



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102575/2019**

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**Held in Glasgow on 21, 22 and 23 October 2019**

**Employment Judge I Atack**

10 **Mrs S McLaughlin**

**Claimant  
Represented by:  
Mr W McParland -  
Solicitor**

15 **Inverclyde Leisure**

**Respondent  
Represented by:  
Ms K Zarkzewska -  
Counsellant**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the claimant was not constructively dismissed in terms of section 95(1)(c) of the Employment Rights Act 1996 and her claim is dismissed.

### **REASONS**

25 **Introduction**

1. In this case the claimant claims that she has been constructively unfairly dismissed. The respondent denies that they dismissed the claimant, stating that she resigned.
2. At the commencement of the hearing Miss Zarkzewska for the respondent advised that they had only received the report relating to the claimant's pension loss very recently. She requested time for the respondent to obtain their own report. After hearing the parties it was decided that the hearing would be converted into a merits hearing with a remedy hearing to take place at a later date if required.

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**E.T. Z4 (WR)**

3. The claimant gave evidence and led evidence from, Claire Osborne an accountancy assistant, Catherine McBain, receptionist and Louise Stewart, who worked in accounts receivables, all employees of the respondent. Evidence for the respondent was given by Audrey Lavelle, their finance manager, and Leslie Hallam the claimant's line manager.
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4. The parties lodged a joint bundle of documents, which including further documents which were accepted having been presented by the respondent at the commencement of the hearing, extended to 276 pages. Reference to documents in this judgment will be by reference to the page number in the bundle.
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5. From the evidence which I heard and the documents to which I was referred I found the following material facts to be admitted or proved.

### **Material Facts**

6. The claimant was employed by the respondent from 19 December 1990 until 18 November 2018 when her employment terminated.
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7. The respondent operates a leisure centre at the Waterfront Complex in Greenock.
8. Since 1 April 2014 the claimant has been employed as a senior administrative assistant. Her contract of employment is contained at pages 48 – 51.
9. Her line the manager was Leslie Hallam. Leslie Hallam reported to the finance manager, Audrey Lavelle.
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10. The claimant worked 35 hours per week.
11. The claimant's job description is set out at page 99.
12. The claimant's main duties were processing invoices which were to be paid by the respondent; helping with the banking; managing and operating what was known as the Redro procurement system and dealing with stock received for sale at the Waterfront Complex. Before 2014 the handling of invoices was dealt with by two people but that was not their sole function.
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13. The claimant had a set day for her to do the banking but she helped out at other times also.
14. The banking involved checking that the correct amount of cash was held in the safe, ordering cash when required and ensuring that the cash was correctly counted to be uplifted by the respondent's security providers.
15. Monday was an especially busy day as three days banking required to be done that day.
16. In December 2017 the respondent's HR officer, who worked in the claimant's department, went off for a year on maternity leave.
17. In January 2018 Leslie Hallam was absent on sick leave which lasted for a period of approximately 5 months.
18. In January 2018 another member of the staff in the claimant's department was absent on a long-term illness.
19. The claimant carried out more banking duties as a result of these absences, a duty in which all members of the department participated.
20. The claimant picked up the extra banking work on her own initiative.
21. The claimant found the task of dealing with the stock to be time-consuming. She was required to unpack it and check that what had been delivered corresponded with the delivery note.
22. In 2017 a decision was made by the team at a meeting held by Audrey Lavelle, that invoices should be scanned onto the respondent's system. That decision was made after discussion by the team.
23. The claimant considered that scanning invoices into the system increased her work.
24. She did not discuss her concerns with her line manager or Audrey Lavelle. She did not complain.
25. Audrey Lavelle was not aware that scanning was an issue for the claimant

26. The claimant required to check, using the Redro system that invoices received matched what had been ordered by the respondent and that the price shown on the invoices was correct. She found that time-consuming.
27. There was discussion about obtaining a price matching tool which would have reduced the time for carrying out that task. There was no promise given to the claimant that such a tool would be purchased, merely that it would be looked at in the business plan.
28. The claimant also assisted with the processing of direct debits.
29. There was an instruction from Audrey Lavelle on 25 November 2018, page 67, that in future when processing direct debits the date when the invoice was paid through the bank was to be used rather than the date of the invoice which was being paid.
30. The claimant did not voice any objection to her line manager or Audrey Lavelle at being asked to carry out that instruction.
31. On 26 April 2018, page 70, Audrey Lavelle sent an email to the claimant stating *"Just checking all is okay and if you need anything?"*.
32. The claimant responded to that email on the same date stating *"Everything's fine, no problems."*
33. The claimant did not inform Audrey Lavelle that she was feeling stressed at that time.
34. Each morning Leslie Hallam held a team meeting which the claimant attended. The purpose of that meeting was to learn what each member of the team was doing that day.
35. The claimant informed Leslie Hallam of what she had to do. She made Leslie Hallam aware that her own work was not up to date. She did not complain about her workload: only that it was not up-to-date. She was simply advising what work she had to do.

36. The claimant was advised to put suppliers' bank details onto the respondent's system so that the suppliers could be paid by BACS. That task involved extra work for the claimant.
- 5 37. The respondent made a decision to pay suppliers every two weeks rather than weekly. That decision was taken with the intention of it saving work by cutting down the number of cheques sent to regular suppliers.
38. Some suppliers complained about the change in procedure. The claimant dealt with calls from those suppliers. She did not inform her manager of any concerns she had about these calls causing any extra work or stress.
- 10 39. It was not brought to the attention of Audrey Lavelle that some suppliers might consider they were being paid late.
40. The payment of suppliers on a two weekly basis was within the respondent's payment terms.
- 15 41. In August 2018 a suggestion was made that those in the claimant's department would empty their own bins and vacuum the floors. That suggestion was made as there had been complaints about other parts of the building not being cleaned properly and the cleaners could be diverted to deal with that concern.
- 20 42. Some in the team refused to carry out the task as it was not part of their job descriptions.
43. The claimant advised she would not carry out the task because of pressure of work. She indicated that she might do it if her work was up to date.
- 25 44. The claimant was a conscientious worker who carried out the tasks given to her and helped others in tasks such as banking even when it was not her set day for that task.
45. The claimant did not ask for any of the tasks which she performed to be removed from her.
46. She did not refuse to do any work asked of her.

47. She accepted she could raise a grievance but did not do so.
48. At a meeting held on 3 August 2018 to discuss the issue of the emptying of bins and vacuuming, the claimant informed Audrey Lavelle and Leslie Hallam of her concerns regarding her work.
- 5 49. That was the first time Audrey Lavelle and Lesley Hallam were aware of her concerns.
50. Audrey Lavelle and Leslie Hallam suggested they could look at the matters of scanning invoices and the other concerns claimant had raised when she returned from a week's leave which she was about to start.
- 10 51. The claimant was told they would hold a formal meeting upon her return when these matters could be looked at.
52. There was no agreement that the respondent would take any action between the meeting on 3 August and the claimant's return from her leave. The respondents was to consider what could be done and then discuss the matter further with the claimant.
- 15 53. The claimant returned to work from her leave on 13 August. Audrey Lavelle was then on leave for two days until 15 August.
54. The claimant spoke on 13 August to Leslie Hallam who told her that there was now no need to do the emptying of the bins or vacuuming.
- 20 55. On 15 August 2018 the claimant had a meeting with Audrey Lavelle and Leslie Hallam. The purpose of that meeting was to follow-up from the meeting held on 3 August.
56. The claimant was upset at the meeting and complained about another employee who had been using her phone, sleeping and generally not working whilst the claimant was working hard. She was told they could not discuss another employee.
- 25 57. The claimant became upset and left the meeting. She did not return to it.

58. One of her colleagues, Catherine McBain, found her upset and emotional in the toilets.
59. The claimant did not return to the meeting. She continued her work for the rest of the day.
- 5 60. The respondent has a grievance policy page 260-265. The policy is referred to in the claimant's statement of terms and conditions of employment at page 50.
61. The claimant did not raise a formal grievance about her workload or that she felt it was causing her stress.
- 10 62. The claimant sent a fit note on 17 August 2018, page 107. That stated the reason for her absence from work was work related stress.
63. The claimant continued to send in sick lines covering the period until her employment terminated, pages 108, 109, 110, 111 and 112.
64. The claimant's general practitioner told her not to speak to the respondent.
- 15 65. On 22 August at 10.20am Leslie Hallam attempted to contact the claimant by phone. She was unable to do so and left a message asking the claimant to call her back, page 115.
66. The claimant replied stating *"sorry I missed your call Leslie but think it's best I don't talk about work at the moment. Thanks for calling me to see how I am though."*, page 116
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67. Leslie Hallam replied to that email the same day stating *"My main reason for contacting you was to see how you were feeling and to discuss how best we can help and support you at this time. I see from your fit note that it states "stress at work" and in line with our policies we will require you to attend an occupational health appointment. I will write out further once I receive a date and time for this appointment. If you have any concerns Sharon please feel free to contact me at any time. Take care"*, page 117 – 8.
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68. The respondent referred the claimant to Inverclyde Physiotherapy and Occupational Health Services on 22 August 2018 at 8.37am. They sent a referral form, pages 122 – 126.
69. The claimant did not have any input into the referral form. It was completed by Leslie Hallam and Audrey Lavelle.
70. The respondent had sent the referral form to the Occupational Health Services before informing the claimant that they intended to refer her.
71. An appointment was arranged for the claimant and she attended a meeting with occupational health on 3 September 2018.
72. Following that meeting a report was sent from occupational health to the respondent on 3 September 2018, pages 135 – 136.
73. That report suggested that two stress management sessions be arranged for the claimant prior to her returning to work.
74. The respondent did not send a copy of the report to the claimant. They thought occupational health would send it.
75. The claimant did not receive the report until her husband collected a copy from occupational health on 5 November.
76. The respondent advised occupational health on 5 September that they agreed to the two further stress management sessions suggested for the claimant, page 234.
77. Occupational health responded to the respondent on the same date stating they would contact the claimant and arrange her next appointment, page 234.
78. The respondent expected occupational health to contact the claimant direct about these appointments.
79. Occupational health did not do so as they had overlooked the email sent by the respondent agreeing to the two further sessions.



80. The respondent thought the occupational health report had been provided to the claimant by occupational health. They did not send a copy of the report to her.
81. On 16 October Leslie Hallam telephoned occupational health to inquire about the stress management sessions.
82. She was informed that occupational health had not been able to contact the claimant on the number they had been given. They asked for the claimant's mobile phone number. The claimant's mobile phone number was not on her personnel record held by the respondent although Leslie Hallam had that number in the capacity of a friend of the claimant.
83. She took advice from the respondent's external advisors and was instructed not to give out the claimant's mobile number as to do so would be a breach of General Data Protection Regulations.
84. The respondent accepted that advice and did not provide the mobile number to occupational health.
85. Occupational health had failed to contact the claimant to inform her about the stress management sessions agreed to by the respondent.
86. The respondent considered they should not contact the claimant as she was absent on sick leave and should leave any contact to occupational health.
87. The claimant sent a letter to the respondent on 22 October 2018, page 137, resigning from her position and giving four weeks notice.
88. She followed that up on 24 October 2018 setting out the reasons for her resignation, pages 138 – 139. In that email she stated that her job had been overwhelming for some time; that watching another employee doing very little was frustrating; that since going to see occupational health on 3 September she had heard nothing; no solution had been provided regarding her workload; no follow-up appointment had been given and she had not received a copy of the report. She stated she was suffering from stress.

89. The respondent replied to the claimant on 1 November 2018, page 141, inviting her to a meeting to discuss the matters she had raised in her resignation letter. They offered her a choice of dates for that meeting.
90. The claimant replied on 3 November asking if the meeting could take place at the end of the week as she was at that stage on medication, page 143.
91. The respondent offered to rescheduled the meeting for 12 or 13 November, page 144.
92. The claimant replied to the respondent on 5 November that she would let the respondent know what date suited her best, page 145.
93. On 6 November the claimant emailed the respondent to say she would not attend the meeting, page 146.
94. The respondent sent a letter to the claimant on 8 November acknowledging the email of 6 November and again offering an opportunity to meet on the 12 or 13 November page 148.
95. The claimant sent an email to Audrey Lavelle on 12 November advising that she would not be attending the meeting, page 150.
96. In that email she alleged that her line manager had told staff she had left on 24 October, two days after her resignation.
97. Leslie Hallam had told what she described as “close staff” that the claimant had resigned but they were already aware of that fact before she told them.
98. The respondent’s policy for managing attendance at work is contained at pages 240 – 259.
99. That policy provides at page 250 “*Before requesting a medical examination you have discussed the reasons with the employee*”.
100. The respondent did not discuss the reference to occupational health with the claimant before referring her.

101. The policy, page 250, provides that the employee must receive a copy of the medical report.

### **Submissions**

#### *Claimant*

5 102. Mr. McParland set out what the claimant required to prove in order to succeed in her claim. The claimant relies on a series of acts and omissions which cumulatively amount to a breach of contract by the respondent. The last straw was the failure to communicate to the claimant following the occupational health process. That failure was not an innocuous act but was harmful and  
10 was destructive of the term of trust and confidence, by the employer.

103. The respondent failed to deal with the claimant's issues at work and instead of addressing those issues gave her more work. She was overwhelmed. The respondent compromised the claimant's health and prejudiced her future livelihood through their actions. There was more they could have done to help.  
15 They had a duty to provide safe environment for their employees.

104. It was his position that the claimant was raising issues at the daily meetings but these were not substantially addressed by the time she resigned. The respondent failed to address the issues and deliberately ignored her concerns.

20 105. It was self-serving to suggest they did not know of the issues before the meeting on 3 August as they were able to discuss potential solutions with her at that meeting.

106. The nature of the claimant's tasks had changed and were much more time-consuming.

25 107. With regard to the circumstances surrounding the occupational health report, there was an unaccountable failure by the respondent to follow their own policies and to protect the claimant's interests. She was not given a copy of the report but that was a right she had under the process.

108. The terms of reference were in any event flawed and the summary provided to occupational health was inadequate.
109. He submitted it was highly suspicious to push through the reference to occupational health as quickly as had been done without discussing it with the claimant.
110. The claimant was not told of her rights under the policy and she was concerned how quickly the respondent was going through the medical process.
111. The fact that the occupational health report had not been sent to her was inexcusable and was a breach of the policy.
112. There were obvious steps which could have been taken to protect the claimant but they were not taken and her health was damaged by the delay. This was a breach of trust by the respondent.
113. It was the duty of the respondent to provide a copy of the report but they did not do so. The claimant was left for a period of 45 days without contact from the respondent or occupational health. The actions of the respondent were sufficient to amount to a breach of the implied term of trust and confidence.
114. Mr. McParland submitted that the claimant resigned in time and did not wait too long before resigning. All the matters she complained about were cumulative and there was no suggestion that she accepted them or acquiesced in any breach of her contract. He urged the tribunal to find that the claimant had been constructively dismissed.
115. Mr. McParland referred to the following cases:
- ***Buckland v Bournemouth University Higher Education Corpn*** [2010] IRLR 445
  - ***Western Excavating (ECC) Ltd v Sharp*** [1978] IRLR 27
  - ***Post Office v Roberts*** [1980] IRLR 347

- ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35

### *Respondent*

- 5 116. For the respondent Ms Zarkzewska denied that any treatment experienced by the claimant was a breach of any express or implied term of her contract. In the event that there was a breach it was not serious enough to be regarded as a fundamental breach.
117. The respondent's position was that the claimant had resigned and that was not in response to any breach of contract.
- 10 118. She submitted that the claimant had waited too long between the meeting on 15 August and resigning and that was an excessive delay. The claimant did not resign within a reasonable time of any alleged breach.
119. If there had been any repudiatory breach the claimant had waived it and was not now entitled to terminate her contract with or without notice.
- 15 120. It was her position that all events prior to August 2018 were not part of any course of conduct and were not part of any continuing chain up to the date of resignation. It was the respondent's position that the claimant had simply resigned and this was not a dismissal in law.

### **Decision**

- 20 121. The claimant claims that she has been constructively dismissed as described in section 95 (1) (c) of the Employment Rights Act 1996. This states that there is a dismissal where the employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.
- 25 122. ***Western Excavating (ECC) v Sharp*** (above) makes it clear that the employer's conduct must be a repudiatory breach of contract; "*A significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract*". It is clear that it is not sufficient that the employer's

conduct is merely unreasonable. It must amount to a material breach of contract.

123. The employee must then satisfy the tribunal that it was this breach that led to the decision to resign and not other factors.

5 124. Finally, if there is a delay between the conduct and the resignation, the employee may be deemed to have affirmed the contract and lose the right to claim constructive dismissal.

125. The term of the contract that the claimant relies on is that commonly called “trust and confidence”. This was defined in ***Malik v Bank of Credit and Commerce International SA (In liquidation)*** [1997] IRLR 462 where Lord Steyn said that an employer shall not “*without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.*”

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126. In this case the claimant was a diligent and conscientious worker. There were no complaints about the way she carried out her work. She helped others with the task of banking even on days when it was not her set day for banking. She did not complain about her workload prior to 3 August and did not indicate it was causing her to be stressed.

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127. She did raise at the daily meetings that her work was not up to date but that was not stated as a complaint that she had too much work to do. When asked by Audrey Lavelle on 26 April if she needed anything her response was that all was fine and there were no problems. That was an opportunity for her to have raised her concerns about her workload, but she did not take it.

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128. She raised no concerns about the time it was taking her to deal with the stock or any concern she had about the time taken to scan invoices on to the system or do with direct debits.

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129. It was not until 3 August that the claimant raised her concerns with the respondent. Until that meeting the respondent was not aware of any concerns the claimant had about her workload or the effect she alleged it was having upon her.

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130. That meeting had been arranged to discuss the suggestion that those in the claimant's department might empty their own bins and vacuum the floors. Other employees had refused to carry out those tasks as it was not part of their contract. The claimant however did not seek to argue that, merely that she was too busy.
131. When the respondent learnt of the claimant's concerns they immediately offered to help and deal with her concerns. Although some possible suggestions were made at the meeting on 3 August the respondent decided to consider this matter in the claimant's absence on leave and meet her upon her return to discuss the matter further.
132. Upon her return and that of Audrey Lavelle, they held that meeting. The claimant was upset because she had witnessed another employee who was apparently not working but was using her phone. She left the meeting and did not return.
133. She then sent in a fit note which stated that she was suffering from work related stress. The respondent decided to refer the claimant to occupational health. They did so without discussing the matter with the claimant. That is clear from the fact that the occupational health referral form was sent by email at 8:37 AM and Leslie Hallam did not attempt to contact the claimant until 10:20 AM.
134. The claimant responded that she did not want to talk about work at that time. Leslie Hallam then advised her that the purpose of contacting her was to tell her the respondent required her to attend an occupational health appointment and would contact her when it had been arranged. She did so and with the claimant's consent the appointment was arranged for 3 September 2018.
135. That meeting took place and report was sent to the respondent with a suggestion that the claimant attend two stress management sessions.
136. The respondent agreed to that suggestion and informed occupational health who stated they would contact the claimant and arrange the appointment.

137. The respondent did not at this stage require to do anything more. They had agreed the sessions and understood that the claimant did not want to speak to them. There was no requirement for them to contact the claimant about the sessions as they understood occupational health would do so.
- 5 138. The report stated, at page 135, that the claimant had given authority for it to be sent to the respondent. I accepted that the respondent felt occupational health would send a copy of the report to the claimant.
139. The report was not however sent by occupational health. The claimant did not receive it until her husband collected a copy direct from occupational health  
10 on 5 November, after her resignation.
140. I was not persuaded that any of the alleged breaches by the respondent were material breaches going to the root of the contract or showing that the respondent no longer intended to be bound by it.
141. The claimant was not being asked to do any different work than in her  
15 contract. I accept that she had a large workload and could not get through all her tasks as she may have wished but she did her work and did not complain that she was overworked.
142. When the respondent learnt of her concerns on 3 August they offered to help. I was not persuaded there was anything suspicious in the respondent  
20 suggesting possible solutions as soon as they learnt of the claimant's concerns. They did not offer any definite solution but suggested they would consider the matter and discuss it with the claimant upon her return from leave.
143. The claimant walked out of the meeting on 15 August and did not return to  
25 discuss her concerns and possible solutions to them. She was then absent on sick leave so the matter could not be discussed until she returned, which did not happen due to her resignation. The respondent was as a result not able to resolve any issues about her workload.



144. She may in the latter stages of her employment have regarded her employers as uncaring but, even if they were, that conduct of itself could not be said to be a material breach of contract.
145. The respondent's policy does oblige them to discuss the reasons with an employee before referring that employee for a medical report. The respondent did not do that in this case. They informed the claimant of the referral just under two hours after they had sent it to occupational health. The claimant did consent to attend the arranged appointment. Such a breach in procedure is of a minor nature and could not be regarded as a fundamental breach of contract.
146. It is regrettable that the claimant was not advised of the two stress management sessions which were to be arranged but it is clear from the evidence and from the productions that occupational health said they would contact the claimant and I accepted the respondent's explanation for their decision not to contact her.
147. The respondent had on their files only one telephone number for the claimant and that is the one which they gave to occupational health, on the referral form. They did not have the claimant's mobile number on their files and it was only Leslie Hallam who held that number in her capacity as a friend of the claimant. The respondent took advice as to whether or not they should release that mobile number to occupational health but were advised not to do so. I considered that they were entitled to rely on the advice which they were given and that they did so in good faith.
148. I was not persuaded that the instances which the claimant has referred to as being continuing breaches of contract over a period of time amounted to such. It was not suggested that the final actions by the employer were themselves a material breach entitling the claimant to resign but instead, they were to be seen as the last straw entitling the claimant to resign and claim constructive dismissal.
149. There was a breach of the procedure in that the claimant was not told of the referral before it was instructed but I did not consider that to be a serious

beach. The claimant was told of the referral very shortly after it had been made and she had no objection as she agreed to attend the appointment made.

150. I also did not consider the fact that the claimant had not received a copy of the report was by itself a breach of contract. From the evidence led I  
5 considered that the respondent was entitled to take the view that the report would be sent to the claimant by occupational health. I also noted that the report sent to the respondent specifically stated that the claimant had given her consent to its being sent to them. It is unfortunate the claimant did not receive the report but I did not consider that the failure to provide it was a  
10 material breach of contract. As I have already said I did not consider the previous acts to amount to a continuing course of action and accordingly there is no cumulative fundamental breach of contract.

151. The claimant's claim is dismissed.

15 Employment Judge:

I Atack

Date of Judgement:

30 October 2019

Entered in Register,

Copied to Parties:

05 November 2019

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