



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss L M Smith

**Respondent:** Oakland (Leicester) Ltd

**Heard at:** Leicester

**On:** 8 and 9 January 2020

**Before:** Employment Judge Butler (sitting alone)

## **Representation**

**Claimant:** Mr S Liberadzki, Counsel

**Respondent:** Mr A MacMillan, Counsel

# JUDGMENT

The Judgment of the Tribunal is that the claim of constructive unfair dismissal is not well founded and is dismissed. The claim for unauthorised deductions from wages is dismissed on withdrawal by the Claimant.

# REASONS

## **The Claims**

1. The Claimant commenced employment with the respondent on 6 April 2010 after a period of working for the respondent on a self-employed basis as a bookkeeper. She resigned with effect from 28 June 2019 at which point she held the title of the Respondent's Office Manager. By a claim form submitted on 5 September 2019, after a period of early conciliation from 8 July 2019 to 8 August 2019, she claimed that she had been unfairly constructively dismissed and the Respondent had made unauthorised deductions from her wages. The amount of the unauthorised deduction was paid to the Claimant on the second day of this Hearing whereupon she withdrew that part of her claim.

## **The Issues**

2. The Claimant argues that the Respondent fundamentally breached the implied term of mutual trust and confidence which entitled her to resign. The conduct of the respondent she relies on is:

- (a) the repeated and regular insults and derogatory comments made by Mr Oakland, a director of the Respondent, to the claimant;
- (b) the removal of her duties and responsibilities as Office Manager;
- (c) Mr Oaklands's stubborn refusal to accept her advice;
- (d) Mr Oakland's willingness to accept advice from someone other than the Claimant despite her expertise and long-standing relationship with the Respondent;
- (e) the indication made by Mr Oakland and Mr Nassau, a consultant of the Respondent, that her role of Office Manager would be removed from her in the near future; and
- (f) Mr Oakland's failure to employ someone to replace her colleague, Tina Gerrard, causing her workload to increase without any additional remuneration or recognition.

The Claimant relies on the above matters as a course of conduct over a period of time with the last straw being detailed in paragraph (f) above.

3. The Respondent denies that its treatment of the Claimant amounted to a breach of any express or implied terms of the Claimant's contract of employment. It further argues that if there was such a breach it was not a repudiatory breach and if there was a repudiatory breach the Claimant affirmed that breach.

4. The issues before me are, therefore, relatively straightforward. I must determine whether the Respondent's conduct amounted to a repudiatory breach of any term of the Claimant's contract of employment and, if so, whether the Claimant affirmed that breach and, potentially, whether the Claimant can rely on the last straw principle.

### **The Law**

- 5. Section 95 Employment Rights Act 1996 (ERA) provides that an employee is dismissed by his employer if, inter alia, "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".
- 6. Section 98 ERA provides that in determining whether the dismissal of an employee is fair or unfair the employer must show the reason, or principal reason, for the dismissal and that it relates to the employee's capability, conduct, the fact that the employee was redundant or that the employee could not continue to work in the position which he held without contravention of a duty or restriction imposed by legislation. Further, a dismissal may be fair if it is for some other substantial reason of a kind such as to justify dismissal.

7. I have had regard to the following case law:

Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA  
BG plc v O'Brien [2001] IRLR 496 EAT

Malik and Mahmud v Bank of Credit and Commerce International SA [1997] UKHL 23

Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

### **The Evidence**

8. I heard evidence from the Claimant and Ms Tina Gerrard, a former employee of the Respondent. For the Respondent, I heard evidence from Mr James Oakland, director, Mr Ben Mellor, a designer, and Mr Philip Nassau, a Business Coach and Mentor. All of these witnesses provided detailed witness statements, gave oral evidence and were cross-examined. There was an agreed bundle of documents running to 98 pages and references to page numbers in this judgment are to page numbers in the bundle.

9. I consider the Claimant's evidence in relation to the matters which she claims amounted to a course of conduct which ultimately led to her resignation. I note at the outset that her witness statement amounting to 70 paragraphs contained much information which did not have anything to do with the issues before me. I first consider what she said were regular insults and derogatory comments made by Mr Oakland. In this context, at the beginning of her cross-examination, the Claimant said she had a good working relationship with Mr Oakland until 2010. She had no complaints until then. She said he attempted humour at work and made jokes and there was a happy atmosphere.

10. The Claimant said at paragraph 18 of her statement that Mr Oakland first made a derogatory comment towards the start of her employment which I remind myself was in 2010. He allegedly said that if the Claimant was married he would not have to pay her so much. She says that these kinds of comments made her feel extremely undervalued and suggested Mr Oakland did not consider women as equal to men or that her abilities merited a decent wage. Although the Claimant refers to "these kinds of comments" she said in cross-examination that she had a good working relationship with Mr Oakland until 2017 and had no complaints until then. I find this evidence to be somewhat inconsistent. Similarly, the first sentence of paragraph 18 of her statement said she would "constantly" ask Mr Oakland to stop speaking to her in an unprofessional manner. Again, this is inconsistent with her oral evidence and she gives no further examples of these comments. Instead, she said in her oral evidence that "in the main, up to 2017, I was not upset by his comments even though I didn't like some of them".

11. At paragraph 20 of her statement, the Claimant makes reference to what she describes as "incredibly insensitive things" Mr Oakland said about the colour of her hair, her weight and intelligence. She alleges that he made reference to "here comes the badger" if she had not been to the hairdressers to have her roots

touched up and she said this contributed to her low self-esteem. Notwithstanding this allegation, the Claimant accepts that she herself made reference to having a "wider parting" but this was said in jest. She said he made the badger comment once or twice in her oral evidence but does not attach a number to the times he allegedly said this in her witness statement. Further, when asked specifically when he made these comments, the Claimant said she could not remember at all. She attributed Mr Oakland's alleged comment about her size making it difficult to leave through the fire exit as his attempt at humour. She confirms also that there was often talk about fitness and diet in the office. She also could not remember when Mr Oakland said she was thick. She admitted that they both complained when the other did not understand something. I found this evidence to be very vague.

12. As far as I could determine, the reference to the Claimant going back into her "box" was not a reference to her personally but to the size of the office in which she worked at that time.

13. In relation to her various complaints, the Claimant was asked why she did not use the Respondent's grievance procedure which is at page 45 in the bundle. There were two aspects of her response which did not assist her claim. The first was that the comments were not a constant occurrence and the second was that they were not serious enough for her to pursue.

14. The Claimant also stated in oral evidence that Mr Oakland had dealt with the comments he was making by reducing his contact with her so that by the end of 2018 the situation was resolved. She accepted that she felt comfortable criticising Mr Oakland to others and was very direct to him by telling him he needed to get his act together.

15. I further note that the Claimant's allegations in relation to alleged comments by Mr Oakland differ between her statement, oral evidence and her particulars of claim at page 15. At paragraph 5 of the particulars of claim, she states "the insults and offensive language became so prevalent that the Claimant would expect to hear such comments every week". The Claimant has been inconsistent in relation to the prevalence of the alleged comments and the effect they had upon her.

16. The Claimant also complains of the removal of her duties and responsibilities as Office Manager. As far as I can see from the evidence, however, none of the Claimant's duties as Office Manager were actually removed from her before her resignation took effect on 28 May 2019.

17. The third act of conduct relied upon by the Claimant is stated to be Mr Oakland's stubborn refusal to accept her advice. There are a number of instances in the Claimant's evidence where she criticises Mr Oakland for, in effect, his lack of business acumen and his tendency to change the times and specifications for site work. However, Mr Oakland is a director of the Respondent and is, effectively, the person in charge. Whether he ran the Respondent well or badly is a matter for him. He is and was under no obligation to accept the Claimant's advice.

18. Fourthly, and in similar vein, the Claimant complains that Mr Oakland was willing to accept advice from someone other than her despite her expertise and long-standing relationship with the Respondent. The one specific example the

Claimant gives of this is the introduction by Mr Oakland of a regular staff meeting at the suggestion of Mr Nassau, when he did not implement regular meetings when she had suggested it. This, of course, came after Mr Oakland had realised the Respondent was not doing well financially and set about changing things by appointing Mr Nassau. I do not consider this can possibly amount to a breach of any term of the Claimant's contract of employment. In fact, the complaints are more suggestive of the Claimant thinking that she knew best and her advice should always be followed.

19. Fifthly, the claimant complains that Mr Oakland and Mr Nassau indicated that her role of Office Manager would be removed from her in the near future. As far as I can see, she bases this statement on an email she saw on Mr Oakland's computer in February 2019 which she says suggested an Office Manager was to be recruited in October 2019. There was a business plan attached to the email which had images of Post-it notes on it. The Claimant cannot remember whose handwriting was on the Post-it notes as the email is not in the bundle. She accepted Mr Oakland did not indicate she was going to be dispensed with. She further bases her conclusion on seeing the framed Vision Orbit plan in Mr Oakland's office. She accepts she had never seen a Vision Orbit plan before and could not explain why it said there was no Office Manager at the time she was in that role. She acknowledges that the Vision Orbit plan showed that there was one person working in accounts and she thought that was her. In her oral evidence, she said her concern was based on her own conjecture and assumption that she would lose all or some of her role in October 2019. She said it was about what she feared she might lose in the future and thought Mr Oakland was keeping his plans close to his chest until he was ready to tell everyone. This is some way from the "indication" that her role of Office Manager would be removed from her in the future (page 21).

20. Lastly, the Claimant relies on Mr Oakland's failure to replace Tina Gerrard resulting in additional work for her without additional remuneration or recognition. She describes this as the last straw but also stated in her oral evidence that she did not complain as there was not any point and "someone had to do it". She admitted she made no attempt to discuss this extra work with Mr Oakland and did not ask for any extra pay. She also accepted that arrangements were under way to recruit a replacement for Ms Gerrard which the Claimant was actually involved in. She said she worked under these conditions for a month before resigning and accepted the Respondent was trying to recruit a replacement.

21. The Claimant confirmed she did not make any mention of her complaints in her resignation letter which itself was delayed until she secured alternative employment. I found her evidence to be at times vague and inconsistent as noted above. In common parlance, she gave as good as she got. She was not afraid to criticise Mr Oakland to his face and to others. She joked about her hair herself and was not offended by the badger comment. Much of her claim centres around the fact that her role was to disappear or diminish but these thoughts appear to me to be based on conjecture or assumptions.

22. Ms Gerrard said she resigned without explanation and did not think she was treated badly by Mr Oakland and he never shouted or became aggressive with her. She said that sometimes the atmosphere was so bad she did not want to go to

work and she was very uncomfortable at the way Mr Oakland treated the Claimant, to whom he was dismissive. She heard him say the “box” comment several times to the Claimant. She disagreed with the Claimant as to when things began to go wrong saying it was in 2015. She thought the Claimant just got used to it but “stood her ground in arguments”. Mr Oakland, she said, had a poor attitude towards his staff but “it was more the way he went about it than what was said”.

23. Ms Gerrard was unable to give dates when Mr Oaklnad made comments to the Claimant but said the badger comment was made five or six times as opposed to the Claimant saying it was once or twice. My overall impression of Ms Gerrard’s evidence was that it was somewhat exaggerated and designed to help her friend.

24. Mr Oakland produced two witness statements which were somewhat contradictory. His first said he made no derogatory comments towards the Claimant but in the second statement he accepted he had made the badger comment once, that she “wouldn’t get her arse through the window” once, they both referred to each other as being thick and he did tell her to shut up and get back in her box once. He was at pains to say in evidence that he left the paperwork to the Claimant and he was always on site working as a fitter to bring in the money.

25. He accepted they would become frustrated with each other if jobs did not go well but said he never lost his temper. In relation to the meeting with the Claimant when she allegedly told him about her anxiety, he said he thought it was “women’s problems” which she had previously told his wife about and “I stayed well clear of it”. Regarding taking up Mr Nassau’s suggestion of a weekly staff meeting, he said he did not think about the effect this might have on the Claimant.

26. Mr Oakland confirmed he did say that there would be no job changes “yet” but that was because he was not then in a position to make changes. The Post-it notes attached to the business plan did, he said, make reference to hiring an Office Manager but, as far as he was concerned, this did not affect the Claimant’s role as she was accounts based.

27. My impression of Mr Oakland’s evidence was that it showed him as a director with little experience of running a business but who, with the arrival of Mr Nassau, realised he needed to participate in the business side of things and who made a concerted effort to do so. I found his evidence that his comments to the Claimant were made in jest to be genuine, if ill-advised at times but, as recorded above, they were received by the Claimant as they were intended, without any malice.

28. Mr Benjamin Mellor gave evidence which was mainly uncontentious, describing what the Claimant and Mr Oakland did in the business. His view was that the Claimant was not happy with Mr Nassau’s appointment which he gleaned from her comments about the Vision Orbit plan. When Ms Gerrard left he did some of her work but the Claimant did the bulk of it. She did work some lunchtimes and after 5pm but never as late as 7pm as she claimed in her evidence. She did not do this every day. The Vision Orbit plan was not a secret and was in the main office for everyone to see.

29. Mr Philip Nassau said that Mr Oaklad did not have a natural aptitude for running a business and when he was appointed the Respondent was in a high risk financial position and on the verge of insolvency to the extent that Mr Oakland would sometimes not take his monthly salary. He said the Claimant spoke to Mr Oakland in such a demeaning way that one would have thought she was the owner and not Mr Oakland.

### The Facts

30. In relation to the issues, I find the following facts:

- (i) There was a longstanding relationship between the Claimant, Mr Oakland and his family. They obviously knew each other well. The Claimant was openly critical of Mr Oakland's lack of business acumen both directly to him and to others.
- (ii) There was much straight talking between the two of them but also a very jokey and light-hearted atmosphere between them. The Claimant effectively ran many of the essential parts of the business while Mr Oakland, as he was so keen to tell me on many occasions, worked on site "to bring the money in". He neglected the business side of things which he left to the Claimant. She undertook many roles in the business but principally was responsible for important accounting matters.
- (iii) On occasions, Mr Oakland made comments which were close to the knuckle. These included comments about the Claimant's hair and physique. She happily engaged in banter about her hair and the whole office often talked about diet and exercise. Mr Oakland's comments were not made maliciously or with any intent to insult or upset the Claimant. More importantly, she did not receive those comments as such. At no time did she raise a grievance formally or informally about the comments.
- (iv) There was no plan to remove the Claimant from her duties. Mr Oakland, taking advice from Mr Nassau, knew he had to become involved in the business affairs of the Respondent. This would entail changes which would have to evolve over a period of time. The Claimant's view that she would be undermined, have her role reduced or be removed altogether was based on assumption and conjecture.
- (v) There was no last straw. As she had done before, when Ms Gerrard left the Respondent, the Claimant took the view that "someone had to do (the additional work)". There was no intention on the part of Mr Oakland not to replace Ms Gerrard.

### Submissions

31. I heard detailed submissions from both counsel. Mr MacMillan submitted that there had been no breach of any term of the Claimant's contract of employment. Mr Oakland had not acted in a way calculated or likely to damage the relationship of trust and confidence between employer and employee. In bringing in other personnel he had acted in a way necessary to meet the needs

of the business if it was to survive. The language used towards the Claimant may have been unwise but he and the Claimant were old acquaintances and had a good relationship. Details of incidents given and relied on by the Claimant were vague and she was unable to give concrete dates as to when they occurred. Her failure to act meant she had, in any event, affirmed any possible breaches of trust and confidence. She did not resign until she had another job to go to. She had been resistant to change and had resigned in anticipation of a future breach. The additional work she undertook when Ms Gerrard left was in accordance with her contract of employment which provided for additional duties to be carried out in accordance with the needs of the business.

32. Mr Liberadzki submitted the Claimant had been truthful in relation to the comments made by Mr Oakland and had a good recollection of them. Mr Oakland's comments may have had the effect of a repudiatory breach even when that was not intended. The Claimant may have been mistaken in her assumptions about the email with post it notes and the Vision Orbit plan, but the issue was the failure to tell her what was happening or to reassure her. Regarding the last straw principle, a failure to act in appointing a replacement for Ms Gerrard can amount to a breach of the implied term of trust and confidence in the same way a positive act can. Remaining in employment for a month after the last straw did not amount to an affirmation but it was born out of financial necessity.

### Conclusions

33. It is not very often that comments made by one individual to another, particularly a man to a female employee can be correctly classified as banter. In order for that to be the case, it is necessary to be satisfied that the comments were made and received as such. This requires a close examination of the circumstances surrounding the comments.

34. In this case, I have little hesitation in classifying Mr Oakland's comments as banter. The Claimant had worked with him for many years. She was an integral part of the business and, during the course of her employment, had turned her hand to many of the functions of that business; examples include design work, accounts, estimating, ordering, invoicing and planning the work. Their relationship was, with bickering on both sides, a close one in that there was straight talking between them. The Claimant told Mr Oakland and others that, in terms, he was a hopeless businessman. To him, carrying out the fitting of new kitchens and bathrooms was the most important aspect of the business. They frequently clashed over particular jobs. He did make the comments attributed to him in relation to "badger", the Claimant's posterior and her "box". I accept there was no malice on his part but the important issue is how those comments were received by the Claimant.

35. In my view, the comments were received in the spirit in which they were made. The Claimant's own evidence was that she made comments about her "wide parting" when her roots needed to be dyed and Mr Oakland continued the joke. The comments about the Claimant's physique were part of an ongoing discussion amongst staff about fitness and diet. The "box" comment I find to be completely innocuous. These conclusions are supported by the Claimant's own evidence. She could not recall specific or



approximate dates when the comments were made and her evidence was at odds with that of Ms Gerrard in terms of how many times the badger comment was made. She never formally complained about them and made no mention of them in her resignation letter. More particularly, and tellingly, she said in evidence about the comments, "It wasn't a constant occurrence. It wasn't serious enough for me to pursue". This contradicts her claim that the comments were "repeated and regular insults and derogatory comments..." (page 21). This really closes the door on the claim that the Claimant is entitled to rely on the comments made to support her case.

36. That the Claimant's duties and responsibilities were removed (page 21) is also open to question. Although Mr Oakland was not at all forthcoming in what his plans were, I suspect because they had not been finalised, the Claimant's view is, as discussed above, based on assumptions and conjecture as a result of seeing documents on Mr Oakland's computer and the Vision Orbit plan. The Vision Orbit plan was not a secret document but, as Mr Mellor confirmed, was hanging on the wall for all to see. I do not accept the Claimant's evidence that Mr

Nassau or the Mr Oakland gave an indication that her role as Office Manager would be removed from her in the future. I do not consider these matters support the claim.

37. That Mr Oakland did not accept the Claimant's advice and preferred to take the advice of Mr Nassau completely ignores the fact that Mr Oakland was a director of the Respondent and was under no duty or obligation to take or follow any advice given by the Claimant. Indeed, she was under a duty to follow his reasonable management instructions. This rather supports Mr Nassau's evidence that the way the Claimant spoke to Mr Oakland was more in line with her being a

director and Mr Oakland an employee. The Claimant's evidence does not support her claim.

38. I did not find the Claimant's evidence regarding the appointment, or lack of it, of Ms Gerrard's replacement to be credible. Her claim at page 21 refers to a failure to replace Ms Gerrard yet they both had a hand in the appointment process which was inadvertently mismanaged and, consequently, delayed, by Mr Oakland. The additional work carried out by the Claimant was always going to be a temporary measure and she knew that. There was no express right to additional remuneration for the extra hours worked and asking her to do so was supported by an express contractual term. Her second contract at page 54B provides at clause 9, "You will be expected to keep your working hours flexible to a reasonable extent, depending on the needs of the Company. At times the needs of the Company will require these hours to be modified and you will be expected to vary your hours of work accordingly". I find no breach of contract in this scenario.

39. In conclusion, I did not find the Claimant's allegations to be credible. On the contrary, the claim seems to be an attempt to manufacture a claim out of events which, in the main, were of no consequence to her. In particular, it is not possible for her to say on the one hand that matters were not serious

enough to pursue and on the other hand to rely on them to support a claim of constructive unfair dismissal. I do not find that any of the matters referred to amount to a breach of contract let alone a fundamental breach and they do not amount to a course of conduct leading to a last straw.

40. For the above reasons, I dismiss the claim.

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Employment Judge Butler

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Date: 09 February 2020  
JUDGMENT & REASONS SENT TO THE PARTIES ON

10 February 2020

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FOR THE TRIBUNAL OFFICE