



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Davis
Respondent: Mr David Brian Sherlock & Mrs Tracey Anne Sherlock

Heard at: Leeds Employment Tribunal
Before: Employment Judge Deeley
On: 18 and 19 March 2020

Representation
Claimant: In person (with assistance from Ms E Sayles)
Respondent: Miss S Brewis (Counsel)

JUDGMENT

1. The claimant's claim for constructive (unfair) dismissal under Part X of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant has not succeeded in a claim listed under Schedule 5 of the Employment Act 2002. She therefore cannot be awarded compensation on the basis that the respondent has failed to provide her with a statement of written particulars of employment under s38 of the Employment Act 2002.

REASONS

INTRODUCTION

Tribunal proceedings

3. The parties provided a joint file of documents which I considered together with witness statements and oral evidence from:
 - 3.1 the claimant;
 - 3.2 Ms Elsie Sayles (who attended the grievance hearing with the claimant);
 - 3.3 Mrs Tracey Sherlock;
 - 3.4 Mrs Karen Needham (an employee of the respondent); and
 - 3.5 Mr Brian Clarke (who heard the claimant's grievance).

4. Mr David Sherlock was unable to attend the hearing due to his medical condition. I also considered the oral submissions made by Ms Sayles on behalf of the claimant and by Ms Brewis on behalf of the respondent, together with Ms Brewis' written submissions.

ORDER – NAME OF RESPONDENT

5. The parties agreed at the start of this hearing that the correct respondent to this claim is Mr and Mrs Sherlock. I ordered that the name of the respondent should be amended with the consent of the parties to “Mr David Brian Sherlock & Mrs Tracey Anne Sherlock”.

CLAIMS

6. The claimant brought a claim for constructive dismissal only, which is a claim for ordinary unfair dismissal under Part X of Employment Rights Act 1996 (the “**ERA**”).
7. In addition, the claimant stated that she was not provided with a written statement of particulars of employment by the respondent at any time during her employment. The Tribunal has the power to award compensation for such failure under s38 of the Employment Act 2002, if the claimant succeeds in her claim for constructive dismissal. The claimant did not seek to bring a claim under s11 of the ERA for the Tribunal to determine what particulars ought to have been included in order to comply with s1 of the ERA.

ISSUES

Constructive dismissal

8. The issues to be decided in relation to the claimant's claim of constructive dismissal are as follows:
 - 8.1 Did the employer breach the implied term of mutual trust and confidence - i.e. that the employer will not act in a manner which is calculated or likely to damage:
 - 8.1.1 the relationship of trust and confidence between employer and employee; and/or
 - 8.1.2 the implied term to provide either a suitable and/or a satisfactory working environment?
 - 8.2 Mrs Davis complains that either:
 - 8.2.1 her employer permitted or failed to prevent the alleged conduct by Thomas Sherlock; or
 - 8.2.2 her employer carried out the conduct;
- set out below (paragraph references are references to the Grounds of Complaint):
- a) **Paragraphs 6a to 6f:** Thomas Sherlock's behaviour during 2017;
 - b) **Paragraph 7:** Mrs Sherlock's discussion with the claimant in 2018 regarding Thomas Sherlock holding a knife to her throat and Mrs Sherlock's subsequent handling of the claimant's complaints regarding Thomas attending the Post Office premises;

- c) **Paragraph 8:** the incident on September 2017 between the claimant and Thomas Sherlock;
 - d) **Paragraph 8:** Mrs Sherlock's discussions with the claimant in the lead up to the Court Order relating to Thomas Sherlock, granted on 20 February 2018;
 - e) **Paragraph 9:** the incident on 9 March 2018 outside of the Post Office between Thomas Sherlock and the claimant;
 - f) **Paragraph 9:** three further incidents during 2018 when Thomas Sherlock attended the Post Office premises; and
 - g) **Paragraph 10:** the incident on 29 April 2019.
- 8.3 Do any of the complaints set out at paragraph 2 above constitute a breach of Mrs Davis' contract terms? *[Mr and Mrs Sherlock contend that they are not responsible for Thomas Sherlock's conduct.]*
- 8.4 In particular, was the incident on 29 April 2019:
- 8.4.1 sufficiently serious to repudiate the contract, leading to Mrs Davis' resignation (without notice) on 28 May 2019; and/or
 - 8.4.2 the last in a series of incidents which justified Mrs Davis' resignation (the "last straw")?
- 8.5 Did Mrs Davis resign in response to such breach or breaches or for another unconnected reason? *[Mr and Mrs Sherlock contend that Mrs Davis left to take up new employment.]*
- 8.6 Did Mrs Davis delay too long in terminating the contract in response to the employer's alleged breach or breaches?
- 8.7 If the respondent did dismiss the claimant:
- 8.7.1 did the respondent have a potentially fair reason for that dismissal, namely some other substantial reason (i.e. that it was impossible for the claimant to work in the Post Office when the respondent was unable to prevent Thomas Sherlock from attending the Post Office) under s98(1)(b) of the ERA)?
 - 8.7.2 was the dismissal within the band of reasonable responses?
 - 8.7.3 did the claimant's conduct cause or significantly contribute to her dismissal?

Failure to provide a written statement of particulars of employment (s38 Employment Act 2002)

9. Has the claimant succeeded in any claims that fall within Schedule 5 to the Employment Act 2002 (i.e. her claim for unfair dismissal under s111 of the ERA)?
10. As at the date of these proceedings, did the respondent fail to provide the claimant with a written statement of particulars of employment under s1 of the ERA?
11. If so, what sum should be awarded to the claimant? In particular:
- 11.1 are there exceptional circumstances that would make it not just and equitable to award two weeks' pay; and

11.2 is it just and equitable to award four weeks' pay?

RELEVANT LAW

Constructive dismissal

12. The right not to be unfairly dismissed is set out in s94 of the ERA. In order to bring a claim for unfair dismissal under s111 of the ERA, the claimant must first show that her resignation amounted to a 'dismissal', as defined under s95(1) ERA:

“s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—...

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

13. The claimant must show the following key points to demonstrate that her resignation amounted to a dismissal under s95(1) of the ERA:

13.1 that a fundamental term of her contract was breached;

13.2 that she resigned in response to that breach; and

13.3 that she did not waive or affirm that breach.

14. The claimant's Particulars of Claim rely on the incident on 29 April 2019 as the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Mutual trust and confidence

15. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) 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.”

16. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8): *“The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention...”*

Duty of co-operation and support - suitable and/or satisfactory working environment

17. The implied term that an employer has a duty to provide a suitable working environment or a satisfactory working environment has been set out in many cases,

including: *Waltons and Morse v Dorrington* [1997] IRLR 488 and *Graham Oxley Tool Steels Ltd v Firth* [1980] IRLR 135.

18. I note that these cases also set out two key principles that are relevant to this claim:

- 18.1 a breach of an employer's duty of care (or a breach of any statutory health and safety duty), does not of itself result in a fundamental breach of contract by the employer – this will depend on the gravity of the breach and the period of which it extends; and
- 18.2 any failure to make a complaint (or any formal complaint) does not necessarily prevent a claim based on this implied term when dealing with small companies where working conditions are well known to the owners or directors.

Unfair dismissal provisions

19. If the claimant was found to be dismissed by the respondent, the respondent will seek to rely on 'some other substantial reason' as a potentially fair reason for such dismissal under s98(1)(b) of the ERA ("**SOSR**"), namely that it was not possible for the claimant to continue to work in the respondent's Post Office when Thomas Sherlock could enter the Post Office at any time.

20. The respondent would need to demonstrate that they dismissed the claimant due to SOSR if the claimant was found to be dismissed. The tribunal must then consider the fairness of the dismissal for that reason under s98(4) of the ERA, taking into account the guidance in *British Home Stores Limited v Burchell* [1980] ICR 303 and *Iceland Frozen Foods Limited v Jones* [1983] ICR 17.

21. Section 98(4) of the ERA states as follows:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case..."

Failure to provide a written statement of particulars

22. The relevant provisions of s38 of the Employment Act 2002 are as follows:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change)....,

the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.”

23. Unfair dismissal is included in the list of claims at Schedule 5 of the Employment Act 2002.

FINDINGS OF FACT

Context

24. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, I have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

25. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties, including employees and family members. It was said in that case: *'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'*

26. I appreciate that the events relating to this claim took place during a difficult period for the claimant and for Mr and Mrs Sherlock. I wish to make it clear that simply because I do not accept one or other witness' version of events in relation to a particular issue does not mean that I consider that witness to be dishonest or that they lack integrity.

Claimant's employment

27. Mr and Mrs Sherlock have run the South Kirkby Post Office since July 1999 (the "**Post Office**"). They entered into a formal partnership agreement for the running of the Post Office. Mrs Sherlock then entered into an "On Site Main Post Office Agreement" on 30 August 2013 with Post Office Limited which set out the terms on which the Post Office would be run. These included minimum opening hours, the fees payable by Post Office Limited and the services to be provided as part of the operation of a Main Post Office Branch. The agreement also set out the fittings and fixtures and other equipment required for the Post Office.

28. Mr and Mrs Sherlock employed the claimant as a Post Office clerk with effect from 2 May 2014 until her employment terminated on 28 May 2019, following her resignation email on 24 May 2019. The only other employee at the Post Office was Mrs Karen Needham, who also worked as a clerk and has been employed by the respondent since July 1999. Mrs Needham and the claimant were only scheduled to work alongside each other for four hours on Mondays.

29. Mr and Mrs Sherlock lived with their son, Mr Thomas Sherlock (referred to in this judgment as '**Thomas**'), in Crowle (around 40-45 minutes' drive from South Kirkby) when the claimant started working for them in 2014. Mrs Sherlock subsequently moved to a house that was closer to South Kirkby in 2017. Thomas did not live with Mrs Sherlock in her new home. Thomas was age 22 in 2019, when these proceedings were commenced.
30. Thomas started using drugs in 2015 and his behaviour caused serious difficulties for his parents. Mr and Mrs Sherlock had to call the police regularly due to problems with Thomas. I understand that Mrs Sherlock eventually obtained a Restraining Order against Thomas in December 2016 which expired in December 2018.
31. Mrs Sherlock told Thomas numerous times not to come into the Post Office, but he frequently ignored her instructions. Thomas' behaviour during this period was unpredictable and he was frequently verbally abusive to Mrs Sherlock. Mrs Sherlock found it difficult to calm him down or to persuade him to leave the Post Office without giving in to his demands (e.g. for money or cigarettes). Mrs Sherlock called the police on several occasions regarding Thomas' behaviour from 2017 to 2019.
32. Mrs Sherlock told the claimant and Mrs Needham that they should ignore Thomas and not enter into discussions or interact with him. Mrs Sherlock said that she would deal with Thomas herself if he came to the Post Office. Mrs Sherlock also told the claimant and Mrs Needham that if Thomas called the Post Office telephone line, they should either:
 - 32.1 not answer the phone if they thought it was Thomas calling (because he would normally call Mrs Sherlock's mobile phone first); or
 - 32.2 pass the phone to Mrs Sherlock as soon as they heard Thomas' voice.It was common for the Post Office phone to ring without answer if Mrs Sherlock or her staff were busy serving customers.
33. Mrs Sherlock investigated whether it was possible to block Thomas' mobile number from calling the post office phone line. Unfortunately, that this was not possible because Post Office Limited paid the Post Office's telephone bills and the telephone provider would not block Thomas' number except for at Post Office Limited's request.
34. Mrs Needham followed Mrs Sherlock's instructions regarding any contact with Thomas. Mrs Needham did not experience any direct problems with Thomas whilst she was working at the Post Office, although she did observe the difficulties that his behaviour caused to Mr and Mrs Sherlock and to the claimant.
35. The claimant said that she enjoyed her job with the Post Office. She said that she was happy working there, except for when Thomas caused problems due to his behaviour. It is not disputed that Thomas was often rude to the claimant and verbally abused her either if she answered the phone or if he was in the Post Office at the same time as her. It is also not disputed that the claimant frequently got into arguments with Thomas, for example when she was defending Mrs Sherlock against Thomas' verbal abuse. I accept Mrs Sherlock's evidence that she told the claimant to let her deal with Thomas, but the claimant did not follow those instructions.
36. Mrs Sherlock also told the claimant to take the following steps if there were difficulties with Thomas:

- 36.1 that the claimant should switch counter positions with Mrs Sherlock if Thomas turned up outside of the Post Office so that she could not see Thomas;
 - 36.2 that the claimant should go into the back office if Thomas came into the Post Office, so that she could remove herself from the situation.
37. The layout of the Post Office included:
- 37.1 a public area, which customers can enter through the shop door;
 - 37.2 a counter or office area, which is screened from customers using a glass 'fortress';
 - 37.3 a security door from the public area to the office/counter area, the top part of which includes a parcel hatch. The security door cannot be forced open, unless the hatch is open in which case it is possible to reach through and lift the door lever; and
 - 37.4 a middle door from the counter area to the back office; and
 - 37.5 the back door which led out of the back office to the street.
38. Mr Clarke attended the hearing primarily to give evidence about the claimant's grievance (which I have considered below), but he is also the sub-postmaster at the Bailgate Post Office in Lincoln. I asked Mr Clarke about the security measures that he has in place at the Bailgate Post Office. Mr Clarke's unchallenged evidence was that sub-postmasters receive guidance on security measures from Post Office Limited. He noted that the key advice is to keep all doors to the Post Office counter area and parcel hatches closed at all times. He said that parcel hatches should only be opened when a customer hands over a parcel and that they should be closed again immediately.
39. Mr Clarke stated that the Bailgate Post Office has a panic alarm button. Pressing the panic alarm automatically sends a call to a private security firm. That firm views the Post Office's CCTV footage from a security centre and decides whether to call the police or send security officers to attend the Post Office. However, Mr Clarke said that the level of security varies between post offices, depending on the perceived level of risk in each post office's local area.
40. I accept Mrs Sherlock's evidence that most security facilities are provided by the Post Office Limited to individual post offices. The panic alarm link to a private security firm was not installed at the South Kirkby Post Office until July 2019. I also accept that Mrs Sherlock had no control over when this system would be installed and was not aware that Post Office Limited had fitted the system to other post offices. Mrs Sherlock stated that whilst the claimant was employed, the Post Office did have a panic button which, if pressed, would lock the door to the shop and call through to the police. I accept her evidence that this would not have assisted in any situations with Thomas because Thomas would then have been locked into the Post Office with staff and customers and that the police often took some time to arrive.
41. Mrs Sherlock was asked during cross-examination why she did not obtain a second Restraining Order until after the claimant's employment had terminated. I accept Mrs Sherlock's evidence that she had rung the police several times during 2019 but that the police took no action was taken until she raised a formal complaint. Mrs Sherlock said that she then obtained a second Restraining Order after the claimant had resigned and that Thomas had been imprisoned recently for a breach of that order.

42. I also asked Mr Clarke how he handled difficult customers. He said that he did not expect his staff to become involved, but would send them into the back office until he had dealt with the incident. Mr Clarke said that he had never had to obtain a Post Office ban, but that a neighbouring post office had obtained one. He said that the ban would prevent a customer from coming to the post office counter. I accept Mrs Sherlock's evidence that she had contacted Post Office Limited about the possibility of obtaining a ban against Thomas. However, she decided against this because the ban would not prevent him from entering the Post Office premises. In addition, she believed that the threat of criminal sanctions for breach of a Restraining Order would be more effective than a Post Office ban.
43. The claimant was asked during cross-examination whether there was anything else that Mrs Sherlock could have done to prevent Thomas from entering or phoning the Post Office after 14 September 2017. The claimant stated that: "*there are things that [Mrs Sherlock] could have done to prevent it happening again in the future*". However, she was unable to provide any specific examples of any steps that Mrs Sherlock could have taken. She said that Mrs Sherlock could have called the police more often, but that step would not have prevented Thomas from entering the Post Office in the first place.

Claimant's terms of employment

44. The claimant's evidence was that she never received a contract of employment at any time during her employment with the respondent. Mrs Sherlock gave evidence that she provided the claimant with:
- 44.1 a contract of employment which Mrs Sherlock herself had produced when the claimant started work in 2014, but that this contract was lost during Mrs Sherlock's house move in 2017; and
 - 44.2 an updated contract of employment prepared by HR4UK (Post Office Limited's recommended HR advisers) before 17 September 2018. Mrs Sherlock stated that she told the claimant and Mrs Needham on the morning of 17 September 2018 that they could access the contract and an employee handbook online and gave them login details. Mrs Sherlock also stated that she offered to give both the claimant and Mrs Needham printed hard copies of the contracts if they wished, but that neither the claimant or Mrs Needham wanted a copy.
45. The claimant recalled the conversation about the updated contract and handbook in September 2018, but stated that she was unable to access either document because her login details did not work. The claimant said that she had raised this matter with Mrs Sherlock, but that Mrs Sherlock did not obtain any login details.
46. I find that Mrs Sherlock did provide the claimant with a contract of employment in 2014, but that the contract did not contain all of the written particulars of employment required by s1 of the ERA. In reaching this finding:
- 46.1 I note that the claimant had signed documents when joining the respondent in 2014, including the Post Office vetting form on 14 April 2014. However, Mrs Sherlock's evidence was that she drafted the original contract of employment without any HR assistance and she admitted that it was not up to date with current legislation;

46.2 I also note that the only grievance procedure referred to by the parties was in the 2018 employee handbook and that the respondent had not previously put in place a grievance procedure.

47. I accept the claimant's evidence that she did not manage to login to the HR4UK website and view her contract of employment. Mrs Sherlock stated that she did not provide a hard copy of the claimant's contract to her because the claimant said that she did not want a hard copy. I therefore find that the claimant was not provided with written particulars of her employment in 2018.

Paragraphs 6a to 6f: Thomas Sherlock's behaviour during 2017

48. The claimant stated that she did not have any problems with Thomas' behaviour from 2014 to 2016. She said that Thomas' behaviour became a problem when Mrs Sherlock increased her working hours at the Post Office from two days per week to full time hours in 2017.

49. I accept Mrs Sherlock's evidence that Thomas was living in Pontefract in 2017 and that he did not attend the Post Office regularly during that time. The main reason for this was because he would have had to take a 30-40 minute bus journey each way and he preferred not to use public transport.

50. The claimant was unable to provide the dates of any specific incidents that took place in 2017 during her evidence, other than the incident on 17 September 2017 which I have considered below.

Paragraph 8: the incident in September 2017 between the claimant and Thomas Sherlock

51. Thomas attended the Post Office on 17 September 2017 because he had left his new job on an industrial estate across the road from the Post Office and wanted Mrs Sherlock to drive him home to Ackworth. Mrs Sherlock refused. Thomas shouted abuse at Mrs Sherlock, the claimant and at customers who were queuing to be served. Thomas attempted to gain access to the counter area of the Post Office by reaching through the parcel hatch in the door to the counter area to reach the lever that would allow him to open the door. Mrs Sherlock attempted to block Thomas' entry to the area but he was bigger and stronger than Mrs Sherlock. Mrs Sherlock then fought with Thomas to get him into the back office, where she called the police.

52. The claimant also called the police regarding the incident, although she maintains that Mrs Sherlock did not call the police. I accept that both the claimant and Mrs Sherlock called the police regarding this incident. The key reason for my finding is that I note that Thomas was later charged with breaching his Restraining Order against Mrs Sherlock on 20 February 2018. It is unlikely that such a charge would have been made without a complaint from Mrs Sherlock.

53. Thomas was arrested by the police in relation to this incident and bailed the next day. I accept Mrs Sherlock's evidence that Thomas did not enter the Post Office between 17 September 2017 and 20 February 2018 because it was a condition of his bail that he would not come to South Kirkby.

Paragraph 8: Mrs Sherlock's discussions with the claimant in the lead up to the Court Order relating to Thomas Sherlock, granted on 20 February 2018

54. In order to maintain the chronology of events, I have made the findings of fact relating to the complaint at paragraph 8 of the claimant's Particulars of Claim before moving on to my findings regarding the complaints at paragraphs 7 and 9 below.
55. It is not disputed that Mrs Sherlock withdrew her statement regarding Thomas' conduct on 17 September 2017 before the court hearing on 20 February 2018. Mrs Sherlock withdrew her statement because Thomas had received a job offer and she believed that if he had a criminal record, then that offer would be withdrawn. She thought that if Thomas was at work during the day, then he would not come into the Post Office. The case against Thomas for breach of his Restraining Order relating to Mrs Sherlock could not proceed in the absence of Mrs Sherlock's witness statement.
56. However, the claimant obtained a Restraining Order against Thomas which stated that Thomas: *"is now subject to a Restraining Order in the following terms:*
- *Not to attend at South Kirkby Post Office...at any time when [the claimant] is present and/or working.*
 - *Not to contact directly or indirectly [the claimant].*
 - *Not to post anything on social media relating to [the claimant]."*
57. The Restraining Order was stated to last 'until further order'. It stated that if the claimant had any further complaint regarding Thomas, then she should contact the police.

Paragraph 7: Mrs Sherlock's discussion with the claimant in 2018 regarding Thomas Sherlock holding a knife to her throat and Mrs Sherlock's subsequent handling of the claimant's complaints regarding Thomas attending the Post Office premises

58. The claimant and Mrs Sherlock gave conflicting evidence regarding how the claimant became aware that Thomas had threatened Mrs Sherlock with a knife. However, as it is agreed that the claimant was aware of the incident.
59. Mrs Sherlock was aware that the claimant had suffered from anxiety and that the claimant's anxiety had started before she was employed by the respondent. I accept the claimant's evidence that her knowledge of the knife incident increased her concerns regarding Thomas' behaviour.
60. I also accept the claimant's evidence that she made several complaints to Mrs Sherlock about Thomas' behaviour during 2018 and 2019. I accept the claimant's evidence that she did not make any written complaints or raise a formal grievance because the respondent was a small business. The claimant was alone at work with Mrs Sherlock during most of her working time and frequently discussed Thomas' behaviour with Mrs Sherlock.
61. Mrs Sherlock did not treat the claimant's complaints as a grievance. I asked Mrs Sherlock about the grievance process set out in the respondent's employee handbook which referred to an initial informal stage of raising a grievance and asked why she did not deal with the claimant's complaints in line with this process. Mrs Sherlock said that she did not treat the claimant's complaints as a grievance because the Post Office was a small business where they spoke to each other regularly. She accepted during her evidence that she probably should have treated the claimant's complaints as an informal grievance in retrospect, but said that HR4UK had not advised her to treat the claimant's complaints as a grievance.

Paragraph 9: the incident on 9 March 2018 outside of the Post Office between Thomas Sherlock and the claimant

62. It is not disputed that Thomas was leaning against the railings of the Post Office when the claimant attended work on 9 March 2018 and that she called the police. Thomas did not enter the Post Office on that day and this incident took place outside of the Post Office premises.

Paragraph 9: three further incidents during 2018 when Thomas Sherlock attended the Post Office premises

63. The claimant was unable to provide the dates or details of the three further incidents that she referred to in her Particulars of Claim in 2018, although she provided some details of other incidents without dates.

64. The respondent did not dispute the claimant's evidence that:

64.1 on one occasion Thomas fell asleep in the Post Office behind the counter when he was lying on the floor with Mr and Mrs Sherlock's dogs and that Mrs Sherlock asked him to leave;

64.2 on another occasion Thomas entered the Post Office whilst pushing a man in a wheelchair and stared at the claimant; and

64.3 Thomas had stolen money from the respondent, which Mrs Sherlock replaced from her own bank account.

However, I find that it is likely that these incidents took place before the incident on 17 September 2017. If they had occurred after the incident on 17 September 2017, it is likely that the claimant would have called the police to report that Thomas was in breach of either his bail conditions (before the hearing on 20 February 2018) or her Restraining Order (after 20 February 2018). The claimant did not state in her evidence that she called the police on any of the occasions of which she did not recall the dates.

Paragraph 10: the incident on 29 April 2019

65. Mrs Sherlock's Restraining Order against Thomas expired in December 2018. I accept Mrs Sherlock's evidence that she called the police on at least three occasions in early 2019 about Thomas' behaviour, but that no action was taken because they treated the matter as a 'domestic' incident.

66. Many of the events of Monday 29 April 2019 were subject to dispute by the parties. My findings of fact in relation to the events on that day are set out below:

66.1 Mrs Sherlock opened the Post Office to customers at 8am. The claimant was due to start work at 8.30am that morning. Mrs Needham was also due to work on that day. The Post Office was very busy because the post office in the next village was closed that day and there were customers queuing outside the shop when Mrs Sherlock arrived.

66.2 Thomas came into the Post Office shortly after 8am. He asked Mrs Sherlock if he could use the toilet. She initially refused, but changed her mind when a few of her customers said she should let him use it. Mrs Sherlock told Thomas that he would have to leave once he had used the toilet. I accept Mrs Sherlock's evidence that she was in a difficult position – if she had not let Thomas use the toilet then he would probably have remained in the public area of the shop. She could not call the police and ask them to remove Thomas because she no

longer had a Restraining Order against him and the claimant had not yet arrived at work.

- 66.3 Mrs Sherlock locked door between the counter area and the back office to prevent Thomas from coming back into the counter area. However, Thomas started to hammer on that door, causing Mrs Sherlock's dogs to bark so loudly that she could not hear the customers' requests.
- 66.4 Mrs Sherlock decided that she would let him into the counter area and try to empty the Post Office of customers so that she could deal with him. Mrs Sherlock told Thomas to stand next to her behind the counter area so that she could see where he was because the drawers were full of money. Thomas then made himself a cup of tea.
- 66.5 Mrs Sherlock did not call or text the claimant to warn the claimant that Thomas was in the Post Office. Mrs Sherlock said that she was very busy serving customers and that she hoped that there would be a short gap when she could put the shutter down and deal with Thomas. I do not accept Mrs Sherlock's evidence that it was not possible to take a short break so that she could attempt to warn the claimant of Thomas' presence. She could have asked the customers to wait for two minutes and texted or called the claimant to warn her of Thomas' presence.
- 66.6 Mrs Sherlock spoke to the claimant when she entered the Post Office and told her that she should go and wait in her car until she had dealt with Thomas. The claimant saw Thomas and said that it was her place of work and that she was contracted to work from 8.30am. They started to shout at each other and Thomas said that the claimant should be 'sacked'.
- 66.7 Mrs Sherlock then asked the claimant to take over serving customers because the claimant had refused to wait in her car and Mrs Sherlock needed to deal with Thomas. Mrs Sherlock then took Thomas into the back office and he said that he needed some money. Mrs Sherlock went to the counter area and withdrew money from her bank account. Mrs Sherlock gave Thomas some money and he left the Post Office via the back office door. The claimant called the police whilst Mrs Sherlock and Thomas were in the back office because she thought she heard a 'scuffle' between them and was concerned for Mrs Sherlock's safety.
- 66.8 After Thomas had left, he called the Post Office telephone line. The claimant answered the phone and spoke with Thomas. The claimant's unchallenged evidence was that Thomas said to her: *"I'm going to make your life hell"*. I accept Mrs Sherlock evidence that the claimant responded by saying *"bring it on, do your worst"*.
- 66.9 The police arrived at the Post Office after that call. The claimant wished to speak to the police immediately when they arrived. Mrs Sherlock did not wish the claimant to give a statement at that time because the Post Office was busy with customers. She told the claimant that she should finish serving her customer first, because that was what the claimant was "paid to do".
- 66.10 The police said that they needed to have a brief discussion with the claimant because she had called them, but that she could give a statement later. The claimant finished serving her customer and then spoke with the police whilst

Mrs Sherlock and Mrs Needham continued serving customers. Mrs Sherlock went to speak to the police when the claimant returned.

66.11 The claimant went into the back of the Post Office and spoke to her husband for around 20 minutes. When the claimant returned, she referred to a comment that Mrs Needham had made to her in Mrs Sherlock's absence. However, the claimant said that she enjoyed working with Mrs Sherlock and Mrs Needham and that she *"did not want to create an atmosphere"*. She then continued to work for the rest of the day.

Events leading to the claimant's resignation

67. The claimant was not scheduled to work on Tuesday 30 April 2019. The claimant attended work as usual Wednesday 1 May 2019. She did not attend work on Thursday 2 May 2019 and sent Mrs Sherlock a text message stating: *"Sorry Tracey I can't make it to work this afternoon! Have been sick this morning, was hoping it would pass before now but I really don't feel good"*. The claimant accepted during cross-examination that Mrs Sherlock would not have realised that her absence on 2 May 2019 was due to the events on 29 April 2019 or due to her anxiety.
68. The claimant attended work as usual on Friday 3 May 2019. The Post Office was closed on Monday 6 May 2019 due to the May Day Bank Holiday. The claimant was not scheduled to work on Tuesday 7 May 2019, but attended work as usual on Wednesday 8 May 2019.
69. The claimant did not attend work on Thursday 9 May 2019. She sent a text message to Mrs Sherlock stating: *"I won't be in today and will be dropping a sick note in tomorrow for a week."* Later that day, the claimant obtained a doctor's fit note for one week stating that she was absent due to 'work related stress/anxiety'. She obtained a further fit note for two weeks from 13 May 2019 for the same reason. The claimant did not return to work before her employment terminated.
70. I accept that the claimant did not wish to resign from her job with the respondent until she had found alternative work because she needed to have an income. She saw a job advert on a website and applied for a Home Care Assistant role at some point during her first week of her absence on sick leave. The claimant attended an interview on or around 16 May 2019 and was offered the job at the end of her interview. Her future employer sent a reference request to Mr Sherlock on or around 21 May 2019.
71. The claimant did not provide a sick note for the week commencing 27 May 2019. Mrs Sherlock emailed the claimant on 24 May 2019 stating that she had tried to contact the claimant by phone. Mrs Sherlock said: *"Please can you contact me to advise whether you are returning to work next week or whether you are putting another sick note in as I have to make arrangements to cover your shift."*
72. The claimant responded with an email of resignation which stated:
"Good morning Tracey
I wish to terminate my employment, as from Tuesday 28th May 2019.
Regards..."
73. The claimant started her new role on 30 May 2019.

Claimant's grievance and appeal

74. The claimant sent a grievance letter to Mrs Sherlock on 1 June 2019. Mr Clarke was asked to handle the claimant's grievance in his role as Secretary to the Federation of Sub-Postmasters. Mr Clarke also runs a post office at Bailgate in Lincoln.
75. The claimant challenged Mr Clarke's handling of her grievance and complained that the minutes of the hearing on 27 June 2019 were incomplete. The claimant was unhappy with the grievance outcome which Mr Clarke provided to her in a letter dated 30 June 2019. I also note that the claimant appealed against her grievance outcome, but that no grievance appeal meeting was held. However, the claimant did not raise a grievance until after her resignation and the handling of the grievance could not have affected her decision to resign.

Application of the law to the facts

Constructive dismissal

76. I have some sympathy with the difficulties that the claimant faced during her interactions with Thomas in 2017, 2018 and prior to 29 April 2019. However, I have concluded that:

76.1 except for the incident on 9 March 2018, I found that the only incidents that the claimant could recall in any detail were likely to have taken place on or before 17 September 2017. The reason for my finding was that it was likely that the claimant would have called the police in relation to any later incidents because Thomas would either have been in breach of his bail conditions (for incidents before 20 February 2018) or in breach of the claimant's Restraining Order (for incidents after 20 February 2018);

76.2 the incident on 9 March 2018 took place outside of the Post Office premises and was not within the respondent's control. However, I note that Mrs Sherlock had suggested to the claimant that she should swap her normal desk in the counter area so that Thomas could not see her if he was outside the Post Office; and

76.3 the claimant waived any potential breaches by continuing to work for the respondent after 17 September 2017. I note that the claimant did raise informal complaints with Mrs Sherlock regarding Thomas' behaviour and that Mrs Sherlock admitted that she should probably have dealt with these as a grievance. However, the claimant continued to work despite Mrs Sherlock's failure to resolve her complaints.

77. This leaves the incident on 29 April 2019. I have concluded that the claimant resigned on 24 May 2019 because of the incident on 29 April 2019. It was reasonable for the claimant to seek alternative employment before resigning because she needed to continue earning an income. I accept the claimant's evidence that she saw the job advert after she went on sick leave and that she was offered the job within a couple of weeks.

78. However, I have concluded that the incident on 29 April 2019 did not amount to a fundamental breach of contract for the following key reasons:

78.1 the respondent could not prevent Thomas from entering the Post Office. The claimant was unable to identify any specific additional steps that the respondent could have taken to prevent Thomas from entering the Post Office. In addition, I questioned Mrs Sherlock and Mr Clarke in some detail about the security

arrangements at both the South Kirkby Post Office and the Bailgate Post Office. I accept that Mrs Sherlock could have asked Post Office Limited to issue a ban to Thomas, but that this would have prevented him from being served rather than from entering the Post Office;

78.2 Thomas entered the Post Office before the claimant started work on 29 April 2019. He was not in breach of the claimant's Restraining Order at the time when he entered the Post Office;

78.3 Mrs Sherlock told Thomas to leave the Post Office as soon as he had used the toilet but he refused;

78.4 Mrs Sherlock could have contacted the claimant to warn her that Thomas was in the Post Office before the claimant entered the Post Office. However, as soon as the claimant arrived at work, Mrs Sherlock told the claimant to go outside and wait in her car until she had dealt with Thomas;

78.5 the claimant refused to wait in her car and Mrs Sherlock then took steps to remove Thomas from the Post Office;

78.6 the claimant answered the phone when Thomas called and spoke to him, despite being instructed not to answer the phone (if it was likely to be Thomas who called) and/or to pass the phone to Mrs Sherlock (if she heard Thomas' voice);

78.7 Mrs Sherlock did not prevent the claimant from speaking with the police, but asked that she provide her statement to the police after she had finished work because the Post Office was busy with customers;

78.8 the claimant did not raise any complaints about that incident on that day, instead she stated that she 'enjoyed' working in the Post Office and 'did not want to create an atmosphere';

78.9 the claimant continued to work for the next few days (except for one day's sickness absence) and did not raise any other complaints about the incident on that day until after her resignation. The claimant did not inform the respondent that she was suffering from work-related stress until she provided her doctor's fit note on 9 May 2019, after which she did not return to work.

Failure to provide written statement of particulars of employment

79. I found that the claimant did not receive a written statement of particulars of her employment from the respondent that was compliant with s1 of the ERA. The reason for my finding is that before 2018, the respondent did not have a grievance procedure. The respondent could not, therefore, have referred to the person to whom the claimant could apply to seek redress for any grievance as part of the claimant's written statement of particulars (as required under s3 of the ERA). In addition, the claimant was never provided with a copy of the respondent's updated contract of employment in 2018, albeit that Mrs Sherlock offered to provide the claimant with a printed copy of that document.

80. However, the claimant did not succeed in her claim for constructive dismissal and cannot be awarded compensation for the respondent's failure.

Conclusions

81. I have concluded that the claimant's claim for constructive dismissal fails and is dismissed.

82. I cannot award the claimant any compensation for the respondent's failure to provide her with written statement of particulars of employment because she has not succeeded in a claim listed in Schedule 5 of the Employment Act 2002.

**Employment Judge Deeley
3 April 2020**