



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs W Holmes

AND

Respondent
Sauman Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

23 September 2020

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr M Jackson, CAB

For the Respondent: Mr C Morse, Chartered Legal Executive

JUDGMENT

The judgment of the tribunal is that the claimant's claims for unfair dismissal and wrongful dismissal are both dismissed.

RESERVED REASONS

1. In this case the claimant Mrs Wendy Holmes claims that she has been unfairly constructively dismissed, and also brings a claim for wrongful dismissal in respect of the balance of her contractual notice pay. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. This case was listed to be heard consecutively before a similar claim brought by Mrs Martine Griffiths against the same respondent under Tribunal reference number 1400566/2020. A separate judgment under that Tribunal reference deals with that claim.
3. I have heard from the claimant, and from Mrs Martine Griffiths on her behalf. For the respondent I have heard from Mr Calum Finnie, Mrs Amanda Finnie and Miss Samantha Fitzpatrick. I was also asked to consider statements from Mr Damien Williams, Neil Williams and Lieutenant-Colonel Nicholls on behalf of the claimant, and from Carole Parrett on behalf of the respondent, but I can only attach limited weight to this evidence because none of these potential witnesses were here to be questioned on this evidence.

4. There was a degree of conflict on the evidence, and certain aspects of the evidence from both parties was unsatisfactory. In my judgment there were a number of inaccuracies, inconsistencies, and implausible suggestions made by the parties on both sides. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent is a limited company Sauman Limited. Mr Calum Finnie, from whom I have heard, is the proprietor and sole director of the respondent company. The respondent took over the lease of the Plume of Feathers pub in Redruth in West Cornwall ("the pub") on 15 April 2019. The pub landlord is Punch. The previous tenant was Ms Kathryn Horton. Mr Finnie and his wife Mrs Mandy Finnie (from whom I have also heard) live at the pub with their two sons Adam and Sam. Although Mr Finnie is the sole director, I accept the claimant's argument that Mr and Mrs Finnie effectively acted as the Landlord and Landlady and that Mrs Finnie was able to take normal management decisions with the apparent authority of her husband Mr Finnie.
6. The claimant Mrs Wendy Holmes worked as a Bar Person at the pub. Her period of continuous employment commenced on 1 August 2004. Her employment transferred through successive tenants before transferring to the respondent on 15 April 2019. She resigned her employment by letter dated 20 September 2019 giving two weeks' notice which expired on 6 October 2019. The claimant alleges that she was constructively dismissed relying upon an alleged breach by the respondent of the implied term of trust and confidence between the parties.
7. Mr Finnie and the claimant first met in about February or March 2019 prior to the transfer of the pub lease to Mr Finnie. The previous tenant Ms Horton had not issued written contracts of employment to the existing staff and this was something which Mr Finnie set about to remedy on taking over the pub. The claimant alleges that on doing so he shouted at her, but equally that they "got over" their differences and "moved on".
8. The claimant's case as originally presented relied upon a course of aggressive and bullying behaviour by Mr and Mrs Finnie leading to an event on 15 September 2019 which is said to be the last straw before her resignation. Although there may well have been some initial disagreements between the parties, particularly with regard to how Mr and Mrs Finnie wished to run the pub and whether the claimant, who had been there for so many years, agreed with any changes, it is clear from an exchange of text messages, and as confirmed by the claimant today, that as at the end of June 2019 she was happy in her work. She sent a text to Mrs Griffiths on 29 June 2019 to this effect: "I have to say I'm much happier in work now. I get on really well with them both. I do find Calum harder than Mandy though ..."
9. In her evidence today, the claimant confirms that there were no real issues during the first "two months or so" of her employment, though the situation began to change. She perceived that the respondent began to pick fault with her work and to become vexatious. She only gives two examples. The first is that Mr Finnie told her off for not switching on a coffee machine when she first arrived at work. The second is that Mrs Finnie refused to acknowledge the claimant or speak to her for several weeks for no apparent reason. The claimant challenged Mrs Finnie about this, and she confirmed that the claimant had done nothing wrong but that she felt concerned whether they might have made a mistake taking on the pub. No other examples are given prior to the events of Sunday, 15 September 2019 which are now said to be the last straw.
10. The evidence of Mr and Mrs Finnie was to the effect that the claimant was generally a good employee, but that she sometimes appeared to be less cooperative or enthusiastic than she should have been. In addition, she may have resented being told what to do by Mrs Finnie when she appears to have taken her own decisions in the pub prior to the respondent taking it on. Mr Finnie had raised the matter informally with the claimant, and had arranged for the claimant to attend a training module on customer service through the pub landlord Punch. As it happened she resigned before receiving this training.

11. I find that there was probably a slight clash of personalities between the claimant and the respondent, and in particular Mrs Finnie, but that there was no conduct or course of conduct, either individually or cumulatively, which can be said to have been in breach of the implied term of trust and confidence between the parties up until the events of Sunday, 15 September 2019, which the claimant now says was the last straw. In other words, the crux of the claimant's claim that she was constructively dismissed is centred on the events of 15 September 2019.
12. The claimant has given evidence as to her version of events, which are partly supported at least by a statement from Mr Damien Williams (who was one of two other customers present). This was provided after the exchange of the other witness statements had taken place, and Mr Williams was not present to be questioned on it. The respondents dispute the contents. Mrs Finnie and Ms Samantha Fitzpatrick were both present and involved in the events and have given evidence as to their direct recollection. Mr Finnie was also indirectly involved. The weight of evidence is against the claimant and for this reason I favour the respondent's version of events and I find as follows.
13. Samantha Fitzpatrick is employed by the respondent as a waitress. She is 19 years old and was working as a waitress in the restaurant of the pub at lunchtime on Sunday, 15 September 2019. A group of customers had booked for lunch, including Mrs Tina Winterbourne who is a friend of the claimant's. Mrs Winterbourne complained to Ms Fitzpatrick that her husband's carrots were cold. Ms Fitzpatrick accepts that she touched the carrots to see if they were cold, which she should not have done, but in any event she took the food back to the chef who agreed the food was not cold, but nonetheless warmed it up to their satisfaction. The food was re-served and the customers seemed happy.
14. When they had finished their main course Miss Fitzpatrick returned to clear their plates when Mrs Winterbourne spoke to her aggressively and said words to the effect: "You were rude and unprofessional, your phone was ringing in your pocket the whole time you were serving us, and you should watch your attitude when you are serving people." Miss Fitzpatrick was extremely upset because she had felt she had done her best, and had not been using her mobile phone which was elsewhere behind the bar in silent mode. Mrs Finnie was upstairs unwell in bed, but Miss Fitzpatrick was so upset she went to see Mrs Finnie and explained what had happened. She also explained that her trouser pockets were stitched closed and she could not have had the phone on her. Mrs Finnie got dressed and came downstairs to discuss the matter with the customers.
15. Mrs Winterbourne repeated her complaint to the effect that the carrots had been cold and that Ms Fitzpatrick should not have used her phone. Mrs Finnie explained that she could not have used the phone which was behind the bar and turned off, but that she could have her meal for free if she was unhappy. Meanwhile Miss Fitzpatrick had gone outside to have a cigarette and recover her composure.
16. Mrs Winterbourne then went outside and challenged Miss Fitzpatrick again. She became abusive and started pointing her finger in Miss Fitzpatrick's face. She again accused of being unprofessional and rude and using her phone. Miss Fitzpatrick admits that she then lost her temper and said words to the effect: "I'm sorry but if you don't like it you're welcome to find somewhere else to eat and drink so you can fuck off and don't come back". She later received a disciplinary warning from the respondent for this misconduct.
17. Both Mrs Finnie and Ms Fitzpatrick then say they that they saw the claimant and Mrs Winterbourne's mother-in-law whispering to each other. Mrs Finnie suspected that the claimant might somehow have been involved in these events, but without any clear evidence that this was the case. In any event the claimant then approached Mrs Finnie and Miss Fitzpatrick and said to Mrs Finnie in a confrontational tone "what have I done?". Mrs Finnie went back upstairs, but became increasingly agitated at what had happened, which she considered to be some form of "set-up". She returned downstairs to the pub and said to the claimant words to the effect: "that's it Wendy you've got what you wanted. You can run the pub the way you want but right now I'm closing it so you can go home."
18. The claimant asserts that Mrs Finnie lost her temper and screamed that she was closing the pub until further notice and told her to "fuck off home". She also says that she was concerned for her safety because Mrs Finnie had physically threatened her. The evidence

- of both Mrs Finnie and Ms Fitzpatrick is to the contrary, namely that Mrs Finnie did not behave in this way, but said politely that she was closing the pub. There were two other customers in the pub at that stage (one of which was Mr Williams), who were both asked to leave, and Mrs Finnie did tell the claimant to go home because she was closing the pub. I prefer the respondent's version of events because the weight of evidence is in their favour.
19. The claimant says that she was very upset and physically sick after being sent home, and consulted her GP, who signed her off work for three weeks. Shortly afterwards the claimant resigned her employment by letter dated 20 September 2019. It was addressed to Mr Finnie and stated: "Please accept notice that I will not be returning to work at the Plume of Feathers at the end of my sick leave. My last day in your employment will be 6 October 2019 ... Over the last few weeks I have been made to feel very uncomfortable whilst working, and Sunday was as far as I can be pushed. This has had an extreme effect on my mental health, resulting in a total breakdown and I'm now having to take antidepressant medication. I have taken advice from who have informed me that it's unacceptable to expect anyone to work under those circumstances. Due to Mandy's behaviour towards me, I consider myself to be constructively dismissed."
 20. Mr Finnie replied by letter dated 25 September 2019 offering the claimant the opportunity to reconsider. His letter suggested: "I'm writing to see if there is anything that I can do for you? Was your decision a knee-jerk reaction or do you still feel the same ... Would you like me to take your letter as a formal grievance? If so I would like to invite you in for a formal grievance hearing. If this is a route that you would like to take then please let me know when you would be available".
 21. The claimant replied on 30 September 2019 to the effect that she confirmed her intention to terminate her employment effect from 6 October 2019. She complained of: "many upsetting and unjustified incidents from Mrs Finnie. This is included being humiliated in front of long-standing customers. The last incident took place on Sunday, 15 September 2019 ..."
 22. The claimant subsequently obtained an Early Conciliation certificate and presented these proceedings on 23 January 2020.
 23. Having established the above facts, I now apply the law.
 24. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
 25. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... 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".
 26. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT.
 27. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)")

- and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
28. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: “If the employer is guilty of conduct which is 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; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
 29. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: “... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.”
 30. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.
 31. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.
 32. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”

33. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
34. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
35. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
36. The claimant’s case as originally presented suggested a continuing course of aggressive and unpleasant behaviour by the respondent towards her culminating in the events of 15 September 2019 which are said to have been the last straw. For the reasons explained above, the claimant has not discharged the burden of proof that she was subjected to any conduct on the part of the respondent prior to the events of 15 September 2019 which can be said to be unacceptable or otherwise conduct which (without reasonable cause) can be said to be a breach of the implied term that an employer will not act in a way which is calculated or likely to destroy or seriously damage trust and confidence between the parties.
37. In my judgment therefore, the crux of the claimant’s case turns upon the events of 15 September 2019. If the claimant’s version were correct, and she was shouted at by Mrs Finnie to the effect “fuck off home”, and that this language was coincidental with threatening physical behaviour, then that would be a breach of the implied term that an employer will not act in a way which is calculated or likely to destroy or seriously damage trust and confidence between the parties. However, for the reasons explained above, namely that the weight of evidence is in the respondent’s favour, I have preferred the respondent’s version and I have rejected the claimant’s version of events. Mrs Finnie did close the pub and send the claimant home, but this was in a calm manner and was not aggressive or physically threatening. On balance therefore, I find that the claimant has not discharged the burden of proof that there was any conduct on the part of the respondent which can be said to be a breach of the implied term of trust and confidence in that it was conduct, without reasonable or proper cause, which can be said to be calculated or likely to destroy or seriously damage trust and confidence between the parties.
38. In addition, it had been alleged earlier that the respondent had adopted a course of action in order to force the claimant to resign her employment and thus avoid expensive accrued employment rights which the claimant enjoyed as a result of the transfer of her employment to the respondent. This is not consistent with Mr Finnie’s response to the claimant’s resignation, under which he effectively offered her the opportunity to reconsider her resignation and/or to pursue a formal grievance, neither of which offer was accepted by the claimant.
39. I therefore find that there was no fundamental breach of contract committed by the respondent and that the claimant’s resignation cannot therefore be construed to be her constructive dismissal by the respondent. Given that the claimant resigned her employment and that there was no dismissal, I hereby dismiss her unfair dismissal claim. I also dismiss

- her wrongful dismissal claim in respect of the balance of her contractual and statutory notice period.
40. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 22; a concise identification of the relevant law is at paragraphs 24 to 35; how that law has been applied to those findings in order to decide the issues is at paragraphs 36 to 39.

Employment Judge N J Roper

Dated: 23 September 2020

Judgment sent to Parties: 23 October 2020

FOR THE TRIBUNAL OFFICE