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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs J Georgiou

and

Respondent

Rolec (Electrical &
Mechanical
Services) Ltd

Held by Video on 7 and 8 September 2020

Representation

Claimant:

Mr Georgiou,
Husband

Respondent:

Mr M Jones, Solicitor

Employment Judge Kurrein

REASONS

**For the Judgment given on 8 September 2020 provided
at the request of the Respondent**

Background

- 1 On 21 March 2019 the Claimant presented a claim to the tribunal alleging she had been unfairly constructively dismissed. On 12 May 2019 the Respondent presented a response in which it contested that claim.

Procedural Matters

- 2 There were preliminary hearings on 21 October 2019 before EJ Michel and on the 3 January 2020 before EJ Foxwell
- 3 At the latter hearing the Claimant was given leave to amend her claim to include an allegation that the Respondents failed to give her an appropriate contract and deprived her of holiday pay
- 4 Following those hearings there was an interchange of requests for further information and/or a disclosure

- 5 The full merits hearing of this case has taken place on the common video platform. All parties and witnesses, together with their representatives, have been present throughout. There were no technical problems that caused any party or representative to be excluded.

The Evidence

- 6 I had a bundle of documents which was supplemented by further documents on the first morning of the hearing, and witness statements prepared by each of the witnesses, signed copies of which were emailed to me on the same morning.
- 7 I heard the evidence of the Claimant on her own behalf. I heard the evidence of Mr D Barrett, managing director; Mr P Armstrong, director; Mr G Tufnell, operations director; Mr M Tufnell, health and safety manager; Mr J Rooms, offices administrator; and Mr D Tyler, HR consultant.
- 8 The Claimant's evidence was clear. She was forthright and gave answers to the questions she was asked, many of them dealing with the minutiae of events of borderline relevance, promptly and clearly. She gave the appearance of having a clear recollection of the events she recounted.
- 9 I did not find the Respondents' witnesses at all impressive. They were often hesitant in their replies and gave some contradictory answers, particularly in respect of the events of 7 December 2018.
- 10 Mr M Tufnell thought the incident on 7 December 2018 to be "amusing", in clear contrast to the evidence of others present who thought it to be an altercation from which it was necessary to remove Mr Sharp. Mr M Tufnell did accept that the Claimant and her colleague, Ms J Leach, did not find it amusing.
- 11 Mr G Tufnell, Mr M Tufnell's brother, was even less satisfactory a witness. He relied on his long-term knowledge of Mr Sharp for his assertion that Mr Sharp would never be rude or aggressive, despite clear evidence from others who were present at the time that Mr Sharp did act in such a manner. When it was pointed out to him that his denial of any knowledge regarding the Claimant's requests for her contract to be amended was contradicted by the email the Claimant copied him into he retorted that "I don't read every email I get". He denied any knowledge of the Claimant's holiday pay being underpaid, and when confronted with his own letter acknowledging that fact changed his answer to limit it to the post-termination period.
- 12 Mr P Armstrong, the Claimant's line manager from October 2018, who accompanied Mr Sharp away from the incident to prevent it escalating, accepted that he had been told by Ms J Leach of Mr Adams' conduct. His witness statement, and those of all other relevant witnesses, strenuously denied that the Claimant had ever raised the issue of her not being paid holiday pay, but he acknowledged that the effect of her contact not properly reflecting her working hours inevitably had that effect.
- 13 Overall, I concluded that the Respondent's witnesses were endeavouring to toe the Respondent's line and, on the 7 December 2018, were very much the worse for drink. I could not rely on their powers of recall.

- 14 I therefore concluded that where there was a conflict between the Claimant's evidence and that on behalf of the Respondent, particularly in respect of the events of 7 December 2018 ,when the Claimant, being teetotal, was sober, I preferred the evidence of the Claimant.
- 15 I considered the documents to which I was referred and heard the parties submissions. I make the following findings of fact.

Findings of Fact

- 16 The Claimant was born on 24 October 1968 and started her employment with the Respondent on 15th February 2011. Shortly afterwards she was provided with a written statement of terms and conditions of employment which she returned unsigned because she did not agree with its contents.
- 17 The Respondent does not appear to have taken any steps to deal with that issue then or thereafter.
- 18 The Respondent, as implied by its name, specialises in providing electrical and mechanical services by acting as a subcontractor to specialist housebuilders. It has approximately 20 employees.
- 19 Throughout the Claimant's employment one of the services offered by the Respondent to its clients was the installation and maintenance of home alarm systems. The house builder offered a 12 month maintenance contract on those systems, which was provided by the Respondents, and thereafter the Respondent offered long-term maintenance contracts.
- 20 At the time of the events with which I am concerned the Claimant was known as the alarms/CCTV supervisor, but was also designated as an office administrator. The office staff, save for those at director level, worked in an open plan office.
- 21 The Claimant's work administering the alarms maintenance business was a substantial part, but by no means all or a majority, of the work she carried out. She also dealt with issues arising in customer care, answered the phone and dealt with general matters of administration.
- 22 In March 2018 the Claimant was with Mr Barrett when he mentioned to her that he intended to sell the alarms business. He did not say anything to her about her position or the effect on it of any such sale.
- 23 The Respondent had arranged for there to be a staff Christmas party at an Indian restaurant in Milton Keynes on the evening of seventh December 2018.
- 24 Earlier that day, at about 4 o'clock when the Claimant was in the office, Mr T Sharp, a director of the Respondent whose failure to give evidence was notable, came up to the Claimant and said, "I've been watching you"; "What do you do?"; "Why are you still here?".
- 25 At about 8pm that evening the Claimant went to the restaurant. A number of her colleagues had booked hotels local to it and had left the office at 5pm for "pre-drinks". At about 11.30pm the Claimant went outside for some fresh air with her colleague Ms J Leach. They were chatting outside when Mr Sharp and Mr Armstrong came out. The Claimant thought them to be agitated and they

- were “exchanging words”. She thought there to be a real tension in the air. They then walked up the street away from the restaurant where they appear to have an argument before returning.
- 26 At that point Mr Sharp said to the Claimant, to her face and without preamble, “You’re sacked”. The Claimant said “Pardon” and Mr Sharp, in what the Claimant thought to be a vicious tone, said again “You’re sacked.” At that point Mr Armstrong escorted Mr Sharp back into the restaurant.
- 27 Mr Armstrong returned outside very shortly afterwards and said, “I am your boss I will sort this out”, to which the Claimant replied, “He cannot speak to me like that”, at which point Mr Armstrong raised his hand within about 12 inches of the Claimants face and said, she thought rudely, “You’re not listening”.
- 28 I took the view that the Claimant’s version of events was more than adequately corroborated by the WhatsApp messages she exchanged with Ms J Leach and Ms Alison Barrett, Mr Barrett’s wife, the following day.
- 29 It was on the same day that Mr G Tufnell invited Ms J Leach into his office to receive an apology from Mr Sharp and Mr Armstrong relating to the events of the previous evening. This was because Miss Leach had made it clear to Mr Tufnell that she was very unhappy with the conduct of those directors. Ms Leach indicated that the Claimant should be included in any such meeting, and she was invited to join them.
- 30 I accepted the Claimants evidence that neither Mr Sharp nor Mr Armstrong could recall what had taken place the previous night because they had had too much to drink. They both then said that they would apologise if they had done something to offend her. The Claimant was not impressed by that, and did not consider it a genuine apology. She made it clear that she would wait to see what took place in the future.
- 31 On 18 January 2019 the Claimant emailed Mr Armstrong, with copies to Mr Barrett and Mr D Tufnell, to ask that she be given a contract that reflected the actual hours she worked. She started by saying, “As discussed many times before”, something that Mr Armstrong did not dispute in his later response, and went on to say that despite their discussions no action had been taken to update her contract so she would no longer work any extra hours unless the situation was remedied. She remarked that when she had said this to Mr Armstrong he had simply replied “Okay” and she had felt as if the subject had been dismissed as though she didn’t matter.
- 32 Mr Armstrong replied on 21 January to say that he had no problem with the Claimant or her work, and thought they had a healthy working relationship. He declined to discuss the Claimants allegation that other staff members contracts had been ‘sorted’ but would be happy to discuss ‘any of this’ as required.
- 33 On 22 January Mr Barrett told the Claimant that the alarms department would be transferred to MJ Security on 1 February and gave a long list of tasks for her to do to facilitate the transfer. The following exchange then took place
- C “Where does this leave me?”

- DB "We can work this out when these works are complete" I
- C "Well if I need to look for another job I need to know"
- DB "We will chat about this at a later date just get this work done first"
- 34 I accepted that the Claimant was extremely upset by this exchange. Later that day she received a WhatsApp message from Ms Leach which said,
- "We now know why the contracts haven't been changed. I bloody hope they don't get rid of you, what am I going to do without you'.
- 35 The Claimant was particularly concerned that this message had come from Ms Leach, who was a close friend of Mr D Barrett's wife and saw them socially.
- 36 On 23 January the Claimant received a further email from Mr D Barrett
- "In respect of what happens after maintenance's are passed on, we can discuss this Friday afternoon."
- 37 The Claimant was understandably anxious waiting for this meeting to take place. Mr D Barrett did not contact her so, at 3.40 pm, she went to his office, where the following conversation took place,
- C "Please can we have our meeting I have been waiting all day"
- DB "I'm too busy it will have to wait until Monday"
- 38 The Claimant thought this to be dismissive, and was upset that Mr D Barrett expected her to wait all weekend. She went back to her desk and was visibly upset. Ms Hammond asked her how it had gone ,nd she replied that she had been given no assurance, to which Ms Hammond replied, "I hope you are still here on Monday!"
- 39 The Claimant handed in her resignation when she attended work at 9.20 on 28 January. She detailed her reason as including
- 39.1 The events on 7 December
- 39.2 The lack of clarity regarding her position in light of the sale of the alarms division.
- 39.3 The deferment of the meeting on 25 January
- 39.4 The failure to give her a contract that reflected the hours she worked.
- 40 The Respondent insisted that the resignation cold not take effect until it was dealt with as a grievance, and a grievance meeting was held the next day
- 41 On 30 January the Claimant attended work and was told by Mr D Barret that she would not have to work her notice and could leave immediately.
- 42 The Respondent has subsequently paid the Claimant £1,534.29 in arrears of pay elating to her contract not reflecting her normal working hours.
- 43 The Claimant started work in March 2019, earning the minimum wage.

Submissions

44 I heard the parties' submissions. It is neither necessary nor proportionate to set them out here.

The Law

45 I am centrally concerned with the provision of Ss. 95 and 98 Employment Rights Act 1996.

46 I have also considered the following authorities,

Western Excavating (ECC) Ltd v Sharp [1978] QB 761

Omilaju v. Waltham Forest London Borough Council [2005] ICR 481

Morrow v Safeway Stores [2002] IRLR 9

Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833

Further Findings and Conclusions

Dismissal

47 The onus is on the Claimant to establish, on the balance of probabilities, that she was dismissed within Section 95(1)(c) Employment Rights Act 1996 .

48 For that purpose the matters I have to consider are as follows:-

48.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation

48.2 Has he or she affirmed the contract since that act?

48.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

48.4 If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)

48.5 Did the employee resign in response (or partly in response) to that breach?

49 I deal with each of these questions in turn.

50 The most recent act complained of was the deferment of the meeting that had been arranged for 25 January at which the Claimant was expecting to learn if she had a job for the future.

51 The Claimant resigned on the next working day in response to that. Nothing that she did between those events affirmed the contract.

52 I have concluded that the deferment or cancellation of that meeting was a repudiatory act on the part of the Respondent because it was a breach of the implied term of trust and confidence. This was not something minor or inconsequential, a "lesser blow" as in *Croft v. Consignia plc* [2002] IRLR 851. The Claimant had been on tenterhooks concerning her future since the conduct of her managers and directors on 7 December, when she was clearly told she was sacked, and more so since being told of the sale of the alarms business.

53 In my view to then cancel that meeting without a word of assurance as to the future is a clear breach of the term relating to trust and confidence, any breach of which is repudiatory: *Morrow*. It would have taken only a few seconds for Mr D Barret to tell the Claimant that her position was secure, or not. In fact it appears it was secure: no *Polkey* point was taken.

54 Even if that is not right I am in no doubt that it was part of a course of conduct, within *Omilaju*, from the afternoon of 7 December to that of 25 January as set out above, which were, cumulatively, such a breach.

55 It is quite clear from all my above findings that the Claimant did resign in response to that breach.

56 I therefore find that the Claimant was dismissed by the Respondent.

Fairness

57 The Onus is on the Respondent to establish that the Claimant was dismissed for a potentially fair reason. It has not advanced any evidence to that effect and I inevitably find that this dismissal was unfair.

Mitigation

58 The Respondents sought to argue that the Claimant had failed to take reasonable steps to mitigate her loss. She was unemployed from a resignation coma in late January a comma until March. This was a period during which there was great uncertainty arising from COVID-19. I am entirely satisfied that the Respondents point is not sustainable.

Remedy

59 I make a declaration that the Respondent has unfairly dismissed the Claimant.

60 I make a Basic Award, the calculation of which was not in dispute, in the sum of £4,500.00.

61 I have given careful consideration to the Compensatory Award.

61.1 I award the Claimant the sum of £300.00 for the loss of her statutory rights.

62 Her previous earnings were £19,500.00 gross, £16,640.88 net.

63 I consider it appropriate to calculate her loss of earning for 12 months, by when she may reasonably hope to find alternative, higher paid, employment.

64 I calculate her earnings as follow:-

64.1 42 weeks at 32 hours per week at 7.625 per hour = £10, 263.12

64.2 10 weeks at 24 hours per week at £8.24 per hour = £1,934.70

64.3 Total £12,197.82

65 I calculate her net loss of earnings as £4,443.06 so make a Compensatory Award in the sum of £4,743.06.

Holiday Pay

66 In light of the payment that was made to the Claimant no figure for this loss was claimed.

Contract

67 The Claimant was given a contract. She worked longer hours than required. The Respondent's error lay in not paying her holiday pay in respect of her normal hours of work. The contract was accurate.

Deductions

68 I declined the Respondent's application to impose a 25% deduction for the Claimant's failure to raise a grievance. In the circumstances of this case it would be neither just nor equitable to do so.

Costs

69 I declined the Claimant's application for costs. I did not consider the Respondent to have acted unreasonably in defending the proceedings.

Employment Judge Kurrein
8 November 2020

Sent to the parties and
entered in the Register on 20 :11 :2020
T Henry-Yeo
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For the Tribunal

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