



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Boettcher
Respondent: Chine House Veterinary Hospital
Heard: Remotely
On: 7, 8 and 9 December 2020
(Deliberations: 10th December 2020)
Before: Employment Judge Legard (sitting alone)

Representation

Claimant: Mr N Bidnell-Edwards (of Counsel)
Respondent: Miss S Murphy (Solicitor)

JUDGMENT

The Judgment of the Tribunal is as follows:

1. **The claim of unfair dismissal is not well founded and is dismissed.**
2. **The claim of wrongful dismissal is not well founded and is dismissed.**

Covid-19 statement:

This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

REASONS

1. The Claimant's claims

1.1 By a claim form presented on 22nd March 2019 the Claimant brought claims of constructive unfair dismissal and wrongful dismissal.

1.2 The Respondent denied the claims. It denied that the Claimant was dismissed and contended that she resigned of her own volition and not as a result of any breach of contract on its part, fundamental or otherwise.

2. The Hearing and non-disclosure

2.1 The Claimant was represented by Mr Bidnell-Edwards, Counsel and the Respondent by Ms Murphy, Solicitor. The

parties had prepared an agreed bundle consisting of 240 pages.

- 2.2 On the second day of the hearing, as Ms Simmonds (the Respondent's principal witness) was being cross-examined, she made reference to notes that she had taken following a meeting held on 7th November 2018 at which herself, the Claimant and two partners had been present. This meeting was, on any view, the critical meeting relevant to these claims. It precipitated the Claimant's resignation.
- 2.3 Unfortunately the preliminary hearing in this case originally listed for 10th September 2019 was postponed and never re-listed. However, standard directions were issued on 28th August 2019 and sent out to both parties in which it was made clear that disclosure of all documents relevant to any issue must take place no later than 25th September 2019. Clearly notes taken of the above meeting were relevant and ought properly to have been disclosed. It therefore came as a shock to both representatives (and the Judge) that this document was in existence but had never found its way into an agreed bundle. The hearing was adjourned in order to allow for the document to be

disclosed and for the parties to take stock of their respective positions.

- 2.4 This adjournment prompted further disclosure of documentation in the Respondent's control and potentially relevant to the issues. This added documentation amounted only to a few pages but included (redacted) Partners Meeting notes and email correspondence.
- 2.5 The Respondent's explanation for this material non-disclosure was essentially 'accidental oversight.' I adjourned the hearing for the remainder of the afternoon in order to allow the Claimant time to review this new documentation and take instructions upon the same. I also made clear that, if the hearing were to continue, I would permit the Claimant to be recalled to give evidence. In the event, the Claimant was content to proceed with the hearing the following morning and no applications were forthcoming either in respect of costs or adjournment. I therefore undertook no detailed factual enquiry into the circumstances that lay behind the material non-disclosure. The additional documents were duly added to the bundle and the hearing continued.

2.6 The Claimant gave evidence on her own behalf and called four additional witnesses, only two of whom were cross-examined by Ms Murphy. They were Suzanne Marshall, Tracey Kaepfner, Jeannette Chalmers and Joy Holmes all of whom were former work colleagues of the Claimant.

2.7 A significant proportion of the Claimant's witness statement dealt with events that post-dated her resignation and therefore irrelevant to the complaint of constructive dismissal (although some of those contents may have been relevant to remedy issues, including Polkey). This was acknowledged at the outset by both legal representatives and cross-examination was tailored accordingly.

2.8 The Respondent called the following witnesses:

- (1) Michaela Simmonds, Practice Manager;
- (2) David Blow, Partner;
- (3) Geraldine Goddard, Receptionist;
- (4) Cathy Winward, Finance Manager; and
- (5) Martin Rudkin, Partner.

3. The issues

3.1 I was surprised to find that, given the fact that over a year and a half has elapsed since the presentation of this claim, that a list of issues had not been agreed in advance of the hearing. It is important for parties to note that, where they are professionally represented and even if there is no direct judicial intervention by way of case management, it is up to them to ensure that such a list is agreed in advance so that, subject to judicial approval of those issues, the parties are ready to hit the ground running on the day of hearing.

3.2 That said, I am grateful to Mr Bidnell-Edwards for producing a draft list of issues and to Ms Murphy for agreeing the same. I have tailored those same issues, simply by stripping out some of the evidential material that accompanied them. I set them out below.

Constructive Unfair Dismissal

3.3 The alleged facts, as relied upon by the Claimant in support of her claim, are as follows:

(i) The Respondent ignoring her concerns about Ms Goddard and instead offering her permanent employment;

- (ii) A failure by Ms Simmonds to ensure Ms Goddard's performance improved, or to keep the Claimant included and/or informed of progress;
- (iii) Being told by Ms Simmonds in an aggressive manner on 25 June 2018 that she had no choice other than to move to Finance Manager's office;
- (iv) In October 2018, when seeking Ms Simmonds' advice about Ms Dilks' conduct, Ms Simmonds banged her elbows on the table and said, "we are not bloody well going there again are we?!"
- (v) A failure by the Respondent to listen and provide support to the Claimant at a meeting held on 7 November 2018 but instead to subject her to unfair criticism. Specifically, in relation to this meeting, the Claimant alleges:
- (vi) Although the Claimant had previously been told that the meeting would be an "appraisal meeting", the meeting did not start with an appraisal and the meeting ended before the appraisal started.
- (vii) The Partners present at the meeting did not respond sympathetically or supportively to her report of a more junior member of staff's misconduct.

- (viii) Ms Simmonds unfairly sought to criticise C's conduct and undermine her position by referring to comments attributed to unidentified colleagues
- (ix) The partners present also unfairly criticised the Claimant for causing an 'atmosphere' within the Accounts Department or undertaking work which she was not contractually obliged to do.
- (x) Notwithstanding her objections, being told by Ms Simmonds that the accounts team would be moving into the Finance Manager's office.
- (xi) Ms Simmonds acted in a condescending manner to the Claimant by placing her arm on the Claimant's arm.

3.4 The questions for the Tribunal are, therefore:

- Did the above events actually happen?
- If so, do these individually or cumulatively amount to a breach of the implied term of trust and confidence?

- If so, Did the Claimant resign at least in part in response to those acts found to amount to breaches of the implied term?
- If so, did the Claimant waive any breaches?

3.5 I was also invited to determine, at the liability stage, the ‘Polkey’ question.

Wrongful Dismissal

3.6 Has the Claimant been wrongfully dismissed?

4. Findings of fact

4.1 Having considered all the evidence (both written and oral) and the submissions made by the representatives on behalf of their respective parties, I find the following facts on the balance of probabilities. On the whole, I found all witnesses to have given credible and honest evidence. There were precious few disputes of fact but more differences of interpretation. Nevertheless, I have resolved those conflicts of evidence where they did arise.

4.2 The Respondent is a busy, mixed veterinary practice based in Sileby Leicestershire. In common with other veterinary

practices, the partners are involved day-to-day with providing veterinary services to members of the public and are supported by clinical (nursing) staff as well as administrative and accounting teams.

4.3 The Claimant ('C') was originally employed by the Respondent in 1999 and started out as an assistant cashier and credit controller. As the years went by the practice expanded and the accounting functions became progressively more complex.

4.4 In May 2011 C was promoted to the position of Accounts Office Supervisor. At that time, Cathy Winward ('CW') was Practice Manager. In CW's letter to C, informing her of her promotion, she states as follows:

“The role will encompass the supervision of the work of the staff in the Accounts Office so that you can determine the priority of work to be undertaken to ensure the various accounting and debt collection timelines. The staff will remain managerially accountable to me.”

4.5 This division of responsibility remained unchanged until C's departure in 2018. C continued in that role for the next 7 years or so without once being the subject of any

performance or conduct concerns. She would receive, albeit in common with all staff, annual pay increases. Appraisals (for all staff) were conducted on a somewhat haphazard basis. C's appraisals are generally positive although, of note, is that, at a performance management meeting in February 2015, C is being encouraged to *'create more positivity in the office.'* This is important for reasons that will later become clear.

4.6 The Respondent's policies and procedures are contained within a handbook within which there is, unsurprisingly, a grievance policy. This clearly states that an employee who wishes to raise a formal grievance should do so in writing although employees are also encouraged to attempt to resolve problems informally in the first instance if at all possible. The handbook also includes a policy on harassment which provides, as an example of personal harassment, 'abusive, threatening or insulting words or behaviour.'

4.7 In or around August 2013 Geraldine Goddard ('GG') began employment as an Accounts Assistant. As such she came under the supervision of C although she remained ultimately accountable to the Practice Manager, CW. As is standard for all new recruits, GG's employment was

conditional upon the successful completion of a six month probationary period.

4.8 C clearly had concerns about GG and, in particular, her general attitude and time keeping. GG was not cross-examined at any length and her evidence (namely that neither her attitude nor time-keeping were deficient) went unchallenged. In any event, C reported her concerns about GG to CW but, notwithstanding those concerns, C returned from holiday to discover that GG had been offered a permanent contract. The decision (as to whether or not to offer GG a permanent contract) rested with the Partners, acting on the advice of the Practice Manager in whom staff management accountability rested. At no point did C expressly request the Respondent not to offer GG a permanent contract and it was not her position to do so in any event. She was a supervisor not a manager. The Respondent was perfectly within its rights to offer GG a permanent contract and the fact that C may have been 'disappointed' to discover that GG had been appointed to a permanent role is nothing to the point. Looked at objectively, this 'event' cannot amount to a breach of contract on the part of the Respondent, fundamental or otherwise, nor can it form part of a series of events which, when taken together, might amount to a breach on a

‘cumulative impact’ basis. In fairness to Mr Bidnell-Edwards, these somewhat historic events were not advanced with any real vigour when it came to closing submissions and he conceded that, if anything, they might constitute relevant background to the wider narrative.

4.9 Sadly, it is clear that C and GG simply did not get on and their working relationship appears to have steadily deteriorated over the next few years. This situation (often referred to as a ‘personality clash’) contributed to a worsening atmosphere within the Accounts Office. By way of example, in April 2015, CW reported to Martin Rudkin (‘MR’) that C was responsible for contributing to a poor atmosphere within the office and suggested that C be encouraged to attend an in-house supervisory course in order to improve her person management skills. CW also reported that she had to step in and stop C from reprimanding GG for alleged ‘lateness’ whereas, in fact, GG had only been 3 minutes late. In any event, as CW pointed out, GG regularly made up any ‘lost’ time by working beyond her contracted hours (because C left at 4pm and GG at 5pm this was something that C may not have appreciated).

- 4.10 Contemporaneous notes from this time show that GG was also raising concerns about C and, in particular, complaining that she (GG) felt excluded by C and that C ‘didn’t like her’ for reasons she could not fathom.
- 4.11 In December 2017 Michaela Simmonds (‘MS’) was appointed Practice Manager in place of CW. The Practice had continued to grow and this appointment allowed CW to become full time Finance Manager and thereby relinquish her staff management duties to the new incumbent.
- 4.12 Shortly after MS’ appointment, in January 2018, C went to see her and reiterated her concerns about GG’s performance perhaps in the hope that MS might adopt a fresh approach to the problem. Four years or so had now elapsed since GG had been appointed. In April 2018, C approached MS once again as a result of which MS agreed to place GG on a performance development plan. Overall responsibility for monitoring this development plan rested with MS, not C. However one of C’s concerns was that she was not included in any review meetings and it is right to say that, in an email dated 19th April 2018, MS did indicate that she would be.

4.13 It is clear, however, that this development plan provoked a very negative reaction from GG and, although MS followed through with it, she also took the entirely reasonable view, given the very clear animosity that existed between the two individuals, that C be excluded from any review meeting. In the event, MS was unable to find any particular fault with GG's conduct or performance.

4.14 In her evidence, MS contended that, on or about 16th May 2018, C had stormed out of the office and, obviously referring to GG, had said to MS 'can I fucking slap her?' In oral evidence, MS said that this 'slap' incident had been subsequently admitted by C, albeit that she may have said the words in jest. I am not satisfied that this event did happen in the way described by MS. There is no contemporaneous record of it; no mention within the ET3 and no reference to it in MS' email to two partners only a few days later. It may well be that C expressed audible frustration at GG's perceived poor performance on various occasions but I am not satisfied that she did so in such terms.

4.15 On 24th May 2018, in that email addressed to two partners, MS commented that the 'atmosphere in Accounts is back

to being awful' and that GG had expressed a strong desire to move out of the office if an opportunity arose.

4.16 One partner (Mr Leaman) replied that '*...unfortunately I don't think any thing we do other than sack one of them will make any difference.*' The other partner (Mr Turner) commented:

'I am very disappointed with [C's] attitude. She obviously does not have the skills to be an office supervisor. This has happened with other members of staff and [C] in the past. Her actions are bordering on bullying and my preferred response now would be to explain this to [C]...Best solution is to move [GG] now but this is a recurring theme with [C] which I feel should be addressed too.'

4.17 In June 2018, on C's return from holiday, MS spoke to C and proposed that she moved into CW's, the Finance manager's, office. She made this proposal for essentially two reasons. First, this would enable C to concentrate on areas of work (such as debt collection) where they were in danger of falling behind. This coincided with the installation of a new computer system which was causing a number of people, including partners, to become

frustrated. The second reason was to help alleviate the atmosphere within the accounts office.

4.18 C contends that MS presented this proposed move as a ‘fait accompli’ – and that MS aggressively slammed her hands down on the table and shouted ‘you do not have a choice!’ MS accepts that she made the proposal but categorically denies having done so in the manner described. Having had the opportunity of seeing MS give evidence, I am unhesitatingly of the view that she did not slam her hands down or express herself in the manner as alleged by C. Once again, there is no contemporaneous report or complaint of such conduct but, perhaps more importantly, there is no evidence to suggest that the Respondent (MS specifically) took any steps at all to enforce such a move. Indeed, MS accepted C’s decision and the matter was left there. Clearly C did have a choice (as to whether she accepted the proposal or not) and that choice was honoured.

4.19 Fortunately, soon afterwards, a vacancy arose in reception and, in July 2018, GG moved there and has worked there happily ever since. Gemma Dilks (‘GD’) replaced GG in the Accounts Office. As stated above, C would generally leave the office at 4pm. That would leave Joy Holmes

(‘JH’) and, now, GD to cover the office duties for the remainder of the working day. JH complained to C that GD soon developed the habit of absenting herself in other parts of the practice during that time and, in so doing, burdening JH with a number of onerous tasks. C spoke to GD about her time-keeping on several occasions but, concerned that her words were falling on deaf ears, eventually decided to escalate the matter to MS in October 2018.

4.20 It is also right to point out that, even on C’s own evidence, the working atmosphere within the Accounts Office had begun to deteriorate once again.

4.21 Shortly before C went to see MS, however, GD had also approached MS in order to complain of C’s conduct and management style. So when C did come to see MS it is not surprising that she (MS) should express frustration at what she saw as a re-emergence of office politics. MS had hoped that, with GG’s move to reception, the problems which had plagued the Accounts Office for the past 5 years or so were now a thing of the past.

4.22 Against that background, I am satisfied, on balance, that MS would have said words to the effect of ‘we’re not

bloody well going there again are we’ when confronted by cross-accusations from C and a member of the accounts team. It must have been hugely dispiriting for MS to be faced once again with a problem of this nature so soon after GG’s departure. Those words, although spoken in C’s presence, were not directed at her as such but simply a vocal expression of understandable frustration. When judged objectively, these words do not constitute a breach of contract on the part of the Respondent, fundamental or otherwise, nor can it form part of a series of events which, when taken together, might amount to a breach on a ‘cumulative impact’ basis. It is also important to note that, once again, C did not avail herself of the grievance procedure in relation to this incident.

4.23 The Practice was due a regulatory visit from the RCVS in November 2018. In the circumstances, MS sought to ensure that appraisals for all members of staff were up to date (the last ones having been conducted approximately three years previously). In October 2018 she informed everyone that appraisals would be undertaken over the ensuing weeks. On 4th October 2018 MS emailed the partners seeking feedback (‘good or bad’) in respect of all ‘Receptionists/Accounts/Dispensing/Insurance’ staff, promising to treat any such feedback in the strictest

confidence. This was a generic email and in no way targeted at C. One such partner emailed MS and, aside from various negative comments about receptionists, also commented that C was ‘unhelpful’ (in terms of assistance with borrowing a company car) and also gave negative feedback in terms of her ‘general manner and the way she speaks to people.’

4.24 On 6th November C was invited to an appraisal meeting for the following day. One of the performance indicators included on the blank form sent to her in advance of the meeting was:

‘Competent to supervise the accounts team’

In evidence, the C contended that the inclusion of the above necessarily questioned her competence and was therefore, in itself, undermining of her trust and confidence. However, at no stage did C question or complain about its inclusion before, during or after the appraisal meeting. For reasons that I describe below the appraisal was never undertaken and therefore neither C nor her appraisers had the opportunity of rating her against this specific performance indicator. It is quite clear that C’s concern about this question came as an afterthought and

could not in any way have influenced a decision to resign. In any event, its inclusion as part of an appraisal process for her role was entirely appropriate.

4.25 The appraisal was to be conducted by MS but in the presence of two partners, namely David Blow ('DB') and Martin Rudkin ('MR'). There was nothing unusual about this. Indeed it was expected that at least one partner (and preferably two) would sit in on an appraisal for someone of C's relative seniority.

4.26 On 6th November MS emailed both DB and MR about C's forthcoming appraisal and, in doing so, informed them both that GD had come to see her that same day and had expressed serious concerns about C's management style. This was not, of course, the first time that GD had gone to see MS in order to complain about C's management style. MS went on to say:

"The atmosphere in [the accounts office] is awful, none of the girls feel they can talk to each other when [C] is there about anything other than work, the minute she goes for lunch the whole atmosphere changes and they can relax – its not a great working environment."

4.27 In that same email MS also pointed out that, in order to create more space for the vets, it was planned to move the entire accounts team into CW's (Finance Manager's) room. This would have the added benefit of allowing CW to maintain an eye on working relationships within the accounts team more generally.

4.28 In the afternoon of 6th November C needed to leave the office in order to deal with a routine company car matter. She needed GD to cover her temporary absence. However GD was not there and was in fact meeting with MS (as the earlier email from MS to DB and MR attests to). C, unable to locate GD, put out a tannoy call for her. The tannoy call was heard by both MS and GD (as they were in the meeting) and GD was instructed by MS to ignore it. The failure by GD to inform C as to the reason why she had left the office and her subsequent refusal to respond to the tannoy left C deeply frustrated.

4.29 The following morning, when GD and C were alone in the office, GD approached C and berated her for having put out a tannoy for her the previous day. According to C, GD directed the following tirade at her:

“How dare you put tannoys out for me. Who do you think you are? You’re not going to fucking bully me like you fucking bullied Gez!” Gez was the name by which GG was known.

4.30 GD was not called to give evidence on behalf of the Respondent and I am satisfied that an exchange broadly in line with C’s recollection took place. C did not lodge any formal complaint about GD’s behaviour at the time but instead determined to raise it at her forthcoming appraisal later that afternoon.

4.31 The appraisal was scheduled to take place at 3pm. This being an extremely busy vets practice the appraisal did not in fact start until 3.40pm but nothing turns on this. The meeting began with C being asked how she was (there was a dispute as to who asked her this question but, again, nothing turns on it). C responded by informing MS and the two partners that she had been shouted at by GD earlier that day – she did not report the detail of what GD is alleged to have said until later in the meeting. The consequence of C raising this incident was that the discussion began to revolve around the deteriorating situation in the accounts office as opposed to a formal appraisal process.

4.32 C's chief complaint is that, having reported to her superiors what GD is alleged to have said to her, they should have offered her immediate and unconditional support and reassurance rather than subject her to criticism of her management style. Indeed it is this that forms the cornerstone of her constructive dismissal complaint.

4.33 MS' notes of the meeting, recorded either contemporaneously or shortly thereafter are, in my Judgment, an accurate representation of what was discussed. In the context of the earlier incident between GD and C, MS was perfectly entitled to draw to C's attention legitimate concerns that senior management and partners had in connection with the running and supervision of the accounts office. In short, the situation in the accounts office had become unsustainable in the short term. It was a developing situation that had been flagged in consecutive partnership meetings. DB and MR, both of whom gave clear and compelling evidence, were simply trying to understand what lay behind this unfortunate state of affairs and find a solution. As MR put it in his oral evidence, when it was put to him that they had simply used this discussion to criticise C:

“No – we wanted to know why are we here, why are things not working in the office; why are we in this position? We were trying to highlight a problem in the office – we were not blaming C but explaining to her why others saw a problem and we were simply trying to seek a solution which was what this was all about.”

4.34 It is true that neither MS nor the partners immediately sprung to C’s side in what was then an uninvestigated and informal complaint about GD’s conduct. It is equally right to say that the subsequent discussion broadened into a more generalised critique of the accounts office. However, this was not a question of the senior managers or partners being unsupportive or unsympathetic towards C – it was simply a matter of trying to bottom out the cause that lay behind the dysfunctionality of what was, on any view, a vital component part of the practice. In my judgment, in the absence of any formal grievance, the partners cannot be criticised for initially and instinctively treating this incident as a symptom of a worsening and deteriorating workplace relationship as opposed to a case of ‘gross insubordination.’

4.35 At some point during the discussion DB mentioned to C that he had noted C undertaking administrative tasks (for example arranging for the replacement of a toilet handle) at

a time when they (the partners) had been trying to reduce her workload as a means of support. C took this, quite unreasonably in my Judgment, as a criticism of her when it was nothing of the sort. DB was simply using the ‘toilet handle’ issue in order to highlight the fact that they were and remained keen to offer C support by reducing her workload.

4.36 The discussion then turned to MS explaining that the accounts office was to move into CW’s office in order to create a working and meeting space for vets. C disagreed with this suggestion on the basis that there would be insufficient space but MS, who had conducted all the necessary measurements, informed her that the move was in accordance with business needs and would taken place. Once again, it is difficult to see how such a decision, which was entirely legitimate and in accordance with the business needs of the practice, could possibly form part of a series of events calculated or likely to destroy or seriously damage the relationship of confidence and trust.

4.37 Clearly the meeting had been emotionally draining for C and the appraisal was postponed until the following day. It was not clear who proposed this but, either way, it was a sensible and pragmatic suggestion.

4.38 C alleges that, as the meeting drew to a close and she was preparing to leave, MS patted her on the arm ‘in a condescending’ manner and told her to go home and think about what had been said. MS categorically denies having touched C on the arm and points to the fact that such was the width of the table between the two of them (together with MR’s positioning) that any touching was a physical impossibility. Both MR and DB were equally forthright that this touching did not happen in their evidence. I am quite satisfied that no such touching took place.

4.39 C left the office clearly upset and returned home. In her words she felt that she could no longer work for the Respondent in light of the lack of support offered by MS, DB and MR and because she felt that, rather than take action against GD for her insubordinate comments, the tables had effectively been turned on her. Later that evening she typed her resignation letter which did not allude to any of the above, still less her reasons for resigning. The following day, C handed in her resignation to MS shortly after her arrival at work. Despite a number of attempts to persuade her to retract the same, her resignation stood and was formally accepted by letter dated 9th November.

4.40 C worked out the bulk of her notice period (there was some dispute as to the impact of a pre-arranged holiday period on that period) and was absent sick for a few days in early December. Her last day of work was 6th December 2018.

5. Relevant law

Constructive dismissal

- 5.1 Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94.
- 5.2 Section 95(1)(c) 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. This is known as 'constructive dismissal'.
- 5.3 The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to

a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: ***Western Excavating (ECC Ltd) v Sharp [1978] I.C.R. 221, CA.***

5.4 In this case, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in ***Woods v WM Car Services (Peterborough) Limited [1981] I.C.R. 666:***

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” – see also ***Malik v. BCCI [1997] ICR 606, Courtaulds Northern Textiles Ltd. v. Andrew [1979] I.R.L.R.***

5.5 To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to

look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see *British Aircraft Corporation Ltd. v. Austin* [1978] I.R.L.R. 332. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: *Post Office v. Roberts* [1980] I.R.L.R. 347.

- 5.6 The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal if the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial: *Omilaju v*

Waltham Forest London Borough Council [2005] IRLR 35.

- 5.7 It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: ***Meikle v Nottinghamshire County Council [2005] ICR, CA.*** It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: ***Wright v North Ayrshire Council UKEATS 0017/13 (27 June 2013); Abbey Cars West Horndon Limited v Ford UKEAT 0472/07.***
- 5.8 It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract: ***Woods v WM Car Services (Peterborough) Ltd [1982] I.C.R. 693, CA.*** In determining this factual question, the tribunal is not to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must

simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer: *Buckland v Bournemouth University [2010] IRLR 445, CA*.

5.9 The thorny issue of how the law on affirmation applies in ‘last straw’ cases where there has been past repudiatory conduct has recently been addressed (and resolved) by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust [2019] I.C.R. 1*. The effect of the last straw is to revive the employee’s right to resign in cases where arguably an employee had affirmed an earlier fundamental breach by the employer. The tribunal should consider:

- 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?
- Has he or she affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed

cumulatively, amounted to a repudiatory breach of trust and confidence?

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

5.10 In a case of constructive dismissal, the reason for dismissal is the reason for which the employer fundamentally breached the contract of employment.

Wrongful dismissal

5.11 A complaint of wrongful dismissal is a common law action based on breach of contract. The reasonableness of the employer's actions is irrelevant. The question is whether the contract has been breached. If it has and termination is the result then it is wrongful.

6. Submissions

6.1 I am grateful to both legal representatives not only for the professional and measured way in which they have presented their respective cases but also for their careful and articulate submissions, both written and oral.

6.2 On behalf of the Respondent, Ms Murphy referred me to *Kaur* (supra.) and *Omilaju* (supra.). She argued that C had affirmed any alleged breaches that occurred on or before June/July 2018 on the basis that she had declared herself ‘happy’ prior to this date. In addition Ms Murphy invited me to reject, on a factual basis, the repudiatory conduct alleged or alternatively to find that such conduct, if proven, could not have amounted to repudiatory conduct such as to entitle C to resign and claim constructive dismissal.

6.3 Furthermore, and in addition, Ms Murphy argued that the evidence demonstrates that the Claimant did not resign in response to any such breaches, even if the same occurred. The Claimant, said Ms Murphy, resigned of her own volition and accordingly was not wrongfully dismissed. In the further alternative she argued for a 100% ‘Polkey’ deduction on the basis that dismissal or resignation would have occurred irrespective of any breach of contract on the part of the Respondent, fundamental or otherwise.

6.4 On the Claimant’s behalf, Mr Bidnell-Edwards provided a succinct and accurate exposition of the law and, in doing so, emphasised that the test namely whether the Respondent, without reasonable and proper cause, had acted in a manner either calculated, or likely, to destroy, or seriously to

undermine the trust and confidence between the Claimant and the Respondent, was an objective one - *Malik v. BCCI* [1997] ICR 606, as modified by *Baldwin*. Mr Bidnell-Edwards also referred to *Tullett Prebon PLC v. BGC Brokers LLP* [2011] IRLR 420, and the application of the objective test approved of there from *Eminence Property Development Ltd v. Heaney* [2010] 43 EG 99 (CS) which is to the effect that an objective application of the test means it is asked ‘*from the perspective of a reasonable person in the position of the innocent party*”:

- 6.5 Whether the Respondent had a legitimate, subjective intention which would not have been apparent to a reasonable person in the Claimant’s shoes is irrelevant to the question whether there has been a breach and a Claimant may resign in response to a breach even after the passage of time, and historic breaches are material insofar as later conduct cannot be cleaved entirely from its context in light of earlier conduct i.e. later conduct does not fall into an empty scale.
- 6.6 Mr Bidnell-Edwards argued that, despite her length of service and supervisory role, C was not prioritised or supported and instead treated dismissively. Conceding that a number of the factual allegations (for example concerning

GG) were 'historic', Mr Bidnell-Edwards nevertheless argued that the same were 'at a minimum, material background.' He concentrated his fire on the events, specifically the 'appraisal' meeting, that immediately led up to C's resignation.

6.7 He argued that GD's remarks to C should have been met with words and actions of support and not with implied or express criticism of her supervisory role.

6.8 On the subject of wrongful dismissal, Mr Bidnell-Edwards merely stated that: 'For the reasons stated above the Claimant also claims Wrongful Dismissal.' Finally he argued that the Respondent's submissions on 'Polkey' were 'dangerous' and should be rejected.

7. Conclusions

7.1 This is a sad case because there is no doubt in my mind that C is a thoroughly decent, honest and hard-working individual proficient at her job. Unfortunately she struggled to develop and maintain positive working relationships with consecutive accounts assistants. This was not necessarily her fault but an all too common feature of working life in small offices. The accounts team was a relatively small,

albeit critical, part of the practice and inevitably the tension and unhappiness created by the worsening relationships within it were bound to have an impact upon the wellbeing of the practice as a whole.

7.2 Consecutive practice managers tried their best to repair the dysfunctional relationship that had arisen between C and GG. C's concerns were listened to and she was supported – the fact of GG being placed on a performance development plan speaks for itself. It must have come as a singular relief to senior management and partners when an alternative position was found for GG in reception. That relief, however, was short-lived as only weeks had elapsed before similar issues emerged, this time between C and GD, giving rise to palpable frustration on the part of both senior management and partners. On any objective view, the partners and MS were perfectly and understandably entitled to view the incident on 6th November (when GD allegedly swore at C) against that background and use the meeting as an opportunity to explore the reasons that lay behind this ongoing deterioration in working relationships within the accounts office. On the facts of this case it cannot be said that the respondent conducted itself in a manner calculated or likely to undermine trust and confidence by failing to simply treat the incident as an act of gross insubordination,

without any reference to what had or may have led up to it. At no stage had C raised a formal grievance in respect of any of the matters about which she complains in support of her present complaint, a route open to her and one about which, in her supervisory capacity, she was all too well aware.

7.3 I have considered each of the specific factual allegations relied upon by the Claimant in support of her claim in detail above. Having done so, and being careful to apply an objective as opposed to a ‘range of reasonable responses’ test, I have concluded that not one of the matters upon which she relies constituted a breach of contract on the part of the respondent. Furthermore there was no repudiatory conduct and, in any event, at all material times the respondent (and those for whose actions they were vicariously responsible, principally MS) acted with reasonable and proper cause. For those reasons the claims for both constructive and wrongful dismissal fail and are dismissed.

7.4 For the avoidance of any doubt, the fact of C working out her notice would not, on these particular facts, have been fatal to any claim for constructive dismissal on affirmation grounds.

Employment Judge E Legard

Date: 29 December 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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