by Steph Curson which became bullying, intimidating and unacceptable and that this led to the claimant's resignation on 3rd December 2018.

- 5.6 A considerable amount of evidence was given as to events which occurred during the latter half of 2018.
- 5.7 As to booking of holidays the claimant maintained that Steph Curson was unreasonable in relation to the claimant's request to book a holiday in November 2018 even though this was in accordance with similar arrangements from previous years. When the claimant attempted to book this holiday it was refused twice by Steph Curson. The evidence showed that Steph Curson did ultimately communicate to the claimant that there was no issue as to the duration or timing of the holiday but only as to the claimant not having followed the correct procedure in the manager self-service computer system. There was e-mail evidence whereby Steph Curson informed the claimant that if the holiday was logged correctly then it would be authorised. I found that the claimant did not read or read carefully that e-mail which included the clear statement that the holiday was being authorised. Contrary to this, the claimant continued to allege that she was not being allowed the holiday and she then indicated to Susanne Graham, Retail Manager and Recruitment Expert, that because of this she was proposing to resign. In the event the holiday was formally authorised and taken.
- 5.8 An issue arose as to the cover provided in the Berwick branch for the maternity leave taken by Margaret Attard, a travel advisor. Steph Curson had queried the arrangements made by the claimant to provide a temporary contract to Leonie Taylor who had previously worked in the store. This was to cover holiday weeks which were to be taken by Margaret Attard at the end of her maternity leave. Steph Curson was challenging the amount and length of the cover, suggesting that it meant that the branch would be overstaffed. Ultimately the claimant obtained confirmation that the cover arrangements had been approved by Gail Smithson while she was covering the region. Various further incidents occurred in relation to Leonie Taylor's time at the store and she was requested to transfer to the Morpeth branch which she did not wish to do and she ultimately left the store. The claimant maintained that this incident led Steph Curson to be angry with her. However, no formal issue was taken up with regard to what occurred. This was one of the two issues included by the claimant in her claim form suggesting that it led to Steph Curson victimising her.
- 5.9 On 1st October 2018 the claimant noticed that there was a shortfall of UAE2600 currency in the store currency bureau. The company's guidelines require such discrepancies to be reported immediately to the shop manager's ARM. The claimant did not do so until 8th October when she e-mailed the Foreign Exchange Discrepancies Department at Head Office. Steph Curson was informed of this and on 8th October she instructed Deborah Crannage retail manager for the Durham branch to carry out an investigation at the Berwick store.
- 5.10 This investigation commenced on 10th October at the Berwick store and was in relation to three allegations: 1) wilful neglect of the company's safety

and security policy 2) irregular practice in respect of records and accounts
3) misappropriation of company money and assets.

There was an official investigation at the store on 12th October and this was carried out by Deborah Crannage who interviewed the claimant, Kay Walton and Diane Eke. Notes were taken of the meetings and the CCTV film was viewed. One of the travel advisors Eilidh Jones was not interviewed as she was off that day.

- 5.11 Deborah Crannage reported to Steph Curson the outcome of the investigation and it was decided that the matter proceed to a disciplinary process.
- 5.12 It was not part of the claimant's case that the investigation was unfair or oppressive but there was an issue about not interviewing all of the employees. However, as the claimant ultimately admitted fault in relation to the allegations made against her, I do not find any need to set out further details as to the investigation but on the evidence I found that it was thorough.
- 5.13 The respondent was decided that the claimant be suspended pending the disciplinary hearing. This was in accordance with the company's policy which is common in relation to employment practice. There was an issue as to whether Steph Curson played a part in making the decision for the claimant to be suspended. I do not find that this is a significant factor and it was not a point upon which the claimant placed any material significance.
- 5.14 Julie Guthrie, Senior Retail Manager at the Metro Centre branch was appointed to hold a disciplinary hearing which took place on 6th November 2018. Suzanne Graham, Retail Manager from Wallsend was the minute taker. The claimant was represented by her union officer James Postings of USDAW who also represented her at this Tribunal hearing. The claimant admitted the allegations made against her but mitigated on the basis of her long service and the fact that she had shown remorse and was promising not to repeat such offences in the future. Julie Guthrie considered the matter and was aware that the offences were potentially gross misconduct. She took advice from HR (and not from Steph Curson). Her decision was not to dismiss but to impose a final written warning together with an action plan to be agreed between the claimant and her line manager that the claimant must:
- i. review, read and take ownership of company policies,
 - ii. accept responsibility for safety and security in the store.

As to the disciplinary finding, the claimant was given the right to appeal to her line manager Steph Curson.

- 5.15 The claimant made it clear that she had no issue as to the disciplinary process. I find that the process was thorough and fair. The claimant did challenge comments which were allegedly made by Julie Guthrie during

the adjournment of the hearing and in a private discussion with her representative Mr Postings before he left the disciplinary hearing in advance of the decision being announced. The alleged comments were to the effect that she said that the claimant was lucky that she Julie Guthrie was holding the disciplinary hearing and that others may not have been so lenient. I took into account the admissions by the claimant and that she confirmed that she had been very worried at potentially being dismissed but also that she repeatedly expressed thanks to Julie Guthrie for not dismissing her. I placed no importance on the allegation that Julie Guthrie made these comments. I do not find them relevant with regard to the claimant's case of alleged constructive dismissal. They appear irrelevant as they do not appear to relate to Steph Curson. Julie Guthrie notified the claimant in the outcome letter that she had the right to appeal and that her appeal would be addressed to Steph Curson. The claimant did not appeal.

- 5.16 On 9th November the claimant had a review meeting with Steph Curson. This was a lengthy meeting lasting several hours. The claimant maintained that she was distressed. She felt that Steph Curson was unsympathetic and should have allowed her a comfort break. It was not indicated that any such request was made or refused. The review was three days after the disciplinary hearing.
- 5.17 On 14th November the claimant's assistant manager Diane Eke resigned and left which meant that the store was short of staff. The following day 15th November, which was nine days after the disciplinary, Steph Curson and Suzanne Graham attended the Berwick store to undertake an audit/action plan visit. That in itself was not an unusual step to take, particularly bearing in mind the recent disciplinary. When they attended they had not known that Diane Eke had just left the day before. The claimant maintained that Steph Curson ignored her and sat with her back to her throughout the day of the audit although the evidence and response was that Steph Curson was sitting at the computer for most of the day inputting data and that she and Suzanne did interact with the claimant throughout the day giving hints and tips arising out of the audit. The claimant's shop failed the audit but various hints and tips were communicated as suggestions for improvement. The audit was not used to discipline the claimant personally in any way. The claimant discussed the outcome of the audit with both Steph Curson and Suzanne Graham. The claimant maintained that adverse comments were made to her about the fact that she had in the past had successful audits.
- 5.18 The claimant maintained that the audit referred to was the last straw leading to the claimant's decision to resign.
- 5.19 On 19th November the claimant went on her planned holiday to Mexico and maintained that because of events at work she was dreading returning to the shop.

- 5.20 On Sunday night 3rd December, the day before she was due to return to work, the claimant wrote a resignation letter at 3.00am and e-mailed it to Steph Curson. She knew that Steph Curson was on holiday at that time.
- 5.21 Steph Curson telephoned the claimant on 10th December and asked if she had considered whether she was making the right decision. Steph Curson also sent a standard cooling-off letter to the claimant which was a request that she reconsider her resignation. The claimant stated to Steph Curson that she felt there was no point in discussing the matter any further.
- 5.22 On Friday 14th December Deborah Crannage attended the Berwick store to carry out a partial spot check audit on certain areas. This was part of standard policy and procedure.
- 5.23 On Friday 28th December the claimant telephoned the TUI confidential helpline putting in a grievance against Steph Curson. She was given a reference number and she filled in a leaver's survey. On 7th January 2019 she then sent in a very detailed grievance letter listing a catalogue of issues against Steph Curson.
- 5.24 Notwithstanding that the claimant was by then an ex-employee, the company agreed to investigate the grievance and agreed to appoint Gail Smithson Regional Sales Manager as the independent grievance manager. She carried out a very detailed investigation of the grievance including having discussions with the claimant, Steph Curson, Suzanne Graham and Deborah Crannage. She concluded that there was no evidence that Steph Curson had bullied the claimant. However she did find there were some limited shortcomings as far as Steph Curson was concerned. This included a failure to provide the claimant with her leaver's questionnaire, not offering the claimant a comfort break during her review meeting on 9th November and failing to explain the rationale for some of her decisions in a clear manner. However, Gail Smithson concluded that the claimant may not have welcomed Steph Curson's stricter management style and her requirement for adherence to policies compared with the previous regime under Sandra Morgan. The claimant did not appeal in relation to the grievance. She issued her Tribunal application on 31st March 2019.

6. **THE LAW**

The statute law in this case is section 95 of the Employment Rights Act 1996.

Section 95 (1) (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.

Western Excavating (ECC) Limited v Sharp 1978 ICR 221CA:-

Lord Denning MR: "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 employer's conduct. He is constructively dismissed."

Case referred to by the respondent' representative:

Malik v BCCI [1997] IRLR 462

Kaur v Leeds Teaching Hospitals NHS Trust 2018 IRLR 833

**Bournemouth University Higher Education Corporation v Buckland 2011
EWCA CIV 121**

7. **SUBMISSIONS**

7.1 On behalf of the respondent Mr Randle provided detailed written submissions and referred to the three cases listed above. He invited me to dismiss the claim stating that none of the allegations against Stephanie Curson could be said (individually or collectively) to have constituted a breach of the term of mutual trust and confidence or a fundamental/repudiatory breach of any other term. He emphasised that the claimant's case depended upon the description of bullying by Stephanie Curson. He also said that it was almost three weeks between the store visit on 15th November (last straw) and the letter of resignation 3rd December. In addition the claimant worked her full notice in December and this was inconsistent with her description of the working arrangements. The submissions went through the evidence with regard to the aspects of breach alleged.

7.2 On behalf of the claimant Mr Postings also presented written submissions. He maintained that this was a clear case where there was a fundamental breach because of the numerous unacceptable actions by Steph Curson. She had made the claimant's working relationship intolerable. A person who had worked for a company satisfactorily for thirty years would not have resigned had it not been for such unreasonable and oppressive conduct.

8. **FINDINGS**

8.1 In determining whether there should be a finding of constructive dismissal, it is necessary to decide whether the claimant was entitled to resign as a result of the allegations made as to the employer's conduct. The law makes it clear that this means that there must be a repudiatory breach. The claimant maintains here that the relevant breach was of the implied term of trust and confidence and that this was in relation to the acts and behaviour of her line manager Steph Curson. If there was such a breach then did the claimant resign in response to it and did she do so promptly and without waiving or acquiescing in the said breach?

8.2 Several months had passed since the claimant sent in her resignation letter on 3rd December 2018 when, after the resignation, she went into great

detail in her grievance and listed numerous aspects of Steph Curson's conduct with which she took issue.

- 8.3 For the purposes of the dismissal claim I must look at the reason for the claimant's resignation and whether it was caused by the conduct referred to and whether this led to her terminating her employment.
- 8.4 When the claimant was required to set out the basis of her case in her claim form submitted to the Tribunal on 31st March 2019, she stated that she found it impossible to do her job because of her relationship with her line manager Steph Curson and that she was intimidated and bullied by her. She said this commenced in September 2018 and listed two factors namely the problem with booking her holidays from September 2018 (not April) and also the issue of cover for Margaret Attard's maternity leave. She made no reference in her claim form to the many other issues which she subsequently referred to during the two-day Tribunal hearing.
9. With respect to the holiday issue this appears to have been the result of a failure by the claimant to read carefully an e-mail sent to her by Steph Curson which clearly stated that the holiday would be allowed and that there would be no difficulty as to timing or duration. The claimant had misunderstood the situation. The holidays were allowed and were taken. It may have been that the claimant was frustrated at how her line manager required her to strictly follow the booking policy. I did not have the opportunity of hearing from Steph Curson on this or any issue.
10. As to the Margaret Attard maternity leave, the claimant previously had this approved by the then line manager. When it was queried by Steph Curson, the claimant was able to show that Steph Curson was incorrect. The claimant gained the impression that Steph Curson was upset at this and then made further difficulties which led to Leonie Taylor's resignation. I do not find that there was evidence of any bullying in this incident. It was managed by Steph Curson as she felt appropriate as line manager.
11. With regard to the disciplinary process, regard must be had to the fact that the claimant admitted the allegations against her and in her statement she said she had no significant issues as to the investigation, the disciplinary process or the outcome. I find that the disciplinary processes were of no significance in relation to the claimant's decision to resign. Whilst there may have been some factors in the procedures which could be improved such as interviewing all of the witnesses and the process of appeal and who should hear the appeal or the management of the suspension decision, it is clear that the claimant accepted it was appropriate for her to be disciplined and in the event received a penalty which was less than she feared, namely a final written warning rather than being dismissed. She had the right to appeal. If she did not wish Steph Curson to hear the appeal as to having an even more lenient penalty, she could have asked for someone else to be appointed. However she did not appeal and therefore this did not arise.
12. It was of significance that the claimant was described as being very grateful for not having been dismissed and for having received a final written warning. If it

had been the case that Steph Curson wanted to be rid of the claimant then this may have been shown in the outcome of the disciplinary hearing but this was not the case.

13. As to the audit which followed the disciplinary process, I find that there was no basis for suggesting that this was inappropriate or that it was carried out in an oppressive or incorrect manner. The claimant was clearly feeling vulnerable having just gone through a disciplinary process. However the fact of carrying out an audit at that time did not amount to any form of breach of contract or breach of the duty of trust and confidence. I do not find that it stands the test of being a final straw upon which the claimant could rely in making a decision to resign. Bearing in mind that this occurred so soon after the disciplinary, taking into account that the claimant had admitted the irregularity, it was not unreasonable for an audit to be carried out of the store at that time in order to see what changes may be needed and to see whether there should be some further improvements.
14. I find that there was clearly evidence that the regime introduced by Steph Curson was very different from that which applied when Sandra Morgan was the line manager. Having been a manager for very many years under a different regime, the claimant appeared to find it difficult to adjust to being managed under a more strict regime and to be expected to comply in all respects with the company's policies and procedures. I consider that these contributed to the difficulties which existed between the claimant and Steph Curson. However as to whether this amounted to a breach of the duty of trust and confidence, I find that it did not and there was no convincing evidence that it did.
15. It is not unreasonable for an employer to expect employees to operate under the many established policies and procedures adopted by the company for all its regions and for a regional manager to expect that all managers should comply. I find that this is a case of fair but firm management. It may take time for all employees to get used to such a change and I conclude that the claimant was not able or willing to do so. She did not find the management style acceptable and she chose to resign rather than comply. This was unfortunate bearing in mind that she had been in her job for very many years and that she stated that she loved this employment. On the evidence the claimant has not established that she resigned as the result of a breach by the respondent of an express or implied breach of the contract of employment.
16. For the above reasons I therefore find that the claimant was not constructively dismissed and therefore her claim is dismissed.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
23 October 2019**

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