



EMPLOYMENT TRIBUNALS

Claimant: Dawn Farnell

Respondent: Tesco Stores Ltd

Heard at: Watford (via CVP)

On: 3 and 4 March 2021

Before: Employment Judge Anderson

Representation

Claimant: In Person

Respondent: Ms Wheeler (counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing.

JUDGMENT

The claims of wrongful and unfair dismissal are dismissed.

REASONS

Introduction and Issues

1. The claimant claims that she had no option other than to resign from her position as checkout manager at the Wolverton Tesco store on 2 December 2019 and her resignation was a constructive dismissal. Her claim is that following a catalogue of incidents in which she was shouted at, intimidated and humiliated by her line manager Stephen Craig, and having raised a grievance, this grievance not being upheld, the respondent has acted in a manner which has breached the implied term of mutual trust and confidence in the employment contract between the claimant and respondent. She also claims wrongful dismissal and that notice pay is due.
2. The respondent denies the claim. The respondent says that the claimant was not dismissed and instead says she resigned on 2 December 2019. The respondent denies any allegations of ill-treatment of the claimant by Mr Craig and says that a thorough investigation was carried out in response to the claimant's grievance.

3. There having been no preliminary hearing in this case there was no list of issues. In discussion with the parties at the outset of the hearing the following list was agreed:
 - a. Was the claimant dismissed, i.e.
 - i. Were the acts complained of that took place between December 2018 and ended on the Claimant's resignation on 2 December 2109 a fundamental breach of the implied term of the contract of employment, the so-called 'trust and confidence term', i.e., did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?
 - ii. if so, did the claimant affirm the contract of employment before resigning? if not, did the claimant resign in response to the respondent's conduct.
 - b. The conduct the claimant relies on as breaching the trust and confidence term is set out at paragraphs 6, 7, 8 and 12 of her Details of Claim.
 - c. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")
 - d. if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

The Law

4. The Tribunal is concerned to decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states

"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...only if)-
 - a)-
 - b)-
 - c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"
5. This is what has become known as "constructive dismissal". The leading case of *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* makes it clear that the employer's conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

The Hearing

6. At the commencement of the hearing I discussed with the claimant that her solicitor had come off the record the previous evening. The claimant confirmed that she was prepared to proceed with the hearing.
7. I clarified with the parties that I was in receipt of a joint bundle running to 557 pages and a separate bundle containing three witness statements from the respondent and one from the claimant. The parties confirmed that this was the totality of the written evidence. Partway through the claimant's evidence on the first morning of the hearing it came to light that the claimant did not have a copy of the respondent's witness statements and had misunderstood my questions about this at the beginning of the hearing. Copies were immediately emailed to her and the hearing adjourned in order that she had time to read them.

8. The respondent's witnesses, Stephen Craig and Matthew Jones, attended and gave evidence at the hearing. Naomi Lawes was unable to attend due to sickness and any weight I have given to her statement takes into account that she was unavailable for cross examination by the claimant or to answer questions from the tribunal. The claimant gave evidence on her own behalf.

Relevant Facts

9. The claimant makes 18 allegations which she says led to her resignation on 2 December 2019. These are set out in paragraphs 6,7,8 and 12 of her Details of Claim and in agreement with the parties I numbered these as allegations 1 to 18. The allegations are referred to in this document using those numbers. References in brackets are to page numbers in the hearing bundle.
10. The claimant commenced employment with the respondent on 28 September 1998. From October 2016 she held the position of checkout manager at the Wolverton branch of Tesco Stores Ltd. Stephen Craig joined the Wolverton store in August 2018 as the store manager and was from that time the claimant's direct line manager.
11. On 22 February 2019 the claimant told Mr Craig that she had concluded a disciplinary meeting with a colleague and awarded a final written warning which would remain on the colleague's file for 13 weeks. Mr Craig said that the warning should be for 26 weeks. Mr Craig subsequently discovered he was wrong. He told the claimant that he had been wrong the following day.
12. In March 2019 at a performance review meeting the claimant was awarded a 'met' grading. Mr Craig raised with the claimant that there were areas of the claimant's performance that required improvement and told her that he believed she was struggling in her role as checkout manager. The possibility of moving to another management role was discussed.
13. Allegation 13 is that at this review meeting the claimant was offered the position of stock control manager by Mr Craig who then later withdrew the offer and was involved with interviewing someone else for the role. Although the claimant was interviewed at a later date, she says this was only the respondent covering its own actions, and the claimant was not offered the job. I find that on the evidence provided it is likely that Mr Craig raised the possibility of the claimant applying for the stock control manager job, as it is agreed between the claimant and Mr Craig that he thought she was struggling with the checkout manager job and the two had discussed alternative roles. Mr Craig said it was not in his gift to hand this position to the claimant and would have been against company policy. Mr Jones, also a store manager with many years' experience, and manager at a different store, corroborated this evidence on policy and practice. There was nothing before me to indicate that company policy was not generally followed by the respondent and therefore I do not accept that Mr Craig offered, then withdrew, this position to the claimant. Having no other evidence before me regarding the interview process, I can make no finding as to whether the process itself was fair or not.
14. On 23 March 2019 the claimant did not attend work for her shift. There was a dispute between the claimant and the respondent as to whether this day had been authorised as leave. The respondent carried out a formal investigation and a disciplinary hearing took place on 4 April 2019. The conclusion was that there was no case to answer.

15. Allegation 16 is that disciplinary action relating to the unauthorised absence on 23 March 2019 was unwarranted. The evidence before me was that there was a clear dispute as to whether the absence had been authorised or not, and that Mr Kearney, whom the claimant says authorised the leave, was clear he had not authorised it. In the circumstances I do not accept that an investigation, where there were two different versions of events being put forward, was unwarranted.
16. On 24 May 2019 the claimant told Mr Craig that she had received a phone call congratulating her on being offered the stock control manager position. The caller, a friend of the claimant who worked in another of the respondent's store, said that she had heard that someone had been offered the claimant's current role as checkout manager. The friend therefore assumed that the claimant had been offered the stock control manager job, which had given rise to a vacancy for checkout manager.
17. Allegation 15 concerns this telephone call. This claimant reported the call to Mr Craig who denied it. The claimant said she also raised it with James Kearney and that he said it was upsetting to see a colleague being treated in this way. When interviewed by Mr Jones Mr Kearney said *"I don't think I ever said that. I wouldn't undermine the relationship between her and her direct report."* He goes on to say that he did not think that there were any major issues in the relationship between the claimant and Mr Craig (p509/10). The fact is that the claimant did not get the stock control manager role and she remained as checkout manager until she commenced her sickness leave on 11 July 2019. The claimant's claim is Mr Craig had offered her job to someone else. I find that there is no evidence that Mr Craig offered the claimant's job to someone else.
18. On 12 June 2019 Zoe Delorenci sent a WhatsApp message to Stephen Craig complaining about the claimant failing to complete till short reports (p207), which were part of her remit. On the claimant's own admission this issue had previously been discussed between the claimant and Mr Craig as this was not the first time the claimant had failed to complete this task. Paul Mead, the produce manager, was asked by Mr Craig to take a statement from Ms Delorenci about the till shorts matter. Mr Craig decided that the matter should be investigated and passed it to Karen Kay, the store's human resources colleague, to arrange an investigation meeting.
19. On 22 June 2019 the claimant told Mr Craig that she was aware of the ongoing investigation regarding till shorts. The claimant became upset during the meeting and told Mr Craig that she had been keeping notes about his behaviour. Following that meeting Mr Craig wrote an account of the discussion which was included in the bundle (224-225).
20. A first investigation meeting into the till shorts matter took place on 24 June 2019 between the claimant and Paul Mead, the investigator. Mr Mead decided that the matter should be referred onwards to a disciplinary hearing. Karen Kay overruled this as she took the view that the investigation was inadequate. The second meeting took place on 4 July 2019, this time chaired by Nubia Douglas. The claimant had understood the meeting to be the disciplinary hearing not a second investigatory meeting. The invitation she received to the meeting on 25 June 2019 clearly stated that the meeting was for a disciplinary hearing. Ms Douglas confirmed that she had understood the meeting to be an investigatory meeting and after questioning the claimant confirmed that she was of the view that the

matter required further investigation. The meeting was concluded, and a re-investigation meeting was scheduled for 11 July 2019.

21. On 11 July 2019 the claimant commenced a period of sickness absence due to work-related stress and did not return before tendering her resignation on 2 December 2019.
22. In an interview with Ms Delorenci regarding the till shorts matter on 19 July 2019 she referred to an incident when the claimant said to her, when they were alone, that she was not worried about the till short investigation because if she, the claimant, was being investigated then Ms Delorenci also required to be investigated over a separate unconnected incident. The clear implication from Ms Delorenci is that the claimant threatened her with exposure to potential disciplinary action if Ms Delorenci continued to co-operate with the till shorts investigation.
23. Allegations 9 and 17 relate to the till shorts investigation. There were clearly deficiencies in the way this investigation was handled however, I accept the respondent's case that there was a reason to investigate this matter, and I do not find that the deficiencies in that investigation were deliberate attempts to undermine or humiliate the claimant. The cash office manager Ms Delorenci complained to Mr Craig about the till short situation. I do not accept that Ms Delorenci was forced to make a statement about this matter as she had in effect already done so within the WhatsApp message 12 June 2019 (p207). Ms Delorenci told Mr Jones that she did not want to make a statement, but also that she did not feel that she'd been threatened to give a statement (p487). Ms Delorenci goes on to say that in fact she felt threatened by the claimant. She says the claimant told her that if she gave a statement then the claimant would ensure that an investigation into Ms Delorenci on another matter would be raised with management. The claimant's evidence was that Ms Delorenci was frightened for her own job. I do not accept that. I find that the till shorts investigation was warranted and that it is more likely than not that the claimant tried to discourage Ms Delorenci from taking part in the investigation.
24. On 16 September 2019 the claimant raised a formal grievance against her line manager Stephen Craig. Matthew Jones store manager at the Evesham store was appointed to investigate the grievance. The claimant was invited to a grievance hearing which took place on 25 October 2019. She had a staff representative at that meeting.
25. Following the meeting with the claimant Mr Jones carried out the investigation into the claimant's grievance. Mr Jones interviewed 13 colleagues in addition to interviewing the claimant and Mr Craig, and collating relevant documentary evidence. The steps taken are set out on the first page of his investigation report at p513 of the bundle.
26. Mr Jones completed his report on 13 November 2019. He dismissed the grievance in its entirety. The claimant was provided with a copy of the report and conclusion which she received on 20 November 2019.
27. Allegation 18 is that the respondent failed properly to investigate the claimant's grievance and the outcome was unreasonable. Mr Jones gave evidence to the tribunal that he had interviewed the claimant for four hours, had then gone on to interview Mr Craig, had compiled a list of every name that came up in those two

interviews and sought to interview each of those named people. His report is at pages 512 – 520 of the bundle. Mr Jones interviewed 13 colleagues. The claimant suggested that he should have interviewed a further four people. In evidence at the hearing it was admitted that one of the four had been interviewed, one had left the respondent's employment and it was not possible to interview him and a third had been at the claimant's grievance meeting as her representative. The fourth was Beccy. Mr Jones gave his reasons for not interviewing Beccy and I have set those out at paragraph 35 below. Mr Jones said in evidence that when he had first read the claimant's grievance and spoken to her he was concerned that there was a real issue, however, by the time he had completed his investigation he was clear that none of the claimant's allegations were proven. He had obtained no corroborating evidence. I find that the investigation was thorough and far reaching. The investigator was a store manager in another store in a different area and therefore impartial.

28. On 26 November 2019 the claimant contacted Karen Kay of human resources requesting documentation from the investigation in connection with an appeal she intended to raise.
29. The claimant submitted an appeal against the grievance decision on 2 December 2020, again requesting documentation, and on the same day emailed Ms Kay a second time to submit her resignation. (pp523 – 527)
30. The respondent requested the claimant's attendance at an exit interview on two occasions, 6 December 2019 and 10 December 2019. The claimant did not accept this offer and commenced the early conciliation process on 12 December 2019. There were no further communications between the parties about the appeal.
31. The claimant complains that she was not provided with documentation relating to the grievance investigation in order to inform any appeal preparation (this is not one of the allegations numbered 1-18). She did however submit an appeal. The appeal was not pursued to its conclusion. The claimant says the respondent did not deal with it. The respondent says that it would have discussed the appeal further with her if she had attended either of two exit interviews to which it invited her. Whilst the respondent's policy sets out that exit interviews can be used to address appeal matters when an employee has left the business, the claimant would not have had access to that policy once she resigned and I accept that she did not perceive the two invitations to exit interviews as being connected with her appeal. In any event she did not pursue the appeal. The fact that she did not do so is not relevant to my decision.
32. Allegations 1 - 8, 10-12 and 14 are allegations in which the claimant accuses Mr Craig of humiliating, threatening or belittling her in private or before other staff or customers and span the period from December 2018 to 9 July 2019. Where the claimant has named a witness to one of these incidents, the witness was interviewed by Mr Jones as part of the grievance process, and the claimant's evidence was not corroborated. For example, allegation 7 is that on 27 April 2019 Mr Craig humiliated the claimant by requiring her to hurry behind him to the office, and that she was shouted at and criticised by Mr Craig when she reached the office. Kajan Thillainather is named as a witness and was interviewed by Mr Jones as follows (p471):

*"MJ: 27 April were you witness to FC raising his voice against D?
KT: No*

MJ: Any times witnessing this behaviour?

KT: no

MJ: how would you describe SC and D's relationship?

KT: Alright. No issues at all.'

33. This same witness was also present during a phone call that took place on 9 July 2019 (allegation 16). The evidence given by the claimant was that Mr Thillainather witnessed her humiliation and commented on Mr Craig's attitude (claimant's witness statement paragraph 59) however, when questioned by Mr Jones the witness said there were no issues at all between Mr Craig and the claimant.
34. The claimant said that the reason there was a lack of evidence to support her allegations, was that interviewees would be scared to criticise the management due to the effect this would have on their own working lives. I note that the claimant had worked at the Wolverton store since 2010 and that Mr Craig had been there for less than two years. I do not accept that if the type of behaviour the claimant describes had been ongoing during the period December 2018 to July 2019, none of her colleagues would corroborate any of her allegations, or more generally, her depiction of her working relationship with Mr Craig. Furthermore, I note that one of the grievance interviewees was the store's union representative, Lorraine Wesley, whose evidence was that *"she [the claimant] lacks communication and poor attitude towards staff. Since she's been absent have no complaints with anyone else or anything. I was constantly busy as a union rep while D was in the business."* (p496). I do not accept that Ms Wesley, as the store's union officer, would have been in fear if she spoke out against management.
35. The claimant requested that a colleague called Beccy be interviewed by Mr Jones as part of the grievance investigation. Mr Jones gave evidence that Beccy was on maternity leave and that legally he could not contact her within two weeks of giving birth, even if the claimant had assured him that she was happy to be contacted. In response to the claimant's questioning as to why he did not contact her later in the investigation he said that he did not think it was necessary to disturb her maternity leave as he felt he had all the evidence he required. I note that the claimant did not include any evidence from Beccy to support her case in these proceedings.
36. Mr Craig denies shouting at the claimant in public or otherwise or belittling her. His evidence was that the claimant was unwilling to accept criticism and that in his role as store manager and the claimant's line manager, because there were times when she was not carrying out her role properly, he was required to have conversations with the claimant about her work. He said that in his view, their work relationship was basically good, and he had not perceived there to be a serious problem until the meeting of 22 June 2019.
37. Mr Craig's evidence was supported by the evidence collected by Mr Jones during the grievance investigation. Most interviewees said they had not noticed that there were any problems between the claimant and Mr Craig. Those who did, did not think the problems were serious, and any critical comments made by the interviewees were directed at the claimant. One interviewee said *"Dawn can get wound up at times like we all can. But I had a few complaints about her attitude, the way D speaks to people. I spoke to D directly about that."* (p 453), and another who referred to herself as a friend of the claimant, Dawn McEwan, said:

“DM: it’s hard – I’m friends with D. I have her version of what happened – I haven’t seen/witnessed any of it.

MJ: have you witnessed professional behaviour in meetings?

DM: Most of the time – sometimes banter, sometimes frustration from either side

MJ: Do you see it as correct.

DM: I’ve not seen anything out of line.’ (p455-456)

38. My attention was also drawn by the respondent to a number of WhatsApp messages between Mr Craig and the claimant some of which were sent on days relating to the allegations. These are friendly in nature, often referring to personal matters outside of the work sphere. The claimant said that she had to get on with her working day and the messages did not show anything other than that. I agree that the messages do not add anything to the respondent’s case.
39. However, in relation to allegations 1 - 8, 10-12 and 14 I find, on consideration of the evidence of the claimant and Mr Craig, together with the evidence gathered by Mr Jones in the grievance investigation, on balance the claimant was not subjected to the treatment from Mr Craig that she describes.

Submissions

40. The claimant sets out 18 separate allegations which she claims were instances of ill-treatment by Mr Craig. Of these, 12 are claims that Mr Craig belittled her, shouted at, or threatened her either on the shopfloor or in private meetings. The claimant accepted that she was unable to provide evidence of these incidents but was clear in her submissions that they had all taken place in the manner in which she had described them in her written and oral evidence.
41. The claimant said she had been subjected to an unprecedented number of investigations in the last two months of her time in the store and this was not something she had experienced in the previous 20 years of her employment.
42. The claimant said that by 11 July 2019 she was under such stress and pressure due to Mr Craig’s actions that she became unwell and commenced sick leave due to work-related stress.
43. The claimant said that Mr Craig’s behaviour from December 2018 to July 2019, the failure of Mr Craig to contact her once she commenced sick absence, the delay in dealing with her grievance and the outcome of that grievance, led her to believe that the respondent had so clearly breached the implied term of trust and confidence that she was left with no option other than to resign when she received the grievance outcome.
44. The claimant said that the respondent failed to provide her with the necessary paperwork to pursue her appeal once she had submitted the appeal, and that in any event she did not have any confidence that the appeal process would resolve matters to her satisfaction.
45. In response to the evidence provided in the investigation report, including interviews of a number of the claimant’s colleagues, none of whom corroborated her claims or depiction of her relationship with Mr Craig, the claimant referred to a culture of control in the Wolverton store and stated that colleagues would be concerned for their jobs if they were critical of the store manager in their interviews with the grievance manager.

46. The respondent denied that any of the allegations of bullying described by the claimant took place at all, or in the manner in which she described them. The respondent denied that Mr Craig had shouted at, humiliated, or belittled the claimant in public or otherwise. It pointed to the lack of evidence provided by the claimant in relation to these claims.
47. The respondent admitted that two separate disciplinary procedures had been instigated in 2019, relating firstly to unauthorised absence and secondly to till shorts. The respondent said that it had reasonable grounds for commencing these procedures. It noted that there had been failings in the handling of the second disciplinary process.
48. The respondent said that whilst there had been a delay in organising a grievance meeting, taking the process outside of the target time frame in the respondent's grievance process, there were good reasons for this and these had been explained to the claimant. The respondent said the investigation into the grievance was thorough and detailed and noted that it was carried out by an impartial colleague from another store who did not know any of those involved.
49. The respondent noted that of the 13 employees interviewed by the grievance investigator, none had described the relationship between the claimant and Mr Craig in the way described by the claimant, most had not perceived there to be any problem in their relationship and some noted that there were some difficulties but had not thought these were major. The respondent noted that the evidence also showed that the overwhelming view was that Mr Craig was a good and fair manager and that a number of people held the view that the claimant could be a difficult person to work with.

Conclusion

50. I find that there is no evidence to support the claimant's contention that she was treated in such a way by Mr Craig and the respondent as to breach the implied duty of trust and confidence between the claimant and the respondent. The evidence is that the claimant was good at some parts of her job and not so good at others, that when this was addressed with her, she did not accept the criticism and took it as a personal attack. I have no doubt that there were many difficult conversations between the claimant and Mr Craig during the relevant period but I accept his view that he was not aware of any major difficulties before the meeting of 22 June 2019 when the claimant told him she had been keeping a record of his behaviour.
51. I find that the instigation of the two disciplinary investigations was warranted, and although the second process was mismanaged, I do not find that either the instigation of the processes or the way in which they were conducted were actions that could be construed as contributing to a breach by the respondent of the implied duty of trust and confidence.
52. The grievance investigation was thorough, and the conclusion reached by Mr Jones is one that was clearly open to him on the evidence he had gathered. I do not agree that it was unreasonable.
53. I do not accept that the claimant's resignation on 2 December 2019 was as a result of actions by the respondent which breached the implied term of trust and confidence and I do not therefore find that the claimant was dismissed.

54. As my decision is that the claimant resigned and was not dismissed there is no need for me to consider the other legal issues set out at paragraph 3 above.

55. The claim is dismissed.

Employment Judge **Anderson**

Date 10 March 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....13 April 2021..

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FOR THE TRIBUNAL OFFICE