



---

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5

**Case No: 2405987/2019**

**Held in Glasgow on 10 and 11 October 2019**

10

**Employment Judge: Mary Kearns**

15

**Mrs N Glen**

**Claimant  
In person**

20

**Matalan Retail Limited**

**Respondent  
Represented by:  
Mr Breen  
Of Counsel**

25

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal was to dismiss the claims.

30

**REASONS**

35

1. The claimant, who is 33 years of age, was employed by the respondent as a business risk adviser from 31 May 2008 until her resignation with notice took effect on 12 April 2019. On 5 June 2019, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in which she claimed constructive unfair dismissal and a redundancy payment. The respondent resisted both claims.

40

**Evidence**

2. The parties lodged a Joint Bundle of Documents (“J”) and referred to them by page number. The claimant gave evidence on her own behalf. The respondent called Mr Gary Parkes and Ms Colette Milburn as witnesses.

5 **Issues**

3. The issues for the Tribunal were:-

(1) Whether the claimant was dismissed;

(2) If so, whether that dismissal was unfair;

10 (3) If it was unfair what financial award/compensation, if any is due to the claimant?

(4) Whether the claimant is entitled to a redundancy payment.

**Findings in Fact**

4. The following material facts were admitted or found to be proved:-

15 5. The respondent is Matalan Retail Limited. The claimant was employed by the respondent as a business risk adviser from 31 May 2008 until 12 April 2019. Her job involved advising the stores within her region on loss prevention resources, equipment and strategies; identifying the risk of fraud and poor practices leading to margin erosion both internally and externally; and generally mitigating risk and maintaining staff and customer safety (J53).

20 6. During her time working for the respondent the claimant had experienced restructures, notably, one in October 2015 and another in February 2017. The claimant considered that she had been listened to and fairly treated during the 2017 restructure process.

25 7. In June 2017 a new colleague, P joined the respondent as business risk adviser for the London area and the claimant and P became friends. However, P did not get on with the other members of the team. In September 2017 the claimant’s line manager Lee Clark left the respondent and was replaced as business risk

manager by Gary Parkes. In early 2018 P was involved in a disciplinary investigation and hearing. At the same time, he raised a grievance against Mr Parkes. The claimant acted as P's workplace companion/representative at his disciplinary hearing in June 2018. At a later stage P raised a second grievance  
5 against Mr Parkes. The claimant was not involved on that occasion.

8. On 1 December 2018 the claimant's father in law died and this increased her concerns about work related travel. She felt reluctant to leave her husband alone at such a difficult time.

9. At some point in late 2018 the claimant's job title changed from Business Risk  
10 Advisor to Profit Protection Adviser ("PPA"). The claimant's team was renamed the 'Profit Protection Field Team'.

10. Towards the end of 2018 the respondent identified a business need to further restructure its Profit Protection Field Team. On 24 December 2018 Mr Parkes emailed Colette Milburn, HR Business Partner advising her of this (J27). He  
15 explained that the need had arisen as a result of a number of changes that had either been implemented or were underway. These included the removal of the requirement for the Team to answer out of hours calls; implementation of RFID (Radio Frequency Identification) which would remove the need for the PPA to attend stores for completion of stock counts; implementation of data mining;  
20 implementation of 'Incident Management solution' and the contracted security resource "*moving from static operation to a "resource to risk" deployment*". The email requested Ms Milburn to review the slides attached to the email ahead of a discussion on their return to business in January.

11. On 18 January 2019 the claimant received notification on LinkedIn of a vacancy in  
25 the Regional Profit Protection team at John Lewis (J55). The claimant applied for the job, which was on a higher salary and was based in Glasgow. On 3 February 2019 the claimant received an acknowledgement from John Lewis thanking her for starting the application process for the job of Area Profit Protection Manager (J58).

12. At some point in February 2019 the claimant noticed a presentation on one of the shared network drives (J29) indicating that there was going to be another restructure of her department. Mr Parkes had uploaded the presentation to the drive not realising it was a shared drive that the claimant and others could access. The claimant attended an interview for the job at John Lewis on 5 March 2019.
13. The following day, Wednesday 6 March 2019 the respondent announced to staff that it would be restructuring its profit protection department. A prepared announcement was read to those affected (J74). This stated that the role of profit protection adviser (“PPA”) had changed significantly within Retail with growing use of technology such as CCTV, Data Mining and “POS” to reduce loss. The statement explained that the growing use of RFID technology had removed the need for PPAs to attend stores to complete stock counts. The announcement stated: *“Under the proposals, the role of the PPA will be accountable for driving a robust Shrink agenda, working closely with key stakeholders to implement a business Shrink Reduction Strategy which is consistent at National, Cluster and Store level. In addition, the introduction of a Datamining solution will provide a rich source of data for more focused and detailed investigations.”* The PPAs present were informed that their roles were at risk of redundancy.
14. The proposal was that the number of regions supported by the profit protection team would be reduced from the current 6 to 4 and that the number of PPAs at the claimant’s grade would be reduced from 5 to 3 with the Profit Protection Manager being responsible for Region 4. Because of the importance of data mining going forward, a new role of profit protection data analyst was to be introduced and there would be a further new role of privacy adviser to support the implementation of GDPR. Both new roles would be based at the respondent’s head office in Knowsley, Liverpool. The announcement advised of the consultation procedure. There was to be a first consultation meeting on Friday 8 March 2019 at which each PPA would be asked to confirm which of the new regions they would prefer to apply for. A selection process would then take place at Head Office on Thursday 14 March and the outcome of the selection process

was expected to be confirmed at the second consultation meeting on Monday 18 March 2019.

15. The proposal was that going forward the country would be split into 4 regions. The claimant's region, Region 1 would encompass not only Scotland, Northern Ireland, some stores in North East England, and some stores in South West England, as previously, but some additional stores in North West England and Yorkshire as well. In all, the claimant calculated that the proposed restructure would add a further 18 stores to her remit. The other main difference the claimant identified in the role post restructure (J108) was that store visits were to be concentrated on the 'top 20 high shrink' (highest risk) stores, only four of which were in Scotland. Thus, the claimant viewed the post restructure role as involving more responsibility and travelling for the same pay. However, her main concern was the travel.
16. The claimant received an invitation on 6 March to the first consultation meeting on Friday 8 March 2019 (J80). The meeting was to take place by conference call. The letter informed the claimant that her role was at risk of redundancy and advised her of her right to be accompanied by a colleague or trade union representative. In the morning on 8 March the claimant acted as workplace companion to P on his redundancy consultation call.
17. At 12.30pm the claimant dialled into her own telephone conference consultation call. She knew about her right to be accompanied, but had decided she did not wish to ask anyone else to be there. On the call with the claimant were Gary Parkes and Colette Milburn, HR Business Partner, who took a minute (J81). The claimant asked a number of questions. She queried whether the regions might change depending on who got the roles. Mr Parkes said he did not see a lot changing but that if someone came up with a better solution, they would look at it. The claimant said that she was currently doing a lot of travel and did not know how she would cover Leeds for example. Mr Parkes replied: "*When you look at what we've got coming in to modify ways of working there will be increased travel but it's more specific travel*". The claimant was asking this because at the previous restructure in 2017 her geographical remit had originally been set to

increase, but during the consultation she had raised concerns about the additional travel and workload and asked for her region to be kept as it was. The respondent had listened to her in 2017 and had decided not to expand the remit as originally proposed. However, the claimant did not make this request during the consultation on 8 March, although it was in her mind. The claimant asked some more questions. She asked 'what if you had points on your driving licence?' She was told that this would not stop the process. The claimant then became emotional and Mr Parkes suggested she might want to take a break and call back in ten minutes. Ms Milburn added that her computer had frozen when typing the notes. The claimant hung up and called back ten minutes later.

18. When the call resumed, the claimant asked about the selection process, the scoring and what happened if you did not pass. Ms Milburn replied that the respondent needed to understand everyone's [region] preferences first and see what that looked like. She said that if only one person put in a preference for a particular region, they could put them straight into that role because they wanted to keep people in a job if they could. The claimant said: "*I asked the other day about voluntary redundancy, any update?*" Ms Milburn replied: "*as I said on Wednesday we don't offer voluntary redundancy at Matalan. We need to understand everyone's preferences today and will do our best to accommodate everyone, but if only one person preferences for a role then they may be placed into that role and we want to keep people in a job if we can.*" The claimant replied: "*What if I can't commit to covering the extra travel, what happens to me? I do the most I can now and I just can't commit to another two areas. I've been through this four times now.*" Mr Parkes responded: "*What I would ask is that you look at the region make-up, is there any alternative that you would propose? In terms of you committing to specific regions now, take some time to look at what that means for your travel and if you have any alternatives then we will certainly look at that. In terms of the commitment you show, the amount of travel, your dedication... you may have a bigger area, but will that mean more travel? The additional technology should mean you don't have to.*" The claimant then asked, if she didn't pick a preference, would that be taken as a resignation. Ms Milburn said that it would. The claimant said she did not know if she could commit to

doing more overnights and travel. Mr Parkes replied that the claimant's approach was really good and that he was more than comfortable for her to go away and think about it over the weekend and have a look at what the respondent could do differently. Mr Parkes asked Ms Milburn whether she was happy that the claimant did not choose a preference at the moment. Ms Milburn said it was fine not to state a preference at that point. Mr Parkes also alerted the claimant to the two Head Office posts of Privacy Adviser and Profit Protection Data Analyst. The claimant said she was not interested in them because they were Head Office based. Mr Parkes ended the call by saying to the claimant: "*Go away and think about it over the weekend and I'll give you a call on Monday and see what your thoughts are*".

19. After the call the claimant texted her husband to let him know how it had gone (J87). She told him: "*I have to see this process through. They've gave me the weekend to think about it as I wouldn't commit to applying for one of the roles. If I don't select a region to apply for then they take it as my notice.*" Her husband replied: "*They'll do anything so they don't need to pay you redundancy..*" The claimant responded: "*Basically yes. I won't get it as I'll be the only one applying for up here.*" Later on 8 March 2019 the claimant received a call from John Lewis offering her the Area Profit Protection Manager job. They also sent her offer letter and contract to review.

20. The following week Mr Parkes was at a biannual leadership conference in Liverpool. He did not call the claimant on Monday 11 March because he did not want her to feel he was pressing her to make a decision. On 12 March 2019 the claimant called Mr Parkes at around 12 noon. She told him that she had received a job offer from John Lewis and that she was taking herself out of the redundancy process and tendering her resignation. Mr Parkes asked her if that was her final decision and she replied "yes". Mr Parkes then asked the claimant to confirm her decision in writing and they would catch up later. He explained that he was at a conference and unable to talk further at that point. The claimant accepted the job offer from John Lewis later that day. On 13 March the claimant sent an email

(J88) with her resignation in writing to Mr Parkes and Dawn Williams (Retail Profit Protection Manager) in the following terms:

*“Hi Gary and Dawn*

5 *As I discussed yesterday with Gary, due to the recent restructure announcement and my inability to commit to the new proposed role, please accept this email as my resignation.*

*I will work my month’s notice from yesterday and finish on Friday 12<sup>th</sup> April 2019.*

10 *I would also like to take this opportunity to thank everyone for the last 11 years (almost), of which I’ve worked the last 6 and a half with Business Risk. I am extremely grateful for the opportunities I have been given.*

15 *Just on a separate note, I’ve started saving everything from my laptop to T-Gen (folder called Nicola). It has all the masters for the current PPSV template, Q1 workbook, Q1 self assessments and the PP Manual. There is also a folder called ‘archive’ which has absolutely everything from last year, workbooks, all templates, results etc (including all the stores fully completed self-assessments, in case you need to reference them at any point). Have a look at some point over the next couple of weeks and just let me know if you need anything else. Regards Nicola.”*

20 21. The respondent’s restructure was genuine and not a sham. The claimant anticipated that post restructure her role would involve more travel. She was not prepared to travel more, and she therefore resigned after the first consultation meeting in circumstances where she had another job to go to on better pay with less travelling. Had the claimant not resigned, she would have been matched into  
25 the restructured Region 1 role had she wanted it, because other colleagues dropped out of the selection process. There were additional stores added to the restructured role, but it was essentially the same role.

22. On 21 March 2019 the claimant emailed Mr Parkes (J90) and asked if she could be put on gardening leave. Mr Parkes said to leave it with him and he would have



a chat and get back to her. He called the claimant later to say that he had been told that she could finish that Friday and take the last two weeks of her notice unpaid. The claimant decided she could not afford to do that, so she finished working out her notice and left on 12 April 2019. She started her new job at John Lewis the following Monday, 15 April 2019.

23. In the event, there were some technical teething issues rolling out the RFID systems. The respondent's original plan had been to have it live in all stores by August 2019. As at the date of hearing it had been implemented in 60 stores with the rest to follow by January 2020.

#### 10 **Observations on the evidence**

24. The claimant's position was not consistent. On the one hand she accepted that there was a redundancy situation, and indeed, she sought a redundancy payment. On the other hand, she argued that the whole process, including the restructure announcement, was a sham to ensure that she and P left the business. The implication of that was that no genuine redundancy situation existed. The claimant's rationale for the latter argument included the fact that notwithstanding her acceptance that RFID technology had been introduced, it was 'in its infancy' and stock counts were still happening. Mr Parkes' evidence on this was that there had been some technical issues with RFID which had held it up but it would be fully live by January 2020. I did not conclude that the respondent's restructure was a sham. That would have involved deception on a wide scale, including the preparation and delivery of a false announcement (J74); false organisation charts showing the structure of the department before (J76) and after (J77) the restructure; and a meaningless consultation exercise, at the end of which, the claimant accepted that the organisation had actually changed. The claimant's suggestion that the restructure was a sham to get herself and P out of the business was not credible. I accept that she may have sincerely believed it at some stage, but her belief was not founded on reality.

25. With that (fairly major) exception, there were no real conflicts in the evidence. Ms Milburn accepted that she had replied in the affirmative to the claimant's question

at the consultation on 8 March as to whether she would be taken to have resigned if she did not state a preferred region. Mr Parkes accepted that he had not telephoned the claimant on Monday 11 March under explanation that he did not want to put her under pressure. Both Ms Milburn and Mr Parkes were impressive witnesses, who gave their evidence in a measured way and made appropriate concessions.

## **Discussion and decision**

### **Constructive Unfair Dismissal**

26. In a claim for constructive dismissal the onus rests on the claimant to establish that she has been dismissed. Section 95(1)(c) of ERA provides that an employee is dismissed 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.”*

27. The circumstances in which an employee is entitled to terminate a contract without notice by reason of the employer’s conduct are judged according to the common law. The claimant must establish a repudiatory breach of contract by the respondent. In essence, the claimant requires to prove:

- (i) that there was a breach of a contractual term by the respondent;
- (ii) that the breach was sufficiently serious to justify her resignation;
- (iii) that she resigned in response to the breach and not for any other reason; and
- (iv) that she did not delay too long in resigning.

28. In these proceedings the claimant's case was that the respondent was in breach of the implied term of mutual trust and confidence. The latter term was described by the House of Lords in Malik v BCCI [1997] IRLR 462 HL as a term that:

5                   *“The employer shall not, without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.”*

29. In order to establish a breach of the implied term the claimant requires to prove that the respondent was guilty of conduct that was so serious as to go to the root of the trust and confidence between employer and employee and destroy it or be calculated or likely to destroy it. Furthermore, there must be no reasonable and proper cause for the conduct. In the words of Brown Wilkinson J (as he then was) in Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666 EAT:-

15                   *“The tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”*

30. In this case the claimant resigned by email dated 13 March (J88). The onus is on her to establish that she resigned in response to a repudiatory breach of her contract of employment. The claimant submitted that the following alleged conduct of the respondent amounted to a repudiatory breach/ breach of the implied term of trust and confidence:

- 25                   **a.** The respondent put me in a position whereby I felt I had no other option but to resign.
- b.** They answered ‘Yes’ when I asked if not stating a preference would mean a resignation.
- c.** They showed a distinct lack of care for my well-being despite almost 11 years’ loyal service.

d. Trust and confidence was broken and unable to be recovered meaning I could not fulfil my contract.

31. With regard to the above, I did not find that the claimant had established a, c or d. The evidence did not support any findings along those lines. The respondent was entitled to restructure its business. The restructure was genuine and not a sham. The claimant anticipated that post restructure her role would involve more travel. She was not prepared to travel more, and she therefore resigned after the first consultation meeting in circumstances where she had another job to go to on better pay with less travel.
32. Under cross examination the claimant repeatedly said that what had prompted her to resign was the conference call. I accepted the claimant's evidence regarding what was said at b. above. This was not disputed by either Mr Parkes or Ms Milburn in their evidence. However, taken in context, answering a question frankly in those terms does not come anywhere close to a breach of the implied term. Nor does Mr Parkes omitting to call the claimant on Monday 11 March or Tuesday 12 March, nor any combination of the facts found in this case amount to such a breach. It was also significant in my view that the claimant's letter of resignation was friendly and positive and did not indicate that there had been anything untoward about the conference call. I have concluded on the facts of this case that the claimant has not established that the respondent committed a repudiatory breach of contract. Her claim for constructive unfair dismissal accordingly fails at the first hurdle.

#### Redundancy Payment claim

33. The right to a redundancy payment is contained within section 135 Employment Rights Act 1996 which states so far as relevant:

***"135 The right***

*(1) An employer shall pay a redundancy payment to any employee of his if the employee –*

*(a) Is dismissed by the employer by reason of redundancy, or*

*(b) Is eligible for a redundancy payment by reason of being laid off or kept on short-time.”*

34. Section 136 sets out the circumstances in which an employee is dismissed. Section 136(1)(c) mirrors section 95(1)(c) above. The claimant has failed to meet  
5 this test. She was not dismissed by her employer by reason of redundancy (or for any other reason). She would have been appointed to the restructured role had she wanted it. There were some differences of degree, in that responsibility because further stores had been added, but it was essentially the same role. In any event, the claimant resigned before the consultation period ended and was  
10 not dismissed.

Employment Judge:

25 October 2019

Date of Judgement:

Mary Kearns

15 Entered in Register,

Copied to Parties:

29 October 2019