



EMPLOYMENT TRIBUNALS

Claimant: Miss S Napleton

Respondent: GSI Wealth Management Limited

Heard on: 16th, 17th and 18th September 2020 by CVP

Before: Employment Judge Pritchard

Representation

Claimant: Ms N Gyane, counsel

Respondent: Mr I Ahmed, counsel

RESERVED JUDGMENT

The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds.

REASONS

1. The Claimant claims she was constructively and unfairly dismissed. The Respondent resists the claim.
2. The Tribunal heard evidence on the Claimant's behalf from the Claimant and from Sarah Cope, a former colleague working for the Respondent. On the Respondent's behalf the Tribunal heard evidence from Karen Foskett (Operations Manager at relevant times), Paul Mitchell (Managing Director), Tara Loan (HR Consultant), and Heather Love (HR Consultant). The Tribunal was provided with a bundle of documents and a supplementary bundle of documents to which the parties variously referred. At the conclusion of the hearing counsel for the parties made oral submissions. After the hearing had ended counsel for both parties made further submissions to the Tribunal by email.

Issues

3. At the commencement of the hearing the Respondent conceded that if the Tribunal were to conclude that the Claimant had been constructively dismissed then the dismissal would be unfair. The Tribunal determined that the hearing would consider liability only and that if the Claimant succeeded in her claim then a further hearing would be held to consider remedy.

4. The issues for the Tribunal to decide were:
 - 4.1. Could the Claimant show that the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust? (The Claimant's case was that the Respondent's conduct on 21 March 2019, 27 March 2019 and 29 March 2019 taken individually or cumulatively amounted to such a breach).
 - 4.2. If so, could the Claimant show that she resigned in response to the breach?
 - 4.3. Did the Claimant delay before resigning such that she should be treated as having affirmed the contract?

Findings of fact

5. The Respondent is an independent financial services company. It is a small employer having thirteen employees at relevant times. The Claimant commenced employment with the Respondent in April 2010. The Claimant signed a contract of employment on 19 April 2010 which provides:

1. Job Title Administrator / Sales Support

1.1 You are employed as Administrator / Sales Support

1.2 In addition to the duties, which this job normally entails, you may from time to time be required to undertake additional or other duties as necessary to meet the needs of the Company's business.

8. Hours of Work

8.1 Your normal hours of work are 9.00 a.m. to 5.00 p.m. Monday to Friday with one hour for lunch.

8.2 You will be required to work such hours outside your normal hours of employment as the Company considers necessary to meet the needs of its business and you will not be paid for such further hours.

23. Changes to the terms of your employment

23.1 The Company reserves the right to make reasonable changes to any of your terms and conditions of employment.

23.2 ...

23.3 You will be given not less than one month's written notice of any significant changes which may be given by way of an individual notice or general notice to all employees. Such changes will be deemed to have been accepted unless you notify the Company of any objection in writing before the expiry of the notice period.

6. The Claimant's salary was reviewed annually: her starting annual salary of £18,000 had risen to £33,000 by the time her employment ended.
7. The Claimant was line-managed by Karen Foskett. The Claimant's duties initially involved new business administration and she also assisted Karen

Foskett to organise and arrange seminar events, an important aspect of the Respondent's business.

8. Throughout her employment the Claimant attended performance appraisal meetings. It was noted at a performance appraisal meeting in 2011 that the Claimant wished to have overall responsibility for seminars and be the Seminar Co-ordinator.
9. From about 2015, the number of seminars held by the Respondent increased. The Tribunal heard conflicting evidence as to exactly how many seminars the Respondent now held each year but it is likely to have been about twenty. The seminars were held from March to October, no seminars taking place in the other four months of the year. The Claimant now became wholly responsible for organising and arranging seminar events: this included liaising with the Respondent's printers, researchers and marketing providers; booking venues; corresponding with attendees and attending the seminars to meet and greet. Additionally, although she no longer carried out new business administration, the Claimant carried out ad hoc administrative duties. The Respondent provided the Claimant with business cards which held her out as Seminar Co-ordinator. From September 2017 the Respondent no longer referred to the Claimant as Administrator on her pay statements, instead referring to her as Seminar Co-ordinator. Sarah Cope, employed by the Respondent as Head of Client Services, was of the view that the Claimant was employed as Seminar Co-ordinator. Although Karen Foskett remained the Claimant's line manager, the Claimant would liaise directly with Paul Mitchell about seminar work. Notwithstanding the changed focus of the Claimant's role, she was not issued with a new contract of employment.
10. During a performance appraisal meeting held in June 2018, the Claimant stated that if the Respondent decided to implement different working hours then she would be open and flexible.
11. In about September 2018, at Karen Foskett's request, the Claimant produced a job specification of the role she carried out. It is headed Seminar Co-ordinator Job Specification. In addition to the duties directly relating to the seminar co-ordinator role, the Claimant included the ad hoc administrative duties she carried out. The Tribunal accepts, as confirmed by Karen Foskett in evidence, that the Claimant carried out both her duties relating to seminar co-ordination and the ad hoc administrative duties she listed in the job specification. The Tribunal also accepts Karen Foskett's evidence, not least because she was the Claimant's line manager, that the Claimant never refused to do anything, would not actively avoid other duties and would always find something to do. There is nothing in the notes of the various performance meetings to suggest that the Claimant was refusing to carry out tasks or duties allocated to her; any criticism in the notes, taken at their highest, suggest that the Claimant might lack confidence to undertake tasks in some areas of the Respondent's business causing her to procrastinate or first ask for training. The evidence before the Tribunal made it clear that the Claimant excelled at carrying out her duties as Seminar Co-ordinator.
12. During a performance appraisal meeting held in February 2019, the Claimant stated that she would wish to consider working two hours less each week. This

was agreed and on Mondays to Thursdays the Claimant finished work at 4.30 pm whilst retaining a 35 hour week.

13. The Claimant also noted at this performance appraisal meeting that there had been a downturn in seminar attendance and that her morale had been affected by Paul Mitchell's comments about him seeing her role as part-time and saying he could employ someone else for a lot less. The Claimant was looking forward to taking on extra responsibilities such as those relating to compliance and being proactive in providing seminar analyses.
14. On Thursday 21 March 2019, at Paul Mitchell's suggestion, Karen Foskett invited the Claimant to a luncheon meeting at the local public house. The Tribunal makes the following findings:
 - 14.1. Karen Foskett told the Claimant that she had dreaded telling her but that Paul Mitchell saw the Seminar Co-ordinator role as a three day a week job and that administration had to be undertaken on the other two days of the week;
 - 14.2. Karen Foskett asked the Claimant if she was interested in working just three days a week to cover the seminar co-ordination role only;
 - 14.3. Karen Foskett informed the Claimant that the Respondent was undergoing a streamlining process to make it more productive;
 - 14.4. Karen Foskett told the Claimant that she had one week to decide if she wanted to work three days each week carrying out only seminar co-ordinator duties;
 - 14.5. The Claimant was upset and left the meeting.
15. On Wednesday 27 March 2019, Karen Foskett met with the Claimant for a quick catch-up meeting and asked whether she had made a decision. The Tribunal accepts the Claimant's evidence that Karen Foskett told her that Paul Mitchell wanted to draw up a new contract. The Claimant said she wanted until Friday 29 March 2019 to respond.
16. In the meantime, the Claimant, concerned about her employment and the financial impact of potential part-time working, consulted solicitors. The Claimant's solicitors wrote to Karen Foskett on 28 March 2019 referring to her meetings with the Claimant on 21 March 2019 and 27 March 2019. Among other things the letter states:

We are instructed by Suzanne Napleton in respect of a conversation you had with her last week when you informed her that you and Paul Mitchell had assessed that her full time role no longer existed and advised her that it was [the Respondent's] intention to put her down to a three day week. We understand that you implied that there may be redundancies and asked her to consider her options and confirm her acceptance. Your intention at the start of that meeting was clearly to cause her to be concerned about her ongoing employment with the Company if she did not accept a reduction in her working time down to three days a week.

Our client informs us that yesterday you asked her whether she had made her decision and told her that the Company wished to issue her with a new contract for three days a week commencing on 1 April 2019.

...

For the avoidance of doubt our client does not agree to any variation to her contract of employment.

17. The following day, Friday 29 March 2019, the Claimant was required to attend a meeting with Karen Foskett and Paul Mitchell (which was recorded by way of what the Tribunal understands to be speech recognition software). The Tribunal makes the following findings:

- 17.1. Paul Mitchell did most of the talking in a raised voice;
- 17.2. The Claimant was repeatedly told that she often misunderstood what had been said to her: she heard what she wanted to hear and not what had been said to her;
- 17.3. The Claimant was told that she was not filling her working time, twiddling her thumbs, and that every time the Respondent asked her to do something, she effectively avoided doing it;
- 17.4. Paul Mitchell told the Claimant that the Respondent was not forcing her to go part-time but offering her a part-time position to carry out seminar co-ordination work only: if she only wanted to carry out seminar work, it would be a three-day week part-time role;
- 17.5. If the Claimant wanted to work three days each week, the change would not be implemented immediately but in one month's time;
- 17.6. The Claimant was told that it was not the Respondent's goal to put her down to three days a week: if she wanted to continue to work five days each week she should think of what additional roles could be given to her;
- 17.7. The Claimant said she wanted to seek legal advice;
- 17.8. Paul Mitchell told the Claimant that the Claimant should inform him within the following week if she wished to make changes to her role and that a meeting would take place the following Friday.

18. With reference to the meeting of 29 March 2019, on 1 April 2019 the Claimant's solicitors wrote to Karen Foskett of the Respondent Their letter includes the following:

Our client has informed us that during the meeting with you and Mr Mitchell she was made to feel very uncomfortable, belittled and was humiliated. It was suggested to her by you and Mr Mitchell that she had misunderstood the situation and that she had misheard what you had told her. We understand that Mr Mitchell tried to get our client to agree that her job was a full-time job but that there was additional work that

needed to be found for her. This appears to support the contention that our client's position is in fact redundant and that what you were trying to do was to get her to accept the part-time job to avoid going through a redundancy process with her.

...

In view of your failure to respond to us in writing and the manner in which she was spoken to on 21 and 29 March 2019, we have advised our client to raise a formal grievance against you and Mr Mitchell.

As you and Mr Mitchell are the two most senior people in the Company and the complaints are about the manner in which she has been treated by you both since 21 March 2019, the Company will need to make arrangements for an independent person who has had no dealings with this matter to be appointed to investigate the grievance. ...

19. The Claimant was signed off work with stress at the beginning of April 2019.
20. By letter dated 8 April 2019 the Claimant sent her formal grievance to the Respondent. In summary, she complained that:
 - 20.1. Karen Foskett's actions and conduct on 21, 27 and 29 March 2019 were inappropriate and designed to get her to accept a change to her terms and conditions;
 - 20.2. Paul Mitchell's actions and conduct on 29 March 2019 were inappropriate and the manner in which he spoke made her feel undermined and humiliated;
 - 20.3. The Respondent's actions to try to get her to accept that her position was part-time (three days a week) was deliberate in order to avoid dealing with a redundancy and paying redundancy pay;
 - 20.4. The Respondent had breached its legal obligations by failing to enter into consultation in respect of changing terms and conditions of employment/redundancy consultation.
21. The Respondent engaged Bespoke HR to consider the Claimant's grievance. The Claimant attended a grievance meeting with Tara Lohn of Bespoke HR on 17 April 2019. The Claimant explained what had happened and said she felt she was being pushed out of the company. Tara Lohn carried out her investigation by speaking to Karen Foskett and Paul Mitchell: the Claimant did not want Tara Lohn to investigate by discussing the matter with anyone else. The notes of the investigation with Karen Foskett record, among other things:

What conversations have you had with Suzanne about her role, prior to the conversation of 21 March 2019? Loads of conversations were had with Suzanne trying to get her to take on more responsibility. She doesn't want to do anything other than seminars. She is supposed to do seminar analysis and has only done it once. She was trained to do the analysis and only did it once since then which was July 2018. Spoke to Paul prior to the meeting [of 21 March 2019] with Suzanne as frustrated

and can't get her to do anything extra, so raised it with Paul. Suzanne always says she needs training. She just won't do anything else just seminars. Always avoids everything except seminars.

Please take me through the events of 21 March. This meeting was instigated by Karen after Paul suggested she chat with Suzanne. Took her to lunch (not a drink) to discuss her role. Needed to get the role sorted.... The company runs 18 seminars a year so doing just seminars is not a full-time role. October – March there are no seminars. Suzanne got annoyed and so Karen asked her if she wanted to have a think about things and she said she would think about it...

What was the reason for the meeting? To talk to Suzanne about taking on more responsibility and also see if she was still thinking of going part time.

Why did you want to reduce her days from 5 to 3? Didn't want to reduce her days wanted her to take on more responsibility.

Who made the decision to reduce her days? Her days were not being reduced.

22. Among other things, the notes of the investigation with Paul Mitchell record the following:

Please explain the reasons for the meeting Karen held with Suzanne on 21 March. This has been an ongoing saga for many years. Suzanne's work is poor, and Karen defends her. Every time she is given a job she doesn't do it. Karen had said she has now given up on Suzanne. All Suzanne wants to do is seminar stuff. The role is admin and not just seminars. Suzanne told Karen she wanted to go part time before Christmas. Suggested to Karen to talk to Suzanne as seminars are 3 days a week not 5. Suzanne had also told Karen that she was thinking she might leave. Karen told Paul that Suzanne was offended by the conversation. Paul told Karen to check out the rules and give her one month's notice of any changes. The intention of the meeting was to point out to her that she needed to do more. Suzanne is good at seminars and nothing else and she won't do anything else. Her performance has drastically reduced over time.

Please explain why the company wanted Suzanne to reduce her days from 5 to 3. This is not the case looking to add responsibility to fill the 5 days.

Please explain why a redundancy consultation process was not followed. The role is not redundant...

Was a deadline of 1 April decided and communicated to Suzanne? If so, why? This was a suggestion from Paul of a date when changes could be implemented if they were agreed.

23. By letter dated 25 April 2019 Tara Loan informed the Claimant that her grievance was not upheld.
24. The Claimant appealed against Tara Loan's findings and conclusions, summarised as follows:
- 24.1. That she was employed as an Administrator;
 - 24.2. That the Seminar Co-ordinator role was not a five day per week role;
 - 24.3. That the Respondent was not seeking to gain agreement that the Seminar Co-ordinator role should be part-time.
 - 24.4. That Respondent was not seeking to change her terms and conditions of employment;
 - 24.5. There was no evidence to suggest that her role was at risk of redundancy;
 - 24.6. That neither the conduct of Paul Mitchell or Karen Foskett was inappropriate.
25. At the Claimant's request, Heather Love of Bespoke HR heard the Claimant's appeal by telephone on 8 May 2019. By letter dated 14 May 2019 Heather Love emailed a copy of the grievance outcome appeal letter to the Claimant. Heather Love did not uphold the Claimant's appeal.
26. By letter dated 16 May 2019, the Claimant resigned with immediate effect clearly setting out her reasons for doing so.

Applicable law

27. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if 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.
28. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:
- (i) that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); The final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA. Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.
 - (ii) that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal,

as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; Logan v Celyyn House UKEAT/2012/0069; Wright v North Ayrshire Council EATS/0017/13/BI); and

(iii) that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

29. All contracts of employment contain an implied term 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 confidence and trust between employer and employee: Malik v BCCI [1997] IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; Morrow v Safeway Stores plc [2002] IRLR 9.
30. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.
31. The Respondent referred the Tribunal to Hart v St Mary's School (Colchester) Limited UKEAT 0305/14 and Bateman v Asda Stores Limited UKEAT 0221/09.
32. By email submissions the Respondent referred the Tribunal to Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668, a decision of the EAT in which the employer's letter threatening to remove the employee's directorship was held to be an anticipatory breach, not an actual breach of his contract of employment in respect of which future performance was still executory. The employer was entitled to withdraw its threat before the employee communicated acceptance of the repudiation.
33. In reply, the Claimant reminded the Tribunal that the Claimant is alleging breach of the implied term of trust and confidence, not an express contractual term, and referred the Tribunal to Buckland v Bournemouth University 2010 IRL 445 as authority for the proposition that where there has been an actual breach of contract, a withdrawal / offer of amends by an employer (does not extinguish the Claimant right to accept the repudiatory breach by resigning and on that basis claiming constructive unfair dismissal).

Conclusion and further findings of fact

34. The dispute between the parties arises from the fact that while the Claimant considered her role was that of a full-time Seminar Co-ordinator, the Respondent took the view that she remained an Administrator which involved seminar co-ordination duties which could be undertaken three days a week.
35. The question for the Tribunal is whether, in seeking to resolve the difference of opinion, the Respondent's conduct was such as to breach the implied term of trust and confidence.
36. The Tribunal accepts the Respondent's submission that an employer will not breach the implied term by simply raising such an issue with an employee. Nor, without more, will an employer breach the implied term by merely offering an employee a part-time role. However, in the Tribunal's view the Respondent's conduct went beyond this.

37. Howsoever the Claimant's job title might be described, she had been carrying out mainly seminar co-ordination work for a number of years.
38. The Tribunal notes that Karen Foskett is no longer employed by the Respondent because of a breakdown in her working relationship with Paul Mitchell and other staff. Her evidence before the Tribunal was in many ways inconsistent with that of Paul Mitchell and inconsistent with what she herself had said about the Claimant in the grievance investigation. Although Paul Mitchell made much of the Claimant's failings in evidence, and at the meeting of 29 March 2019, his evidence was undermined by Karen Foskett who told the Tribunal that the Claimant never refused to do anything, did not actively avoid other duties, and did not sit twiddling her thumbs. Karen Foskett told the Tribunal that she did not share Paul Mitchell's view as to what he said about the Claimant's failure to carry out other duties. In this regard, the Tribunal prefers the evidence Karen Foskett gave to the Tribunal under oath. The Tribunal also notes as at February 2019 the Claimant appeared willing to take on extra responsibilities.
39. Whilst accepting that the Claimant lacked confidence in some areas and might procrastinate, the Tribunal is not persuaded that the Respondent had held any meaningful discussions with the Claimant about her alleged poor performance (the appraisals make no such suggestion; there was no evidence that a performance improvement plan of any kind was implemented). Nor was there any credible evidence to suggest that the Claimant's alleged failures to carry out instructions had been discussed with her (the appraisals make no such suggestion; no disciplinary or capability processes were intimated or instigated).
40. At the meeting on 29 March 2019 Paul Mitchell robustly and in a raised voice criticised the Claimant for alleged longstanding failings and refusals to carry out duties. In light of the evidence, the Tribunal finds the criticisms were unreasonable and unfairly made.
41. Apart from Paul Mitchell's comment which caused the Claimant to state at the February 2019 appraisal had affected her morale, there appears to have been little or no discussion as to how or why Paul Mitchell reached his opinion that the Claimant's seminar co-ordination duties, duties she had been carrying out full-time for some years, could and should be undertaken on a part-time basis. Indeed, Paul Mitchell appears to have been unclear himself: when giving evidence to the Tribunal he said he had not thought through exactly how it might work and suggested that it might mean full-time employment during the months when seminars are carried out.
42. The job specification which the Claimant prepared was not rejected by the Respondent and there was no evidence to suggest it had been discussed with her. Rather, the Claimant was simply told of Paul Mitchell's view that the Seminar Co-ordinator role could and should be undertaken on a part-time basis three days a week and she was, in effect, being required to accept that view. In light of the full-time mainly seminar co-ordination duties she had been undertaking for some years, that was unreasonable and unfair.
43. It is clear from the evidence, in particular that of Karen Foskett, that Paul Mitchell wanted the Claimant's employment in a seminar co-ordination role to be just three-days a week. The Tribunal finds it more likely that not that it was Paul Mitchell's desire which informed the discussions on 21 March 2019, 27

March 2019 and 29 March 2019. As recorded in Tara Loan's investigation notes: "Paul told Karen to check out the rules and give her one month's notice of any change".

44. The Tribunal finds it more likely than not that some persuasion was brought to bear on the Claimant at the meeting of 21 March 2019 to accept Paul Mitchell's view (he wanted it "sorted out"):
 - 44.1. The Claimant was required to give an answer within a week whether she was willing to accept part-time employment;
 - 44.2. The alleged performance issues and alleged failures to carry out administration tasks on the other two days of the working week were not raised with the Claimant at this meeting;
 - 44.3. It is noteworthy that Karen Foskett candidly admitted in evidence that if she had been in the Claimant's position she would have felt pressured.
45. The Respondent's conduct went beyond the "lesser blows" referred to in Croft. There was no reasonable and proper cause for such conduct. The Tribunal concludes that the cumulative effect of the Respondent's conduct was to breach the implied term of trust and confidence. The Claimant was entitled to treat the meeting of 29 March 2019 as the last straw entitling her to resign.
46. Given this conclusion, the potential effects of Norwest and Buckland do not arise for consideration.
47. The Claimant did not resign immediately. However, she was off work suffering from stress and progressing her grievance and grievance appeal as encouraged by ACAS and good industrial practice. Through her solicitors' letters she made it clear that she objected to the Respondent's conduct. She did not delay resigning such that she affirmed the contract.
48. The content of the Claimant's resignation letter made clear the reasons why she was resigning: almost wholly because of the breach of the implied term which the Tribunal has found.
49. The Claimant was constructively dismissed. Given the Respondent's concession, the Tribunal concludes that the Claimant was unfairly dismissed.
50. This case will be listed for a remedy hearing with an allocation of one day. In the meantime, the parties are encouraged to seek resolution of remedy by way of settlement if that can be achieved. If so, the parties should inform that Tribunal promptly.

Employment Judge Pritchard

Date: 28 September 2020

