



EMPLOYMENT TRIBUNALS

Claimant: Miss M Mervyn

Respondent: BW Controls Ltd

Heard at: Bristol **On:** 13 and 14 April 2021

Before: Employment Judge Livesey
Mr E Beese
Dr C Hole

Representation:

Claimant: In person

Respondent: Mr Shepherd, counsel

JUDGMENT

The Claimant's remitted complaint of constructive unfair dismissal is dismissed.

REASONS

1. Claim

1.1 By a Claim Form dated 4 December 2016, the Claimant brought complaints of unfair dismissal and discrimination on the grounds of sex.

2. Relevant background and the remitted issues

2.1 This claim had something of a lengthy and convoluted history.

2.2 The issues which fell to be determined at the final hearing which took place on 13, 14 and 15 November 2017 had been identified at a Case Management Preliminary Hearing which Employment Judge Reed had conducted on 8 February 2017; the Claimant had informed the Judge that she had not resigned her employment, but had been dismissed. The Judge's view, as expressed within paragraphs 3 and 4 of his Summary, was therefore that she had either been dismissed, in which case unfairly, or she had resigned, in which case any claim of constructive unfair dismissal would have been likely to fail because she did not allege that she had resigned because of the Respondent's actions.

- 2.3 At the final hearing, this Tribunal concluded that the complaints of unfair dismissal and discrimination had not been well founded and they were dismissed. In relation to the former, we concluded that the Claimant had, in fact, resigned and, since she had not sought to run an alternative case of constructive unfair dismissal and in light of Employment Judge Reed's earlier Case Management Summary, her claim under the Employment Rights Act failed.
- 2.4 Written reasons were requested and were sent to the parties on 9 January 2018. The Claimant then appealed to the Employment Appeal Tribunal on a number of grounds, most of which do not need to be repeated here. HHJ Peter Clarke rejected the appeal pursuant to rule 3. With support from ELAAS, the Claimant managed to persuade HHJ Eady, as she was then, that there was potential merit in one point at a hearing convened under rule 3 (10); whether the Tribunal ought to have considered the alternative case of constructive unfair dismissal despite what was set out above. That point was then addressed by Laing J at a final hearing. She rejected the appeal and stated that the potential constructive unfair dismissal complaint "*was inconsistent with her position during the litigation, and inconsistent with the evidence she gave to the ET.*"
- 2.5 The Claimant then appealed to the Court of Appeal and her case was heard on 19 February 2020. The Court found (Bean LJ giving the leading judgment) that the alternative case ought to have been dealt with. He considered that the list of issues ought to have been amended so as to have directed the Tribunal to consider both the 'ordinary' and the constructive unfair dismissal complaints as alternatives. He considered that it was not possible for the Court of Appeal to say that such a consideration "*could have made no difference to the outcome.*"
- 2.6 The Respondent then sought permission from the Court of Appeal to appeal further. That request was refused on 7 May 2020 and the Supreme Court also refused permission.
- 2.7 The constructive dismissal claim was remitted to the same Tribunal. It was made clear that the findings of fact would stand, in particular the finding that the Claimant had resigned on 14 or 15 November 2016 (paragraph 48 of the Judgment). The Tribunal's remaining task was to hear evidence and argument on the question as to whether or not the resignation had occurred in circumstances in which the Claimant was entitled to terminate her contract without notice as a result of a fundamental breach on the Respondent's part.
- 2.8 A Case Management Preliminary Hearing was then held on 11 February 2021. A great deal of time was taken identifying and recording the nature of the Claimant's outstanding complaints; see paragraph 31 of the Case Summary, to which we will return later.

3. Evidence

- 3.1 The Tribunal heard further evidence from the following witnesses;
- The Claimant;
 - Mr Fowler, Managing Director and owner of the Respondent;

- Mrs Fowler, Company Secretary and Mr Fowler's wife.

- 3.2 The Tribunal received the following documents;
- C1 The Claimant's further closing submissions;
 - R1 The original hearing bundle.
- 3.3 During cross-examination of Mr Fowler, the Claimant appeared unhappy that the Respondent was not calling other witnesses who she had wished to challenge further in evidence. The Respondent had indicated at the Case Management Preliminary Hearing on 11 February 2021 that it had intended to call all 8 witnesses who had given evidence at the first hearing. Its view changed. In the last weeks and days before the hearing, it indicated that only Mr and Mrs Fowler were to have been called. The Claimant did not seek to have others summonsed on her behalf. The Tribunal could not dictate which witnesses the Respondent ought to have called.

4. Additional facts

- 4.1 The Tribunal adopts and repeats that the factual findings which were made at the previous substantive hearing which, in light of paragraph 48 of Bean LJ's judgment, remain. We have made the following additional findings on the balance of probabilities and have referred, again, to page numbers within the hearing bundle, R1, in square brackets. Previous paragraphs from our Reasons of 21 December 2017 have been cited in braces; {}.
- 4.2 The Tribunal had to make several further findings around some of the events which were relied upon as the foundation for the Claimant's constructive unfair dismissal complaint (see paragraphs 1.1.2-1.1.4 of the Case Summary of 11 February 2021).
- 4.3 A number of findings had already been made in relation to the issues identified at paragraph 1.1.1 and paragraph 7 (i)-(iii) of the Case Management Summary of 8 February 2017, although a different case was then being addressed, that of discrimination. In relation to the different angle now examined, we made the following further findings;

- (i) Drinks;
- The Claimant initially alleged that she had complained to Mr Fowler and Mr Hawkes about having to make tea. She then shaded back on that evidence and suggested that she had only had a 'moan' to Mr Woodland about it. She also suggested that she might have 'moaned' to Mr Fowler and Mr Hawkes, but they would not have listened. She asserted that the issue was part of the reason for her resignation.

Mr Fowler denied having received any complaint from the Claimant over this issue.

The Claimant's evidence was rather woolly. Her account in relation to her complaints changed. To the extent that it was relevant to do so, although we accepted that she may have moaned, we found that nothing was said to Mr Fowler which reasonably led him to the view that she had been raising any form of formal complaint about making tea from time to time.

(ii) Overtime;

The Claimant asserted that this was also part of her reason for resignation, although she accepted that the payment of overtime was not covered in her contract. She nevertheless claimed that she was the only employee who was paid on a weekly basis who was not in receipt of overtime. Mr Hawkes lost his overtime entitlement when he moved to salaried pay, having moved from the workshop to a design role. The failure to pay overtime lasted for 10½ years, from the point that the Claimant became full time.

The Claimant again said that she had raised a complaint about the issue to Mr Fowler. As above and in the face of Mr Fowler's denial, which was unchallenged, we found that he had not been made aware of the Claimant's discontent in that respect.

(iii) Foul song/language;

The Claimant asserted that she had raised the use of foul language with Mr Fowler and Mr Hawkes, but nothing happened. She said that it had formed part of her reason for her resignation.

Mr Fowler's treatment of the Claimant on 14 November in front of Mr Perryman

- 4.4 The Tribunal had made a number of findings about the events of 14 November 2016, particularly at paragraphs {4.21-4.24}. None of the conversations covered in those findings had apparently taken place in front of Mr Perryman. Indeed, the Claimant had not herself suggested as much in her Claim Form. Upon close scrutiny of page 2 of her witness statement, she had not made that allegation there either.
- 4.5 Despite that allegation having been clearly recorded as the Claimant's allegation during the hearing on 11 February 2021, she sought to alter it somewhat during her evidence. She alleged that her complaint was *not* that Mr Fowler had demeaned her in front of Mr Perryman on 14 November. He had not been present. Rather, she said her treatment by Mr Fowler had been demeaning *before* that date, on occasions before Mr Perryman. She had not expanded upon that treatment in light of the comments in the Case Management Summary of Employment Judge Reed of 8 February 2017 at paragraph 5; it was not considered that those issues were relevant to her case of express dismissal.
- 4.6 We gave the Claimant a broad rein to explain and expand upon her case in that respect. She referred to having been humiliated in front of Mr Perryman by Mr Fowler in respect of discussions over paternity pay in July. The nature of that humiliation was not explained nor was it put to Mr Fowler in cross-examination, although he was given an opportunity to explain his position. In essence, he said that the Claimant had raised a number of issues about Mr Perryman's pay, she had told him that she did not like him [48] and appeared to be running a vendetta against him for reasons which Mr Fowler did not understand. Issues which were raised by the Claimant about pay inaccuracies were checked with his wife and/or Mr Smith who had different views (see paragraphs 9 and 10 of Mr Fowler's witness statement). The fact that Mr Fowler fed those differences of views back was

taken by the Claimant as a “*an undermining of my capabilities*” (see paragraph 2 of the Claim Form).

- 4.7 But the Claimant’s case focused more upon the events of 14 November and to having ‘*being called a liar*’ by Mr Fowler, ‘*which is a severe breach*’ on 14 November, as she said in her evidence. In her Claim Form, witness statement and new closing submissions (C1), that was the prominent issue.
- 4.8 In that respect, it had been clear to us at the first hearing that the Claimant had not been called a liar in those terms. She had referred to it as an ‘*insinuation*’ in her witness statement or as a ‘*virtual*’ accusation in her grievance [31]. Her account of payments claimed by Mr Perryman in relation to a specific timesheet [169] had been rejected by Mr Fowler to which she replied, “*are you calling me a liar*”, a comment which was not heard or responded to {4.22-4.24}. She then became exasperated and left in the circumstances that we described.

Messrs Fowler and Hawkes informing the workforce that the Claimant had been chastised for an allegation of racism

- 4.9 The note of the ‘chastisement’ did not indicate that Mr Fowler and/or Mr Hawkes had told anyone else about the incident, although it was clear that they had discussed the matter between themselves [48]. The Claimant’s witness statement did not suggest that anyone else had been told, nor did her Claim Form contain such an allegation.
- 4.10 In her further evidence she said that she had believed that Mr Hawkes had spread news about her chastisement because the treatment of her, particularly by Mr Kevin Hawkes (Mr Simon Hawkes’ father) and Mr Kavaliauskas, deteriorated. She said that it was only when she had received the document during the disclosure process that it had all made sense to her. She thought that it explained why she had been badly treated. She had not seen the document before that. Nevertheless, she had not cross-examined Mr Hawkes to that effect at the first hearing.
- 4.11 On the basis of the evidence we received, we had nothing upon which we could reliably base a finding that Mr Hawkes had shared the information within [48] with a wider workforce audience.

Mrs Fowler assuming some of the Claimant’s responsibilities from May 2016 (Mr Perryman’s pay and staff holidays)

- 4.12 Paragraph 7 on page 4 of the Claimant’s witness statement suggested that, in 2016, Mrs Fowler started to become more actively involved in making decisions in the workplace. She complained that Mrs Fowler “*overruled the information that I was asked to obtain by Lee Fowler....regarding Mr Perryman’s request for paternity pay.*” She did not allege that Mrs Fowler took on any specific responsibility from her, either in relation to Mr Perryman or annual leave. Similarly, those allegations had not been made in her Claim Form.
- 4.13 In her further evidence before us, the Claimant said that Mrs Fowler overruled her in July 2016 regarding Mr Perryman’s pay. To some extent, this was ground previously covered by the Tribunal; it had always been

clear to us that the Claimant was not well disposed towards Mr Perryman (see {4.20} and [48]). The fact that Mr Fowler called upon his wife (and/or Mr Smith (see paragraph 10 of his statement)) to determine issues raised by the Claimant has been addressed above. It did not amount to Mrs Fowler assuming of absorbing part of the Claimant's role or taking any of her responsibilities.

- 4.14 She had further alleged that her responsibility for staff holidays had been assumed by Mrs Fowler. In her further evidence she explained that staff holiday requests came to her, she presented them for approval by Mr Fowler and she then recorded the leave on a planner which she kept for her reference. Sometime in mid-2016, Mrs Fowler introduced a new spreadsheet. That meant, she said, that she had to keep her own record and complete Mrs Fowler's spreadsheet. None of her other tasks around staff leave altered.
- 4.15 Mrs Fowler denied that she changed the system. She did introduce some tweaks to the spreadsheet (the introduction of internal formulas) but the Claimant's responsibility for staff leave remained, which included the recording of dates on the charts in the office and Mr Fowler's and Mr Smith's rooms.

5. Relevant legal framework

- 5.1 The implied term of trust and confidence was not breached merely if an employer behaved unreasonably, although such conduct could point to such a breach evidentially. However, it was breached if an employer participated in conduct which was calculated or likely to have caused serious damage to, or destroy, the relationship between them (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] 1 AC 20). Breaches must have been serious. Parties were expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851). In the case of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131, the Court of Appeal encouraged tribunals to ask whether, looked at in the light of all of the circumstances objectively, the party's intention was to refuse further performance of the contract (paragraph 27, per Kay LJ). An objective analysis of the likely effect was also required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8).
- 5.2 It was important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term.
- 5.3 The breach (or breaches) relied upon did not need to have been the only cause of the employee's resignation in order for a claim to succeed; *Wright-v-North Ayrshire Council* [2013] UKEAT/0017/13/2706. It was sufficient for it to have been *an* effective cause of the employee's resignation.
- 5.4 A claimant cannot rely upon a breach of contract which she had been taken to have affirmed. Affirmation can, of course, have been express, but it can also have been implied by both action or by inaction and delay, although simple delay was rarely enough (see Langstaff J's judgment in *Chindove-v-Morrisons* UKEAT/0201/13/BA, at paragraph 26).

6. Conclusions

6.1 We considered the issues as they had been carefully recorded on 11 February 2021.

6.2 The 3 allegations of discrimination identified within paragraph 7 (i)-(iii) of Employment Judge Reed's Order of 8 February 2017;

6.2.1 The first of the complaints concerned the alleged expectation that the Claimant would have made the drinks at work because she was a woman. That allegation was addressed at {4.8} and {5.13-16}; we concluded that, although the Claimant had habitually made the drinks, there had been no expectation or requirement for her to have done so. Some previous administrators had done so, but some had not. We now had to consider whether the complaint was capable of having amounted to a breach of the implied term in the alternative.

6.2.2 We did not accept that the Claimant had ever raised a complaint about the issue or that it amounted to any fundamental breach of the implied term of mutual trust and confidence on the basis of the findings that we had made and the further evidence that we heard. There was no requirement for her to have made the tea, nor had she done so if she had been busy ({4.8} and {5.15}).

6.2.3 The Claimant had, secondly, complained that she was not provided with an overtime rate because she was a woman. We, however, found that nobody in the office had been eligible to earn over time and there had therefore been no discrimination ({4.6} and {5.17}). But what of the allegation of breach of the implied term?

6.2.4 We failed to see how the non-payment of overtime could have been a breach of the implied term as it had not been a contractual entitlement within her written express terms. Further, the practice of not paying overtime had extended over the 10½ year period when the Claimant had worked full time. If there had been a breach, it had been affirmed.

6.2.5 Finally, the Claimant complained about foul language and sexual innuendo in two respects as set out within paragraph 7 (iii) of Employment Judge Reed's Case Management Summary of 8 February 2017. With regards to the first element, the Tribunal rejected the Claimant's evidence in relation to a particular song which had allegedly been sung to or near her by Mr Hawkes and Mr Kavaliauskas ({4.10-13} and {5.18}).

6.2.6 In relation to the other element, the Claimant had complained about the general use of foul language at work, irrespective of the fact that it had not been directed at her. Given our findings within paragraph {4.16}, we could not accept that the complaint amounted to a fundamental breach of the implied term when viewed objectively, as alleged.

6.3 Mr Fowler's alleged treatment of the Claimant on 14 November 2016 in front of Mr Perryman (page 2 of her witness statement);

- 6.3.1 As stated above, this allegation changed slightly during the course of the hearing since it was not the Claimant's case that Mr Perryman had been present on 14 November. There were really two angles pursued; that Mr Fowler had demeaned her in front of Mr Perryman before 14 November and that he had effectively called her a liar on that day.
- 6.3.2 In relation to the first of those arguments, we found that the Claimant's allegation really amounted to no more than the fact that her accusations about inaccuracies in Mr Perryman's pay were checked with Mrs Fowler and/or Mr Smith. The fact that Mr Fowler accepted her account of the situation rather than the Claimant's did not amount to a fundamental breach of the implied term without more.
- 6.3.3 In relation to the second of those arguments, we can do little more than repeat the findings set out in paragraph 4.8 above. We did not accept that the Claimant had been called a liar on 14 November in terms. It was a further situation in which her accusations about Mr Perryman had not been accepted. She had clearly challenged Mr Fowler's authority and came off worse (see the agreed words within paragraph {4.22}). In view of the antipathy which she had towards Mr Perryman, that must have been exasperating for her, and clearly led to the conduct which followed. There was, again, no fundamental breach of the implied term of mutual trust and confidence.
- 6.4 Mr Fowlers' and/or Mr Hawkes' informing the workforce that the Claimant had been chastised for the allegation of racism referred to on page 48 of the hearing bundle;
- 6.4.1 We were not satisfied that the workforce had been informed that she had been chastised for the allegation of racism recorded in Mr Fowler's note [48]. Such an accusation had never formed part of her case, nor had she cross-examined Mr Hawkes about it at the last hearing.
- 6.4.2 But there was a more fundamental problem for the Claimant here; even if the workforce had been informed, she had never reached that view until after she had been dismissed. It was her receipt of the document as part of the Respondent's disclosure which led her to the view that Mr Hawkes had let others know that she had been told off. She could not, therefore, have resigned on the basis that she believed that others had known.
- 6.5 Ms Fowler assuming some of the Claimant's duties and responsibilities from about May 2016. The Claimant asserts Ms Fowler assumed responsibility for Mr Perryman's pay issues and staff holidays, which she had previously handled (page 4, paragraph 7 of her witness statement).
- 6.5.1 We found that Mrs Fowler did not assume responsibility for any of the Claimant's duties. She did not take over Mr Perryman's pay issues. Rather, she gave Mr Fowler her view of the Claimant's accusations, a view which he preferred. In respect of staff holidays, although Mrs

Fowler clearly introduced some new elements to the spreadsheet which were alien to the Claimant, she still had responsibility for receiving staff leave requests, presenting them to Mr Fowler for approval and then updating the spreadsheet and the office charts.

- 6.6 As to the issue of causation (paragraph 1.3 of the Case Summary of 11 February 2021), this has been addressed, where relevant, above. There was the additional, broad, point made by the Respondent that the Claimant had told the Tribunal at the last hearing that she “*had had no reason to leave my job*”. Although Mr Shepherd sought to argue that that evidence was fatal to her case on causation now, the Claimant dealt with that point rather well in our view. She said that, under normal circumstances, she would have had no reason to leave, but she asserted that the Respondent had made the situation intolerable. She did not have a reason of her own. They gave her a reason.
- 6.7 In relation to paragraph 1.4 of the Case Summary of 11 February 2021 and the argument of affirmation, it was relevant in relation to the first two allegations only (tea and overtime), but was not put forward in other respects. On those two issues, it was a good argument.
- 6.8 The Respondent did not seek to argue a case under s. 98 (4) (see paragraph 1.5 of the Case Summary of 11 February 2021), nor did it need to.
- 6.9 For these reasons, the Claimant’s alternative case of constructive unfair dismissal is dismissed.

Employment Judge Livesey

Date: 14 April 2021

Judgment & Reasons sent to the parties: 26 April 2021

FOR THE TRIBUNAL OFFICE