



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Deighton
Respondent: Coopland & Son Limited

Heard at: Leeds Employment Tribunal (by CVP)
Before: Employment Judge Deeley
On: Monday 21 and Tuesday 22 September 2020

Representation
Claimant: Mr Pearson (Claimant's friend)
Respondent: Mr P Smith (Counsel)

JUDGMENT

1. The claimant's claim for constructive (unfair) dismissal under Part X of the Employment Rights Act 1996 fails and is dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

2. This hearing was a fully remote hearing. It was originally listed to be held in person, but was converted to a CVP hearing following applications for a remote hearing from both parties.
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 Mrs Elvidge – Claimant's former colleague;
 - 3.3 Mrs Messenger – Claimant's Manager;
 - 3.4 Mrs Edwina Metcalfe (Area Manager) – Grievance Manager;
 - 3.5 Ms Sharon Key (Regional Sales Manager) – Grievance Appeal Manager; and
 - 3.6 Mrs Susan Smith (HR Manager).

4. The Respondent also submitted a signed statement from Claire Miller (Claimant's Supervisor). However, I understand that she was unable to attend the hearing due to ill health.
5. I also considered the oral submissions made by the parties' representatives during the hearing.

CLAIMS

6. The Claimant brought a claim for constructive dismissal, which is a claim for ordinary unfair dismissal under Part X of Employment Rights Act 1996 (the "ERA").

ISSUES

7. The issues to be decided in relation to the Claimant's claim of constructive dismissal were summarised by Employment Judge Brain at the preliminary hearing on 16 April 2020. Employment Judge Brain determined during the Preliminary Hearing that a separate remedy hearing would be required if the Claimant succeeds in her claim. This is because the Claimant may wish to seek medical evidence in support of any remedy claimed. However, he noted that the issue of any conduct by the Claimant during her employment should be determined at the merits hearing.
8. I discussed the issues with the parties at the start of the hearing. The Respondent's representative confirmed that they were willing to accept that the issues included any procedural issues relating to the Claimant's grievance and grievance appeal. We adjourned to provide both representatives the opportunity to take instructions regarding the issues listed. The Claimant's representative confirmed after the adjournment that the Claimant agreed with the issues set out at paragraph 3 of the summary of the preliminary hearing, in addition to any procedural issues regarding the Claimant's grievance and grievance appeal.
9. The issues to be considered in this claim are as follows:

a) Was the Claimant dismissed?

- 9.1 Did the Respondent breach the implied term of mutual trust and confidence?

The Claimant complains that the following alleged acts (considered separately or together) amounted to a breach of that term:

- 9.1.1 that Mrs Messenger asked the Claimant intrusive questions about her use of the toilet facilities;
- 9.1.2 that Mrs Miller asked the Claimant to bake with out of date ingredients; and
- 9.1.3 that Mrs Metcalfe and Miss Key committed procedural failings when handling the Claimant's grievance and grievance appeal, including:
 - a) their refusal to permit the Claimant to be accompanied by a family friend to the grievance and to the grievance appeal hearings;
 - b) Mrs Metcalfe's failure to arrange a note taker for the grievance hearing;
 - c) Mrs Metcalfe's provision of inaccurate notes of the grievance hearing;
 - d) that the grievance outcome was pre-determined;

- e) Mrs Metcalfe's failure to state in that grievance outcome letter that the Claimant had the right to appeal the grievance outcome;
- f) that the grievance appeal outcome was pre-determined;
- g) that no apology was offered and no parts of the grievance appeal were stated to be upheld by Miss Key.

- 9.2 Did the Claimant resign in response to such breach or breaches or for another unconnected reason?
- 9.3 Did the Claimant delay too long in terminating the contract in response to the Respondent's alleged breach or breaches?

b) If the Claimant was dismissed, did the Respondent have a fair reason for dismissal?

- 9.4 If the Respondent did dismiss the Claimant:
 - 9.4.1 did the Respondent have a potentially fair reason for that dismissal, namely some other substantial reason under s98(1)(b) of the ERA (i.e. breakdown of the employment relationship)?
 - 9.4.2 was the dismissal within the band of reasonable responses?

c) If the Claimant was dismissed, did the Claimant contribute to her own dismissal?

- 9.5 In the alternative, if the Respondent's dismissal of the Claimant was unfair, did the Claimant contribute to her dismissal by:
 - 9.5.1 refusing the offer of mediation; and/or
 - 9.5.2 unreasonably refusing to consider transferring to another of the Respondent's branches?

RELEVANT LAW

Constructive dismissal

10. 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."

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

- 11.1 that a fundamental term of her contract was breached;
- 11.2 that the breach was sufficiently important to justify the Claimant's resignation;

- 11.3 that she resigned in response to the breach and not for some other, unconnected reason – i.e. that the breach was an ‘effective cause’ of her resignation (*Wright v North Ayrshire Council* [2014] ICR 77, EAT); and
- 11.4 she did not delay too long in terminating her contract in response to such breach.

Implied term of mutual trust and confidence

12. 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.”

13. 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...”

14. I also note that where an employer breaches the implied term of trust and confidence, the breach is ‘inevitably’ fundamental (*Morrow v Safeway Stores plc* [2002] IRLR 9, EAT).

Unfair dismissal provisions

15. 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 the employment relationship between the parties had broken down.

16. 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.

17. 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...”

18. If the Claimant was found to be dismissed by the Respondent, the Respondent will seek to argue that the Claimant contributed to her own dismissal by refusing to engage in mediation and/or consider a transfer to another shop. The relevant

provisions on contributory conduct are set out under s122(2) of the ERA (basic award) and s123(6) of the ERA (compensatory award).

FINDINGS OF FACT

Context

19. 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.
20. 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 the parties. It was said in the *Gestmin* 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.'*
21. 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

22. The Respondent's business involves the production and sale of bakery goods via its chain of bakery shops. It employs around 1700 employees in the North of the England in its shops, its bakery production site and at its Scarborough Head office. The bakery shops each have on Site Managers who report into Area Managers (who in turn report into Regional Sales Managers). The respondent employs one HR Manager (Mrs Smith) and has access to external legal advice.
23. The Claimant was employed by the Respondent as a Sales Assistant, working at its Eastfield shop, from October 2016 until her employment ended on 8 December 2019. The Claimant's role included baking goods for sale (known as 'baking off'), serving customers and carrying out other duties in the shop.
24. The Claimant received training on her duties during 2016 and 2017, including courses on health and safety, food safety and hygiene, stock rotation and 'bake off' procedures.

Claimant's sickness absence and return to work

25. The Claimant was absent on sick leave from around February 2018 due to a close family bereavement and related court proceedings. She returned to work on 10 November 2018 on a phased basis. Sharon Messenger was the Assistant Manager of the Eastfield shop before the claimant went on sick leave. She became the shop's

Manager during the Claimant's absence. Claire Miller was the Assistant Manager of the shop on the claimant's return to work.

26. There were around six other Sales Assistants who also worked at the shop during this period, including Catherine Elvidge, who resigned from her employment with the respondent in April 2019. Mrs Elvidge confirmed during her evidence that she could not have any first-hand knowledge of the events referred to in the claimant's claim.
27. The Claimant and Mrs Messenger had become close friends outside of work during the Claimant's sickness absence. Their friendship continued following the Claimant's return to work and they frequently confided in each other during this time.
28. The Claimant described herself as being in an 'extremely fragile and emotional state' during her sickness absence. She said that she remained in this state following her return to work. The Claimant believed that her managers were supportive when she first returned to work. However, the Claimant became concerned by what she regarded as 'bullying' by Mrs Messenger from June 2019 onwards and their friendship deteriorated. The Claimant believed that Mrs Messenger wanted to 'get rid of her' from the shop.
29. Mrs Messenger was concerned about the Claimant's performance at work after her return to work in late 2018. Both she and Mrs Miller kept notes of their concerns. However, she did not raise her concerns with the Claimant at that time. I accept Mrs Messenger's explanation that she did not raise her concerns on a formal basis because of the Claimant's personal difficulties. Mrs Miller did raise a concern with the Claimant on 20 August 2019, when the Claimant mistakenly baked stock delivered on Tuesday, rather than stock delivered on Monday (which could potentially increase waste goods from the shop). She noted this mistake in the Claimant's training record and the Claimant signed that note on 21 August 2019.
30. The Claimant submitted a grievance on 28 August 2019 in which she raised allegations relating to her treatment by Mrs Messenger and Mrs Miller. The Claimant went on sick leave in late August 2019 and did not return to work before her employment ended.

Claimant's grievance

31. There was some discussion between the parties regarding the arrangements for the grievance hearing. Mrs Metcalfe refused the Claimant permission to be accompanied by a family member or friend to the hearing. The reasons for her refusal were that the respondent's policy did not allow this and that she did not believe that a family member or friend would be 'neutral'. The Claimant was disappointed with this response but agreed to attend the hearing.
32. Mrs Metcalfe met with the Claimant on 4 September 2020 to discuss her grievance. Both Mrs Metcalfe and the Claimant made handwritten notes of the hearing. Mrs Metcalfe typed up her notes shortly after the hearing.
33. Mrs Metcalfe and the Claimant discussed the Claimant's concerns during the hearing. Mrs Metcalfe then met with both Mrs Messenger and Mrs Miller to discuss the concerns raised. Mrs Metcalfe emailed her opinion on the grievance to Mrs Smith on 9 September 2020, following which Mrs Smith prepared a draft grievance outcome letter. The grievance outcome letter was sent to the Claimant on 13 September 2020, after Mrs Metcalfe made some changes to the letter. Mrs Metcalfe did not uphold the Claimant's grievance.

34. The Claimant requested a copy of the notes of the grievance hearing but these were not provided until late September 2019. She was not aware of and was not provided with Mrs Metcalfe's email summary of her meetings with Mrs Messenger and Mrs Miller.

Claimant's grievance appeal

35. The grievance outcome letter did not refer to the Claimant's right of appeal against the grievance outcome. Miss Key was on holiday from early September to around 21 September 2019. However, on her return she read the grievance outcome letter and flagged that the right of appeal had been omitted. Mrs Smith sent a letter dated 23 September 2019 to the Claimant, informing her that she had the right to appeal against the grievance outcome.

36. The Claimant appealed against her grievance outcome in a letter dated 28 September 2019. Miss Key met with the Claimant on 16 October 2019 to discuss her grievance appeal. The Claimant brought some notes with her to that meeting, which she used to point out errors that she believed Mrs Metcalfe had made in the notes of the grievance hearing.

37. Miss Kay then met with Mrs Messenger on 22 October 2019 and later discussed the issues raised with Mrs Metcalfe and Mrs Miller.

38. Miss Key sent the Claimant a copy of the grievance appeal hearing notes. However, she did not send the claimant a copy of her typed notes of her meeting with Mrs Miller or her handwritten notes of her discussions with Mrs Metcalfe and with Mrs Miller.

39. Miss Key issued her decision regarding the Claimant's grievance appeal by letter dated 30 October 2019. Miss Key found that the right of appeal from the grievance outcome letter was mistakenly omitted from the letter. She also found that Mrs Metcalfe should have arranged for a note taker at the grievance hearing. Miss Key did not uphold the remaining points of the Claimant's grievance.

40. Mr Pearson responded on the Claimant's behalf by email dated 8 November 2019, noting the Claimant was 'bitterly disappointed' with the appeal outcome.

Discussions regarding mediation and transfer options

41. Miss Key asked the Claimant during the appeal hearing whether she would be willing to consider a transfer to another shop. The Respondent owned another shop (known as the 'Snack Shop') which was around 15-20 minutes' walk from the Eastfield shop. The Claimant refused to consider a transfer, stating that she had done nothing wrong. The Claimant said that the Eastfield shop was convenient for her because it was around a 5 minutes' walk from her home. In addition, she felt comfortable working at the Eastfield shop because she knew all of the staff and customers in the shop.

42. Miss Key then asked the Claimant whether she would be willing to participate in a mediation with Mrs Messenger. The Claimant agreed that she would be willing to participate in a mediation during the appeal hearing. However, Mr Pearson's email of 8 November 2019 stated that "*mediation is not an option that she can pursue at this point*" because she had been signed off by her doctor on the grounds of work-related stress. The Claimant explained during her oral evidence to the Tribunal that she did not want to mediate after receiving the appeal outcome because: "*I felt that*

they never believed anything I said. I felt that I would be at risk of further bullying if I went back”.

Claimant’s allegations of breach of contract

43. The first two allegations of breach of contract relate to incidents in August 2019. The third allegation is that the Respondent committed procedural failings when handling the Claimant’s grievance and grievance appeal.

Toilet discussion – 9 August 2019

44. Staff in the Respondent’s shop had to ask to use the toilet during the working day to ensure that there was always one member of staff at the customer counter at any time. The Respondent’s normal practice was that a member of staff would clean the toilet in the shop at the end of each day.

45. The Claimant, Mrs Messenger and Mrs Miller were working at the shop at around 8.50am on the morning of 9 August 2019. They were all standing close together in the shop when the discussion took place. No customers and no other colleagues were in the shop at that time. Mrs Messenger noticed that someone had put toilet cleaner in the toilet and sprayed air freshener. Mrs Messenger asked Mrs Miller if she had cleaned the toilet. Mrs Miller replied that she had not cleaned it.

46. There was a dispute between Mrs Messenger and the Claimant as to what was said next. The Claimant states that Mrs Messenger questioned her on her use of the toilet. Mrs Messenger states that the Claimant overheard Mrs Messenger’s discussion with Mrs Miller and that the Claimant responded saying that she had an ‘iffy tummy’ due to stress. It is agreed that Mrs Messenger asked the Claimant if she was ‘okay’ and whether she needed to go home. I find that a conversation took place between Mrs Messenger, Mrs Miller and the Claimant and that Mrs Messenger was not seeking to question the Claimant in an intrusive manner.

47. I accept that the Claimant perceived this discussion to be embarrassing. However, I accept Mrs Messenger’s evidence that she needed to check whether either member of staff was suffering from an upset stomach due to the food hygiene implications for the shop. I do not accept the Claimant’s evidence that it was inappropriate for Mrs Messenger to discuss this matter with her.

48. The Claimant also stated that she suffered additional embarrassment and humiliation because this discussion took place in front of Mrs Miller. However, I find that this was a short informal discussion that involved Mrs Miller and that it was not unreasonable for Mrs Messenger to conclude the discussion in front of Mrs Miller.

‘Bake off’ of out of date goods discussion – 20 August 2019

49. The Respondent’s procedures state that all ‘raw’ products which were out of date (such as chicken or steak pasties) should be baked at the shop and then returned to the respondent’s central bakery for disposal.

50. Mrs Miller asked the Claimant to ‘bake off’ out of date products containing raw meat on 20 August 2019. The Claimant refused to do so, stating that they were out of date. Mrs Miller did not challenge the Claimant’s refusal at the time and later ‘baked off’ the products herself.

51. I accept the Claimant’s evidence that she was not aware of (or had forgotten) the Respondent’s procedure relating to the disposal of raw meat products. However, I also accept the Respondent’s evidence that this was in line with their procedures

and that the Claimant may not have observed this practice because of the timing of the shifts that she normally worked at the shop.

52. The Claimant accepted in her witness evidence that the note that she had signed on her training record on 21 August 2019 related to whether she had mistakenly 'baked off' the wrong batch of products. It did not relate to her allegation that she had been asked to out of date goods.

Claimant's allegations regarding the grievance and grievance appeal process

53. The Claimant raised the allegations set out below regarding the Respondent's handling of her grievance and her subsequent appeal:

a) Refusing to permit the claimant to be accompanied by a family member or friend to the grievance and to the grievance appeal hearings

54. The Respondent accepts that they refused the Claimant's request to be accompanied by a family member or friend to these hearings.

b) Failing to provide a note taker for the grievance hearing

55. Mrs Metcalfe accepted that she chose not to bring a note taker to the grievance hearing. She stated that she took that decision because she wanted to reduce the formality of the hearing to make the Claimant more 'comfortable'. Miss Key accepted during the Claimant's appeal that this was the wrong decision.

c) Providing inaccurate notes of the grievance hearing

56. I find that the Claimant had the opportunity to provide her detailed comments on Mrs Metcalfe's grievance hearing notes during the appeal hearing. This information formed part of Miss Key's appeal decision.

d) Grievance outcome was pre-determined

57. I do not accept the Claimant's contention that the outcome of her grievance was pre-determined. The Claimant stated during her oral evidence that she felt that Mrs Metcalfe had deliberately tried to upset her, put her under pressure and 'browbeaten' her during the hearing. She stated that Mrs Metcalfe did not really listen to what she had to say during the grievance hearing. However, the Claimant was unable to point to any specific points evidencing such behaviour in the Claimant's annotated notes of the grievance hearing which the Claimant discussed with Miss Key at the appeal hearing. I accept Mrs Metcalfe's evidence that she and the Claimant had a good working relationship prior to the grievance hearing and that she had conducted a welfare meeting with the Claimant at the Claimant's home during her 2018 sickness absence.

58. The Claimant's main complaint relating to the grievance outcome appears to be that she believed that Mrs Metcalfe believed Mrs Messenger over her and regarded the outcome as 'one-sided' and 'lacking balance'. However, the fact that the Claimant disagreed with the grievance outcome is not of itself evidence that the outcome was pre-determined.

e) Failing to offer the right of appeal from grievance outcome in the outcome letter

59. The Claimant accepted during her oral evidence that the respondent's failure to offer her a right of appeal in the grievance outcome letter was an 'innocent mistake'. In any event, the Claimant was subsequently offered the right of appeal which she accepted.

f) Grievance appeal outcome was pre-determined

60. The Claimant did not complain about Miss Key's handling of the appeal hearing itself. The Claimant's representative referred to an email that Mrs Metcalfe sent to Mrs Smith on 9 September 2019 which was copied to Miss Key. This email set out Mrs Metcalfe's view of the claimant's grievance and stated that she believed that the claimant was 'extremely bitter' and 'quite vitriolic'. Mrs Metcalfe stated that she copied Miss Key into this email because Miss Key was her line manager and this was standard practice. I accept Miss Key's evidence that this email did not influence her approach to the claimant's grievance appeal. Miss Key was on holiday at the time that this email was sent and had only briefly scanned this email on her return to work on or around 21 September 2019. In addition, Miss Key discussed the claimant's concerns in detail during the appeal hearing and re-interviewed Mrs Messenger and Mrs Miller regarding the claimant's concerns.
61. The Claimant's representative also highlighted an email dated 23 September 2019 in which Miss Key stated that: "Ann can be awkward". This email was disclosed as part of the respondent's response to the Claimant's subject request. Miss Key's evidence was that this email consisted of her response to Mrs Smith's email, which set out two options for rectifying the respondent's omission of the right of appeal from Mrs Metcalfe's grievance outcome letter. She said that she had only met the Claimant once before her grievance, that the statement "Ann can be awkward" was an error and that she meant that the fact that the right of appeal had been omitted from the letter was 'awkward'. I accept Miss Key's evidence that the statement in the email was a mistake. The Claimant did not provide any evidence to suggest that she had a poor relationship with Miss Key before the appeal hearing.

g) Grievance appeal – failure to offer an apology or uphold parts of appeal

62. Miss Key accepts that she did not offer an apology and did not specifically state that parts of the Claimant's appeal were upheld. However, it is clear from the grievance appeal outcome letter that Miss Key accepted certain grounds of the Claimant's appeal (e.g. that a note taker should have been provided at the grievance hearing).

h) Other issues

63. In addition, the Respondent's witnesses accepted that they failed to provide notes of Mrs Metcalfe's grievance investigations discussions (with Mrs Messenger and Mrs Miller) and Miss Key's grievance appeal investigation discussions with Mrs Messenger, Mrs Miller and Mrs Metcalfe) to the Claimant.

Reason for the claimant's resignation

64. The Claimant's witness statement referred to her resignation email to Miss Key dated 2 December 2020, under which she resigned with one week's notice. This email stated:

"Further to the email Mark Pearson sent you on my behalf, on 8th November 2019, I am writing to tender my resignation in respect of my role of Sales Assistant at Cooplands.

I do this with huge regret but, sadly, I feel that you have left me with no choice owing to the lack of support I have received from my manager which was further compounded by how you have dealt with my grievance appeal. I firmly believe that my position at Cooplands is no longer tenable as a result of the issues raised in my grievance which I believe you have failed to address in a fair and reasoned manner.

As you are aware, I was keen to return to work but this has not been made possible. I fear that, should I return, the lack of support and hostility shown by my line manager in particular would continue and I am not willing to allow myself to be mistreated like this any longer.

I would be grateful if you could please confirm your receipt of this email along with confirmation of what date my employment will end.”

65. However, the Claimant’s account of the reason for her resignation during her oral evidence to this hearing was different. The Respondent’s representative asked the Claimant why she resigned. The Claimant said: *“I could not take the pressure that Mrs Messenger was putting me under”*. She did not refer to the handling of the grievance or the grievance appeal.

66. It is agreed that the Claimant’s employment terminated on 8 December 2019.

APPLICATION OF THE LAW TO THE FACTS

67. Applying the law to my findings of fact, I have reached the conclusions set out below.

Did the respondent breach the implied term of mutual trust and confidence in the claimant’s contract?

68. I have set out the law in detail above. However, I note again that the legal test requires the Claimant to provide evidence from which the Tribunal can find that the respondent’s conduct was “calculated or likely to destroy or seriously damage” the relationship between the parties. It is clear from the wording of this test that an employer’s actions could damage the employment relationship, without reaching the test’s threshold of destruction or serious damage of the employment relationship.

69. I appreciate that the Claimant was going through a very difficult time during the period in which these events took place and that she was in an emotional and fragile state. I also acknowledge that the Claimant feels very strongly that she was treated ‘unjustly’ by the respondent in the period ending with her resignation. However, the legal test requires me to take an objective view of the Respondent’s conduct. I have concluded that the respondent’s conduct did not breach the implied term of mutual trust and confidence for the reasons set out below.

70. The discussion on 9 August 2019 between Mrs Messenger, Mrs Miller and the Claimant regarding the use of the toilet did not amount to a breach of the implied term of mutual trust and confidence. As set out above, whilst I accept that the Claimant felt embarrassed by this exchange, I find that Mrs Messenger did not question the Claimant in an intrusive manner. In addition, Mrs Messenger had ‘reasonable and proper cause’ to check whether the Claimant had an upset stomach (i.e. food hygiene in a bakery shop), even if the terms of the discussion took place in accordance with the Claimant’s recollection of events.

71. Mrs Miller’s instruction on 20 August 2019 to ‘bake off’ out of date goods containing raw meat did not amount to a breach of the implied term of mutual trust and confidence. This is because the respondent had to follow its waste disposal procedure in order to ensure that out of date products were disposed of correctly. The Claimant admitted during her evidence that she was not aware of (or had forgotten) about this procedure.

72. The Respondent has admitted that mistakes were made during the grievance and appeal process, as set out in my findings of fact. It is clear from these admissions

that the Respondent could have improved the way that they handled the grievance and appeal process. However, I have concluded that these mistakes were not calculated and were not likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the Claimant. The key reasons for my decision are that:

- 72.1 the Claimant agreed to attend the grievance and grievance appeal hearings without being accompanied by a family member or friend, despite noting her disappointment at the respondent's refusal to permit such a companion;
- 72.2 the Claimant agreed to proceed with the grievance hearing without a note taker and did not raise any concerns about the lack of a note taker before the hearing;
- 72.3 the Claimant's comments on the grievance hearing notes (as explained during her oral evidence) do not indicate any significant inaccuracies in the notes. The Claimant had the opportunity during the grievance appeal to comment on the notes and her comments were considered by Miss Key during the grievance appeal;
- 72.4 the Claimant was unable to point to any specific evidence that her grievance outcome was 'pre-determined', as set out above in my findings of facts;
- 72.5 the Claimant accepted that the Respondent's failure to offer a right of appeal in the grievance outcome letter was an 'innocent mistake' and was rectified shortly afterwards;
- 72.6 I accept Miss Key's evidence that she had not formed a view of the Claimant before the appeal hearing and that the email of 23 September 2019 mistakenly referred to the Claimant as 'awkward', rather than the failure to offer her an appeal in the outcome letter; and
- 72.7 the Respondent failed to provide the Claimant with notes of the grievance and grievance appeal investigation meetings with the relevant witnesses. However, the Claimant did not identify any additional points in her evidence on which she could have challenged those witnesses' accounts during her evidence at this hearing.

Did the claimant resign because of the alleged breaches of contract?

- 73. I have concluded that the Respondent did not breach the Claimant's contract, therefore I do not need to reach a decision regarding the reason for the Claimant's resignation. However, if my conclusion that the Respondent's handling of the Claimant's grievance and grievance appeal did not amount to a breach of the implied term of mutual trust and confidence is incorrect, then I find that the Claimant did not resign in response to this breach. The Claimant's oral evidence during this hearing was that she resigned because: *"I could not take the pressure that Mrs Messenger was putting me under"*. She did not refer to the handling of the grievance or the grievance appeal.
- 74. I have therefore concluded that the Claimant was not dismissed for the purposes of s95(1)(c) of the ERA. I do not need to consider whether the claimant was unfairly dismissed under s98 of the ERA because I have concluded that the Claimant was not dismissed.

CONCLUSIONS

75. For the reasons set out above, I have concluded that the Claimant's claim for constructive dismissal fails and is dismissed.

Employment Judge Deeley

Date: 23 September 2020

JUDGMENT SENT TO THE PARTIES ON

Date: 23 September 2020

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