



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms L Niro

v Fraser Property Management Limited
t/a Martin & Co. Bedford

Heard at: Cambridge

On: 17 and 18 March 2020

Before: Employment Judge Ord

Appearances

For the Claimant: In person

For the Respondent: Mr Gary Lee, Solicitor

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. Her resignation of 20 November 2018 constituted a dismissal within the meaning of Section 95(1)(c) of the Employment Rights Act 1996.
3. Had the Respondent followed a fair procedure the Claimant could have been fairly dismissed, on the same day, on the ground of redundancy.
4. The issue of remedy, if not agreed between the parties, will be determined at a further hearing in accordance with Case Management Orders set out at the end of this Judgment.

RESERVED REASONS

Background

1. The Claimant was employed by the Respondent from 2 April 2008 until her employment ended by way of a resignation on 28 November 2018.
2. The Respondent business was initially owned by a Mr Fraser. Mr Fraser did not involve himself in the day to day management of the Respondent's office premises and the staff within it. This was left to the Claimant.

3. The Claimant became in September 2010 a statutory Director of the Respondent company.
4. In November 2013, the Claimant's remuneration package was amended. By letter of 26 November 2013 she received a salary increase of £2,000 per annum with the following words added,

"In addition, with effect from 2013/14 year-end, a bonus of 10% of the net profit will be paid after the accounts for the year have been prepared and signed off. I would think that we should be in a position to pay this bonus with the June 2014 salary. This bonus will be reviewed when the accounts are finalised."
5. The Claimant had worked under those terms for more than three years. From January until December 2017, she took a period of maternity leave and returned thereafter on a three day per week basis. Her salary was pro-rata to 60% of her previous salary, but the bonus structure was unaltered.
6. In early 2018, the Claimant became concerned at the way the business was operating and resigned her position as a statutory Director at Company House. She retained, for the purpose of her employment, the working title of 'Director' and her duties were unaltered.
7. In or about April 2018, Mr Fraser agreed to sell the Respondent business to the three current owners (Mr Shahid Miah, Mr Jay Miah and Mr Habib Rahman). That sale was completed on 24 August 2018 by way of share acquisition.
8. The Claimant, in her evidence, said that from April 2018 onwards decisions were effectively taken either by, or with the substantial involvement of, the putative owners. That evidence was not challenged.
9. The Claimant continued to be unhappy with the way the Respondent business was operating and on 4 July 2018, she tendered her resignation on three months' notice.
10. The Claimant was working her period of notice at the time the new owners had completed the acquisition of the Respondent business.
11. On 11 September 2018, the Claimant had a discussion with Mr Shahid Miah and Mr Jay Miah. Following that discussion, she wrote to those two gentlemen on 12 September 2018 confirming in writing that she was withdrawing her notice.
12. The Claimant's evidence, which again was not disputed, was that she had been persuaded to stay by Mr Shahid Miah and Mr Jay Miah who had expressed their desire that she remain in post and that they considered her an important part of the management structure of the business.

13. On 3 October 2018, the Claimant wrote to all three co-owners of the Respondent business in terms which were accepted by them as her raising a grievance. In her email of 3 October 2018, she set out in writing her previous duties and confirmed that when there had been a discussion about her role she was willing to be involved in any aspect of the business moving forward but was not willing to accept,

“a demotion or a title that could be seen as a demotion”.

14. She set out, however, that over the previous two weeks it had been made clear to her that she was no longer seen as being in a position of any authority at all. Mr Jay Miah was reported to have said to her,

“you are not a manager, these are matters that do not concern you”

after she had advised that another employee (Irene) had been listed to carry out many viewings on a Saturday, (something for which she was not employed).

15. The Claimant further complained that during a discussion with Mr Jay Miah that week, he had referred to her *“ranting”* and having a *“hissy fit”*. The Claimant had challenged the owners over their promise to have at least two full time members of staff, if not three, employed once they had taken over the business, whereas she had raised complaint about understaffing during a very busy period.
16. The Claimant concluded her email by saying that she felt pushed out of her position, had no clarity as to what exactly her job was and that the only thing that had been made clear was that she was no longer considered a Director and had no authority in the workplace where she had been in a position of authority since September 2010. She felt she had two choices, to accept a demotion, or to leave. She asked for clarity.
17. The matter was to proceed to a grievance hearing and on 16 October 2018 the Claimant gave further information regarding her unhappiness. She expressed the need for more defined roles in the office. She described the level of service being provided as having fallen to unacceptable levels. The Claimant said she no longer had any seniority and her opinion was not being sought on matters regarding the operation of the office. She said she was losing credibility, reputation and status with both the staff and the clients and considered her position untenable. She said she had been effectively demoted (*“pushed aside”*) which she considered constituted a fundamental breach of contract and that while she was continuing to work for the moment it was *“under protest”*.
18. This meeting was held on 24 and 25 October 2018 and the Respondent’s grievance outcome was sent on 8 November 2018.

19. The Claimant had been asked for her *“ideal outcome”* which she said was to be made redundant as she did not see how she could stay with the company unless her previous role and responsibilities were restored. In effect, the Claimant stated that the role she was being asked to carry out was of substantially lesser status.
20. The outcome of the grievance was for the Respondent to enter into a period of consultation with the Claimant for seven days which would begin when she received an official consultation letter. She was told not to take the grievance outcome letter as notice of redundancy or her role being at risk.
21. On 12 November 2018, the Respondent issued a letter, signed by Mr Shahid Miah, to the Claimant headed ‘Redundancy / Role Consultation’. In that letter it said that the Claimant’s role of *“Director at Martin & Co.”* was at risk of redundancy. It was said that the Respondent had tried to absorb the Claimant in her current position within the company *“but moving forward this will not be possible”*. The claimant was offered another role as ‘Head of Accounts and Administration’ which the Respondent said was a suitable alternative role. A job description for that new role was attached to the letter.
22. A consultation meeting was held on 15 November 2018. The Claimant said that she did not consider the new role to be of similar status and removed from her managerial responsibilities including line management responsibilities. The Claimant had previously line managed all persons within the Respondent’s office and she was not to be line managing anyone in the new role unless, or until, any accounts or administration staff were subsequently employed. She said before me, and this was not seriously challenged, that the role was that of an Accounts Administrator with the words “Head Of” added.
23. Mr Shahid Miah, then challenged that the new role amounted to a demotion and is recorded as having said that,

“we don’t think it is, it’s not the same role due to changes in the business and this does not constitute a breach to your contract”.
24. The Claimant’s contract of employment includes these words,

“The employee is employed as Director of Fraser Property Management Limited and will report to the Managing Director as their line manager. The employee agrees to devote the whole of their time, attention, ability and skills to the duties of their employment.

The precise description and nature of the job may be varied from time to time and the employee may be required to carry out other duties as may be necessary to meet the needs of the employer”.

25. There was a further consultation meeting on 19 November 2018. At that meeting the Respondent recorded in the notes (as taken by Mr Habib Rahman) that the Claimant shouted aggressively; slammed her notepad on the table creating a very loud bang and subsequently again raised her voice. The Claimant denies that any of those things occurred.
26. The outcome of the consultation was recorded in writing by the Respondent on 19 November 2018. The Outcome Letter says this,

“The consultation period of seven days ends today and the outcome is that your role of Director will no longer exist as of Monday 26 November 2018 and you will be Head of Accounts and Administration (role profile already given to you) from this date. We will write to you confirming the amendment of this suitable alternative employment to your contract of employment in due course”.
27. The Claimant replied by email that evening. She repeated why the new role was unsuitable. She said it amounted to a demotion, that she was given the title of *“Head of...”* a department which consists only of her and covered only one small element of the scope and remit of the work she had been carrying out previously with all staff reporting to her.
28. The Claimant sent a further letter on 25 November 2018 confirming that she did not accept the role of *“Head of Accounts and Administration”* and stating why she did not believe the role amounted to suitable alternative employment. In particular:
 - 28.1 It is not equivalent in status to her previous role;
 - 28.2 Moreover the responsibility and seniority was greatly reduced;
 - 28.3 She would lose any responsibility for the operational management of the business in any department;
 - 28.4 There was no responsibility for strategic decision making in terms of business development, marketing, recruitment or any other aspect;
 - 28.5 The role had no decision making authority of any kind in any department;
 - 28.6 The tasks listed in the role could be completed by an Accounts Administrator or Lettings Administrator;
 - 28.7 There was no line management responsibilities;
 - 28.8 The role is a demotion;
 - 28.9 The role was equivalent in remuneration (although there was no mention of bonus); and
 - 28.10 The role would be perceived as much more junior in status by both clients and employees.
29. On 26 November 2018, the Respondent issued the Claimant with a written *“informal warning”*. The letter was written by Mr Shahid Miah who said that he,

“must address [the Claimant’s] unprofessional, aggressive and rude behaviour.”

He said he had taken into account the fact that she was concerned about her role and was therefore not proceeding with “a formal disciplinary procedure” but could not ignore the Claimant’s “continuing unprofessional, rude and aggressive behaviour” and went on to list examples of that behaviour “some of which can be found in the minutes from the [consultation] meeting”.

30. It was said,

“...if this type of behaviour happens again, formal disciplinary proceedings will take place”

and that the note would stay on the Claimant’s employee file for a period of 12 months and would be taken into account if there was a repeat of that or any other misconduct.

31. On 28 November 2018, the Claimant resigned. She had been absent from work through stress and claimed that notwithstanding this, the Respondent had issued her with an informal written warning regarding her conduct while she was absent from work without following any process whatsoever. She considered that the retention of that on her file for 12 months and the intention to take it into account in any future disciplinary hearing was tantamount to the matter being a formal warning.

32. The Claimant said that her position was no longer tenable and she considered herself to have been constructively dismissed.

33. During the course of the hearing before me, Mr Shahid Miah confirmed in evidence that the role being offered to the Claimant would not attract a bonus. He also confirmed that in his view the bonus arrangements were not contractual and further that the Claimant had not been told that the terms of the new role would include the loss of bonus.

34. It is against that background that the Claimant brings her claim for unfair dismissal.

The Law

35. Under Section 94 of the Employment Rights Act 1996, every employee has the right not to be unfairly dismissed.

36. Under Section 95(1)(c) an employee is dismissed if the employee terminates the contract under which they are employed, with or without notice, in circumstances in which they are entitled to terminate it without notice by reason of the employer’s conduct.

37. Under Section 98(1), if an employee is dismissed it is for the employer to show the reason (or if more than one the principal reason) for the dismissal and that it is a reason falling within Sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee held in the position which the employee held.
38. Under Section 98(2)(c), a potentially fair reason for dismissal is that the employee is redundant.
39. In the leading case of Weston Excavating (ECC) v Sharp [1978] ICR 221, set out that the employer's conduct relied upon by an employee must be sufficiently serious to entitle the employee to leave at once (i.e. without notice).
40. It has been long established that there is an implied term of mutual trust and confidence in a contract of employment. In the case of Lewis v Motorworld Garages Ltd. [1986] ICR 157, the Court of Appeal decided that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident, even though the 'last straw' by itself did not amount to a breach of contract.
41. In Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908, the Court of Appeal firmly rejected the concept that the question of whether the employer's conduct fell within a range of reasonable responses was relevant to determine whether there had been a constructive dismissal. The question was whether there was a breach of the term of mutual trust and confidence.
42. In Morrow v Safeway Stores Plc [2002] IRLR 9, the Employment Appeal Tribunal stated that where the implied duty of trust and confidence had been broken, this would "inevitably" be serious enough to constitute a repudiatory breach of contract.
43. Although the 'last straw' does not need to be a breach of contract itself, it must contribute something to the breach of the term of mutual trust and confidence, (on Omilaju v Waltham Council [2005] ICR 481).

Conclusions

44. Applying the law to the facts of this case, I have reached the following conclusions:
45. When the new owners took over the management and ownership of the Respondent business they were intending to take a far more active role in the day to day management of the business than Mr Fraser had done. Instead of one, partially engaged owner, the Respondent business was owned by three individuals taking a far more active role in the business.

46. This necessarily meant that the previous management structure within the business would be reconsidered and the Respondent was entitled to take the view that the role previously carried out by the Claimant was no longer required, because the roles of line management and office management which she had previously undertaken would be carried out by them.
47. Rather than deal with this “*up front*”, however, the course of conduct undermined the Claimant’s position.
48. Rather than play an active, consulted role in the management of the Respondent’s business, she was side lined. She was told that she had no management responsibilities. She had previously been the ‘number one’ person in the office on a day to day basis and this was removed from her.
49. When the Claimant raised complaint about this, she was offered the role of ‘Head of Accounts and Administration’. The Claimant’s evidence, which was unchallenged, was that this work would all be carried out by an Accounts or Administration Clerk and she, in particular, complained about the loss of status both as regards her position with other employees and in relation to the perception of clients.
50. The Respondent appeared to rely on the clause in the Claimant’s contract of employment which said that she would be required to carry out “*other duties as may be necessary to meet the needs of the employer*”. That clause, however, does not give an employer ‘carte blanche’ to amend the duties and status of an employee, the duties to be performed must be commensurate with the role and status of the individual.
51. The Claimant identified her clear view that her previous role was redundant. The Respondent did not demur from this, but said that the Head of Accounts and Administration role was a suitable alternative role to the Claimant’s previous role as Director.
52. The Claimant then entered a period of consultation with the Respondent but said that the new role was not acceptable. In particular, because of the loss of status.
53. The Respondent did not answer this point in any meaningful way. What the Respondent did, however, was to issue – without any discussion, investigation or process – a written warning (described as an informal warning, but one which would be taken into account if there was any “*future misconduct*”) in relation to the Claimant’s alleged conduct – which she denied – at the consultation outcome meeting.
54. The Claimant considered this the ‘final straw’ and resigned promptly thereafter.
55. The Claimant’s role and position within the Respondent’s undertaking had been undermined and diminished during the period after the new owners took charge of the business.

56. The Claimant lost her line management responsibilities and was not involved in any of the strategic or management discussions relating to the business. She had previously been the line manager for all individuals in the office and had been involved in the day to day management and strategic management of the business.
57. Rather than follow any appropriate process, however, the Respondent simply removed those duties from the Claimant and advised her that she was "*not a manager*".
58. When the Claimant challenged this process, the Respondent, belatedly, commenced a period of consultation but there was no meaningful consultation. She was presented with the role of 'Head of Accounts and Administration' which was a substantial reduction in status within the organisation, removed all line management responsibilities from her and in respect of which the Respondent had made it clear to the Claimant that she was no longer to be involved in the day to day or strategic management of the business.
59. The Claimant was entitled to consider the issue of a warning as regards her conduct as a 'final straw'. There was no warning or discussion to suggest that her conduct was in any way inappropriate before the issue of this warning. It related to alleged (and denied) conduct at a meeting which was a combination of a "*welfare*" meeting during the Claimant's period of absence due to sickness (the reason for her absence being work related stress) and follow up meeting to the consultation meeting.
60. When taking into account the previous diminution of the Claimant's status and role, contributed to the loss of trust and confidence which the Claimant had in her employer. She was entitled to, and did, resign promptly and in the face of that 'final straw'.
61. The Claimant was therefore dismissed within the meaning of Section 95(1)(c) of the Employment Rights Act 1996, the Respondent being in fundamental breach of her contract of employment by breach of the implied term of mutual trust and confidence.
62. Before me, it was submitted on behalf of the Respondent, that any dismissal was fair for "*some other substantial reason*", the "*substantial reason*" being the Claimant's refusal to accept the role of Head of Accounts and Administration.
63. The Claimant had been told that her previous post was redundant. The question is, therefore, whether the role of Head of Accounts and Administration was a suitable alternative role.
64. I have no hesitation in finding that it was not. As well as the matters of status, both internal and external, which the role entailed, there was also (although this had been concealed from the Claimant) a substantial loss of

salary. Previously the Claimant was entitled to 10% of the net profit of the business on an annual basis and whilst the Respondent had (untruthfully) told the Claimant that her salary would be unaltered, this only related to base salary. Her bonus was being removed without her being advised of the fact.

65. That demonstrates not only a lack of honesty between employer and employee, but demonstrates firmly that the new role was not suitable alternative employment as it brought with it (as well as the loss of status and role) a substantial diminution in salary.
66. The Respondent sought to argue before me that the salary was non-contractual because no new contract of employment had been issued after the letter of 26 November 2013 confirming the Claimant's salary increase and bonus arrangements.
67. That argument was clearly without merit. The requirement under Section 4 of the Employment Rights Act 1996 is for any material change in the particulars of employment to be set out in a written statement containing particulars of the change. Her letter of 26 November 2013 does exactly that. The argument advanced before me that a new contract of employment would have to be issued is without merit.
68. The Respondent did, however, have a perfectly valid reason to fairly dismiss the Claimant. She was redundant.
69. This was confirmed by the Respondent itself in a letter of 12 November 2018 when it was advised that her role was at risk of redundancy and during the consultation process when they confirmed that the Claimant's old role had ceased to exist.
70. The "*new role*" being offered to the Claimant was manifestly not suitable alternative role. The Claimant was redundant and could have been fairly dismissed on the ground of redundancy.
71. As a short, but appropriate, period of consultation had already been undertaken, the Respondent could have fairly dismissed the Claimant on the ground of redundancy on the date that she resigned, i.e. 28 November 2018.
72. Accordingly,
 - 72.1 The Claimant was unfairly dismissed; and
 - 72.2 The Respondent, having followed an appropriate process, could have fairly dismissed the Claimant on the day she resigned on the ground of redundancy and that dismissal would have been fair.
73. The Claimant would be entitled to payment for a period of notice and a redundancy payment. She would also be entitled to a compensatory award amounting to £350 for loss of her statutory rights.

74. The parties are invited to agree the amounts due to the Claimant by way of remedy. If they are unable to do so, a Remedy Hearing will be on a date fixed by the Tribunal. The parties are reminded of the opportunity to reach agreement on the issue of remedy through the offices of Acas.

Employment Judge Ord

Date: 23 April 2020

Sent to the parties on: ..04/06/2020

J Marlowe
For the Tribunal Office