EMPLOYMENT TRIBUNALS

Claimant: **Miss K Stacey**

Respondent: **SBH Cliffden Limited**

Heard at: **Exeter** **On:** **24-26 February 2020**

Before: **Employment Judge O'Rourke**

Representation
Claimant: In person
Respondent: Ms Elvin – litigation consultant

JUDGMENT

The Claimant's claims of constructive unfair dismissal and breach of contract in respect of notice pay fail and are dismissed.

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed for approximately four years by the Respondent, as a hotel general manager, following her employment having been TUPE-transferred from a previous employer, the Royal National Institute for the Blind (RNIB), in or about April 2018. She managed the Cliffden Hotel, in Teignmouth. She resigned with immediate effect, on 8 February 2019 and subsequently brought this claim of constructive unfair dismissal and breach of contract in respect of PILON.

2. The issues in respect of those claims were fully canvassed at a telephone Case Management Preliminary Hearing, on 26 July 2019 and are not therefore repeated here, but, in summary, relate to alleged unacceptable demands being placed on her by her new manager, Ms Barnes, resulting in her going on sick leave; pressurising her while she was on sick leave, as to attending meetings; failing to carry out a full and fair investigation in respect of a subsequent grievance of hers and finally, failing also to carry out a full and fair grievance appeal.

The Law

3. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) sets out the definition of constructive unfair dismissal. I remind myself that the burden of proof is on the Claimant, in respect of such a claim.

4. In respect of the implied term of trust and confidence, in the case of **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462**, the House of Lords said that the term was held to be (and as clarified in subsequent case law) as follows:

   "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

5. The Court of Appeal made clear in **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** that it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

6. In respect of the claim of breach of contract in respect of notice pay that claim is uncontentious, to the extent that it is entirely dependent on the outcome of the constructive unfair dismissal claim.

The Facts

7. I heard evidence from the Claimant and on behalf of the Respondent, from Ms Margaret Garcia, a manager of a 'cluster' of hotels in the Claimant's area; Ms Kerian Barnes, an operations director and the Claimant's line manager and Ms Emily Sheldon, a former HR business partner, who conducted the Claimant's appeal against the grievance outcome.

8. I set out the following uncontentious chronology:

   a. In or about late 2017 the Respondent's parent company, Starboard Hotels Ltd, arranged to purchase the Cliffden Hotel from the RNIB (along with other hotels, at the same time). Prior to the purchase, the Hotel generally catered for visually-impaired guests (although there was some dispute as to the proportion of these guests overall, but at least approximately 50%). The sale was completed in December of that year, with the formal transfer taking place on 17 April 2018. It was agreed evidence that between December 2017 and April 2018, Starboard did liaise (at least to some extent) with the Claimant as to the forthcoming transfer.

   b. May 2018 – the Claimant was asked to work on a budget and business plan for year July 2018 to June 2019 and she presented that plan to directors in May 2018 [311-315]. A major change to the Hotel's budget would be the expectation that the budget for staff would be reduced, from 65% in the previous year, to 35% of the total budget.

   c. 5 July 2018 – between May and July 2018, various concerns were raised as to management issues, which will be dealt with in more detail below, but the Claimant went sick on this date and did not return to work.

   d. 8 July 2018 – the Claimant brought a grievance, covering similar issues to that in this claim [154-155].

e. 17 August 2018 – the grievance was heard by an independent consultant and his report was published on 28 August, partially upholding the Claimant's grievance [182-194].

f. 31 October 2018 – the Claimant was provided a copy of the report and on 7 November appealed against the outcome.

g. 3 January 2019 – the appeal was heard and the outcome, dismissing it, was sent on 23 January 2019 [289-298].

h. 8 February 2019 – the Claimant resigned [304-306].

i. 10 April 2019 – the Claimant filed this claim.

9. Alleged Acts or Omissions of the Respondent leading to Resignation. Based on the allegations set out in the case management order, these are as follows:

a. That at an initial meeting between the Claimant and Ms Barnes, the latter was dismissive of the Claimant and did not ask her about her previous skills or experience, indicating a lack of interest in the future working relationship. Ms Barnes firmly denied this allegation, referring to discussions they did have as to future projects. I had no reason at this, or any other point in Ms Barnes' evidence, to doubt what she said. She gave clear and forthright evidence and was not shaken in cross-examination. There was no corroborative evidence whatsoever to support this allegation and based therefore, firstly, on the possibility that the Claimant was simply perceiving this to be the case and secondly, the burden of proof being on her, she has not satisfied that burden and therefore this allegation is dismissed.

b. The next grouping of allegations related to the alleged placing of unacceptable demands on the Claimant, rendering it impossible for her to fill her role, as follows:

i. That Ms Barnes prohibited the use of agency workers to fill gaps in staff, instead instructing that they should be filled in-house. Ms Barnes agreed that that was her view and general policy, as current staff would be more reliable than agency staff and cost less and said that when gaps arose, she had suggested to the Claimant how to fill them, from existing staff, but that the Claimant had ignored those suggestions.

ii. That the staffing budget be cut from 65% to 35% of the overall budget, which was achieved, but resulted in an increase in guest complaints. There was no corrobative evidence provided that complaints had increased. I was simply provided with some examples of such complaints. The Respondent's only apparent concern in respect of such complaints was that it appeared to them that the Claimant was not responding to them, but there was no evidence that this was a particularly live issue between her and Ms Barnes. A separate allegation that this reduction was required to be implemented on a monthly basis (as opposed to spread over the year) was not included in the claim, or in the case management order and is not therefore considered further

iii. That the Claimant was required to implement a buffet-style breakfast, resulting in further complaints. There was no dispute

that there was such a requirement and it was agreed evidence that there were complaints, although Ms Barnes said that those were in relation to the contents or variety of the buffet provided, not the fact of it being instituted. Ms Barnes said that any shortfall in foodstuffs provided on the buffet were ultimately down to ordering failures by the Claimant, or on her behalf, by the Hotel chef, for whom she was responsible. She said that while the Claimant sought to blame the wholesaler (Brakes), there was no evidence of her having escalated such concerns to either Brakes, or to her. Apart from what she said on this point, the Claimant provided no corroborative evidence of such failures by Brakes, or of a particular depot of theirs and therefore, on balance, she has failed to meet the burden of proof in this respect and this allegation is dismissed.

iv. That the Claimant was given insufficient notice, of a few days, of the need to input her staff's shift details into a new payroll system, at a time when the Hotel was particularly busy (weekend of 19/20 May 2018). Both Ms Barnes and Ms Garcia denied such short notice, referring to the Claimant having been advised of the requirement in mid-April [72-73] and stated that she was given specific training on the system, on 26 April [76]. Ms Garcia also said that in the end, she and a colleague took the data from the Claimant and inputted it themselves, but that that was difficult to do, due to the Claimant not keeping clear records of employees' shifts, instead relying on entries in a booking in/out book used also by hotel guests. Ms Garcia said that the entries were sometimes unclear and first names were sometimes used, making it difficult to know who was referred to. On balance, therefore, the evidence indicates that the Claimant was not given short notice of this requirement, but for various reasons of her own, was unable to comply.

v. Two combined allegations that she was obliged to work excessive hours and carry out reception, bar and waitressing duties, due to the pressure to reduce the staff budget. It seems likely that the Respondent was aware that the Claimant was working longer hours than she should and doing non-managerial duties. Both Ms Barnes and Ms Garcia said that they encouraged the Claimant against doing so and made suggestions as to how, with changes to staff shifts and double-roling of some staff, this could be avoided, but that she disregarded such suggestions. While Ms Barnes accepted that all managers will, on occasion, have to work additional hours to complete their job, they considered that the Claimant's additional hours and adoption of other roles was simply down to poor management on her part. Again, this is a matter upon which the burden of proof rests on the Claimant. Clearly, a reduction in staff budget must impact on staffing levels, but there is nothing like sufficient evidence for me to find that that Claimant's workload was directly linked. It was also suggested to her that she could hire an assistant manager, to lessen her workload. Such a person was recruited, but was not yet in place by the time the Claimant went on sick leave.

vi. And finally, under this heading, a general refusal to provide the Claimant with additional resources or support, leaving her physically and mentally exhausted. The Respondent stated that

they did provide additional resources, to include advice from Ms Barnes, practical support from Ms Garcia (such as inputting the staff rosters), training from other managers and the provision of additional staff from another hotel. Generally, however, for there to be a refusal from an employer, there needs to be a request from the employee to initiate it and the evidence here as to any such detailed request is lacking. At no point, in writing, prior to going sick and bringing her grievance, did the Claimant set out her subsequent concerns and the additional resources she felt she needed. Therefore, while she may have had concerns, she is in difficulty, until her grievance, in establishing that they were clearly set out for the Respondent and for Ms Barnes, in particular. As to her stated physical and mental exhaustion, the Claimant went on sick leave on 5 July 2018. She was clearly ill at that point, as the fit note of that date [334] refers to her suffering from work-related stress. A subsequent, more detailed letter from her GP, sent on14 August [174] also referred to post-traumatic stress disorder, due to the death of a guest at the hotel. The Respondent has never disputed this medical evidence, itself obtaining an occupational health report at a later stage [239], which broadly concurred. What is lacking, however, is any evidence that prior to the Claimant going sick, the Respondent was aware of her medical condition. While the Claimant said that she discussed it with Ms Garcia, she does not say so in her statement and nor does Ms Garcia refer to such conversations in hers. Nor was Ms Garcia questioned on this point in cross-examination. I conclude, therefore that the Respondent could not have been aware of the Claimant's ill-health, or any effect its actions may have had in potentially worsening it, until the Claimant went sick, which, as Ms Garcia said, '*came as a bolt out of the blue'*.

c. The next grouping of allegations comes under the heading of an implied badgering or pestering of the Claimant by Ms Barnes, while she was on sick leave. I consider these as follows:

    i. Ms Barnes leaving a voicemail for the Claimant, on the first day of sickness absence, telling her to attend the hotel to carry out a handover. Ms Barnes denied any such request, stating that she had simply attempted to contact the Claimant to establish the nature of her sick leave, as the Claimant had not called her, as required by the sick leave policy, instead texting Ms Garcia. The Claimant did not provide a transcript or a recording of the voice mail and she has not therefore met the burden of proof in this respect.

    ii. A request by Ms Barnes, by letter of 5 July, requesting her to attend a welfare meeting on 10 July [163]. This does seem unnecessarily prompt of Ms Barnes, considering that the Claimant had only gone sick that day. Ms Barnes said that such a request was in line with the sickness absence policy and that she had no direct information at that point as to the nature of the Claimant's illness. I consider, however that it was unreasonable to make such a request so promptly, when an employee can self-certify for the first week of illness and a fit note was provided six days later.

    iii. A request by Ms Barnes, by letter of 9 July [168], requesting that the Claimant contact her after 17 July, to discuss a date when she

might be available for a welfare meeting. I consider this to be an entirely reasonable request, bearing in mind that it was based on the Claimant saying in her grievance email of 8 July that she wouldn't be in a position to discuss any further meetings, until she had seen her doctor on 17 July [167]. Also, at this point, no fit note had yet been provided and the detail of the Claimant's illness was not known, until receipt of the GP's letter, over a month later.

iv. Emailing the Claimant on 2 August to inform her that her grievance would be dealt with by an independent consultant [171]. I can see nothing unreasonable in doing so, as the Claimant had brought a detailed grievance and gave no indication that she wished the hearing of that to be delayed and therefore she had to be informed by somebody of that fact.

v. On 7 August, receiving a voicemail from the consultant to contact him about her grievance. Again, I reach the same conclusion. The Claimant had brought a lengthy grievance, which she gave every indication she wanted dealt with promptly. If she had wished to delay that procedure, until she was better, then she could have said so. Indeed, to the contrary, she subsequently complained of a delay in providing her with the report as to its outcome.

d. The next grouping of allegations relates to the handling of the grievance itself, stating that it was not fully and fairly investigated. I consider these as follows:

i. That Mrs Barnes instructed the consultant to carry out the procedure. I can see nothing wrong in her doing so. Ms Barnes was very much the subject of the grievance and therefore could not have dealt with it herself. The alternative was for another more senior manager to deal with it, but as Ms Barnes is quite senior in the organisation, it was felt more appropriate to instruct an independent consultant, an option which is open to employers. The Claimant did not object to the consultant's appointment and provided no evidence that any instructions provided by Ms Barnes to him were in any way prejudicial. This allegation is therefore dismissed.

ii. That the consultant only interviewed Ms Barnes. The problem for the consultant, however, was that the Claimant had brought a lengthy grievance, focused very much on Ms Barnes and thereafter refused to engage with the process and he therefore had limited information to go on. She did not suggest other people to be interviewed and a friend acting on her behalf at the time, a Ms Jenkins, said in a letter to the Respondent of 16 August [179] that she would not be attending any grievance hearing, or providing any written submissions, beyond her grievance email, which Ms Jenkins considered set out '*her concerns with sufficient detail for any investigation to be commenced and witnesses to be interviewed'* and requesting that it be commenced immediately. This wish not to be involved in the process was said to be due to the Claimant's Ill-health at the time. That may be so, but an option open to the Claimant, therefore, was to delay the grievance until she felt well enough to participate. Another possible consideration for this lack of involvement was that shortly after this

correspondence, in an email to the Claimant of 28 September [195], Ms Clark asks her '*how has the job hunting been going?'*. The Claimant agreed that she had been applying for jobs. The reference to 'job hunting' implies an active effort on her part and one that probably had been ongoing for at least a short period of time prior to the email. The Claimant said that it was her practice to speculatively apply for jobs and that she had done so even before being transferred to the Respondent. When asked whether, if any of the potential employers she had applied to had in fact offered her a job, she would have accepted it, she said that actually she was too ill to have taken up such an offer. I found this explanation deeply implausible. If the Claimant was well enough to 'job-hunt' then, if the right job came up, she would have taken it. Her illness was very much linked to the job-related stress she felt from working for the Respondent and which therefore would have been unlikely to have been replicated in any new employment. I find, therefore that from around this point, early/mid September, the Claimant had already decided to cease work with the Respondent and that therefore the outcome of any grievance and her subsequent appeal were irrelevant to that consideration, hence her lack of involvement in the grievance process. Her subsequent complaints about its process are therefore insincere. In any event, any such alleged failure by the consultant was rectified subsequently at the appeal stage, when several more witnesses were interviewed. The Claimant's absence from work was cushioned by the provision of company sick pay, at full pay for three months and half pay thereafter, from 29 September, until 20 December [249].

iii. Finally, the complaint that Ms Barnes was to action the outcome of the grievance. It is not for an employee to choose which manager will manage them and while the grievance was partially upheld, the outcome certainly did not contain such a degree of criticism of Ms Barnes that she should step aside, or stop managing the Claimant. Ms Barnes, in due course, prepared a comprehensive return to work package, with training and staged return, which the Claimant chose not to avail herself of.

e. There is only one complaint in respect of the appeal process, which is that Ms Sheldon failed to interview employees suggested by the Claimant. This is simply not supported by the evidence. Ms Sheldon interviewed the Claimant on 3 January 2019 and noted that as she had complained about the lack of interviewees at the initial grievance stage, she '*wanted to clarify the additional people to speak to'* and noted that '*Ms Garcia, Tim, Jonny, Ms Barnes, Paul, the Consultant and potentially Linda*' were *'suggested'*, to which it is noted that the Claimant '*agreed with this'*. Ms Sheldon sent the Claimant those notes on 9 January [277]. The Claimant made no amendment to them, at least on this point. Ms Sheldon went ahead to interview the people named, or had good reason for the one or so that she could not. Therefore, it is absolutely clear that this allegation is unfounded. I note also the uncontested evidence of Ms Sheldon (paragraph 18 of her statement) that she '*was surprised that before I could go through the appeal I was asked to consider a settlement agreement by Chris* (Ms Jenkins) *and Karen, as Karen was five months on and still not able to return to work',* which request '*she was happy to go on the record'*. This is, I consider further evidence of the Claimant's true intentions of never returning to the Respondent's employment, regardless

of the outcome of that appeal and the contents of the subsequent return to work package offered to her. She instead resigned, on 8 February 2019 [304].

10. Did any such acts or omissions of the Respondent amount, either individually or cumulatively, to a fundamental breach of the implied term? I note at the outset that in respect of many of the alleged acts or omissions, they did not occur as described, but in respect of those that did take place, I find the following:

    a. There was an undoubted additional pressure on the Claimant, as a manager, due to the Respondent taking over the Hotel from the RNIB. There was uncontested evidence that under the RNIB, the financial demands were less, with the Hotel running, in the year ending 2017, at a technical potential loss (a net profit of £24k, before support costs) (Ms Barnes' statement paragraph 6). The Respondent sought, however, to put the Hotel on a more commercial footing, opening it to a wider clientele and seeking to enhance profits. This was inevitably going to result, for the Claimant, in a pressure to change, from how things had been run for the three previous years. While it was uncontested evidence that initially, when she gave her budget and business plan presentation to the board of directors in May 2018, she was upbeat about the changes and confident they could be achieved, this soon dissipated, with her going sick less than two months later. An employer is entitled to set targets for how it wishes its business to be run and it is uncontested evidence that the staffing target, in particular, was applied to all twenty hotels owned by the parent company, to include one that had also been purchased from the RNIB. This was not something, therefore that was specifically targeted at the Claimant. What is clear, however, is that she could not in fact manage the staffing at the Hotel, under the new regime. The Respondent suggested that this was down to poor management on her behalf and a reluctance to change, or accept advice and recommendations and the Claimant, in turn, blamed the reduction in staff budget. It may well be a combination of the two, based on the evidence I have heard, but it is, nonetheless, for managers to manage and if they cannot, with the resources available and having attempted to implement the recommendations of their employer, then to flag up to their line manager, in clear and certain terms, what is necessary for them to do their job properly. They should, in effect, propose an alternative plan, 'putting the ball back in the employer's court', for them to respond to. This, however, did not happen in this case. It appears that the Claimant pretty quickly decided that she did not wish to work under the new regime and had no solid proposals as to how she might be able to do so. She might, for example, have asked formally for the staff budget percentage to be increased, by say 10%, for 'a settling in period', to allow her and the Hotel some breathing space to adjust to the new commercial realities, but she did not, or make any other suggestion. Instead, she simply went sick and had no involvement thereafter. Applying **Malik**, I can see no course of conduct by the Respondent that was calculated or likely to result in destroying or seriously damaging the relationship between it and the Claimant. The Respondent was merely seeking to increase the profitability of its business, applied standards common to all of its hotels and the evidence indicates, provided advice and recommendations which the Claimant was reluctant to adopt. The fact that the Claimant could not cope with such a change is not a fundamental breach of her contract of employment.

b. In respect of the handling of her sick leave, I consider, apart from the one criticism of Ms Barnes' overly-prompt invitation to a welfare meeting, that the Respondent handled this sympathetically. There may have been some initial pressure on her, but this was very quickly dropped, once the extent of her illness was known. I note also that payment of Company sick pay was at the discretion of the directors [contract 38], but that nonetheless the Claimant received her full entitlement, to both full and half pay. I see no breach of contract therefore in this respect.

c. Finally, in respect of the handling of the grievance and the appeal, it should be clear from my previous findings that I have no criticisms of these procedures, combined with my view that the Claimant was not genuinely engaged in them.

11. Accordingly, therefore, having found that such acts or omissions that did occur did not amount singly or cumulatively to a breach of the implied term of trust and confidence, I do not, strictly speaking, need to go further. However, for the avoidance of doubt, I don't consider that even if there had been some fundamental breach of the implied term, due to the pressure the Claimant felt herself under as a manager, she did not resign in respect of any such breach. Instead, she maintained a lengthy period of largely-paid for sick leave, involving a lengthy grievance and appeal procedure, in which she was not really engaged, while seeking new employment. The allegations in respect of these procedures cannot therefore have formed the 'last straw' she claims and indeed, in her own resignation letter, she raised an entirely different alleged 'last straw', i.e. irregularities with her pay. Her decision to later dispense with that allegation and to substitute instead dissatisfaction with the appeal process indicates the implausibility of that element of her claim. Therefore, even if there had been a fundamental breach, at or near the point she went on sick leave (which, for the avoidance of doubt, I don't consider there was), the onus was on her to resign promptly in the face of that breach, which she did not. I consider it more likely that her resignation was prompted instead by the termination of her Company sick pay and the exhaustion of the appeal process.

12. Breach of Contract in respect of PILON. As the Claimant was not unfairly dismissed, she can have no claim for breach of contract in respect of notice pay.

13. Judgment. For these reasons therefore, I find that the Claimant's claims of constructive unfair dismissal and breach of contract in respect of notice pay fail and are dismissed.

Employment Judge C H O'Rourke

Date: 26 February 2020

Judgment and reasons sent to parties: 27 February 2020

FOR THE TRIBUNAL OFFICE