



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Bodman

**Respondent:** AA-Wargames Ltd

**Heard at:** Bristol

**On:** 17-18 May 2021

**Before:** Employment Judge Oliver

## **Representation**

**Claimant:** Mr S Kitchener

**Respondent:** Mr T Hussain, litigation consultant

# JUDGMENT

The claim for unfair constructive dismissal fails and is dismissed.

# REASONS

## **Hearing**

1. The hearing was conducted by the parties attending by video conference (CVP). It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended and because it was in accordance with rule 46, the Presidential Guidance on remote hearings and open justice and the overriding objective to do so.

2. The claimant did not attend the hearing. Her representative Mr Kitchener explained that she was unwell and had been admitted to hospital. However, she wanted the hearing to go ahead in her absence. I explained to Mr Kitchener that this meant she would not be able to give her version of events to the Tribunal. In addition, she had not prepared a full witness statement for the hearing. I explained that he could apply to postpone the hearing on her behalf. Mr Kitchener said that he definitely had instructions that the hearing should go ahead. The respondent did not object to this proposal.

3. I decided that in the circumstances the hearing should proceed in the claimant's absence. The claimant's representative was clear as to the claimant's instructions that the hearing should go ahead, and there was no objection from the respondent. It is unusual to go ahead in a claimant's absence because it means her evidence cannot be tested. However, the hearing of this matter has already been delayed twice. The claimant's representative says she wishes to

bring the matter to a close on way or the other. On balance, it is in accordance with the overriding objective to proceed with the hearing. I agreed with the parties that I would provide full written reasons for my decision as well as giving oral reasons so the claimant could read and understand the outcome.

### **Issues**

4. This was a claim for constructive unfair dismissal. I discussed and agreed the issues with the parties at the start of the hearing.

5. The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The alleged breaches were as follows (taken from the claim form and the claimant's letter of resignation):

- a. Providing the claimant with insufficient training and support;
- b. Preventing the claimant from using her mobile phone at work, when others were allowed to do so;
- c. Preventing the claimant from speaking with her colleagues; and
- d. Subjecting the claimant to an unfair disciplinary process, in particular:
  - i. Not providing a written invitation to the disciplinary meeting;
  - ii. Giving an oral warning at the start of the meeting; and
  - iii. Failing to provide informal warnings before the formal oral warning.

6. The Tribunal will need to decide whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, and whether it had reasonable and proper cause for doing so.

7. Did the claimant resign because of the breach? The respondent says the claimant resigned for other reasons.

### **Evidence**

8. I had an agreed bundle of documents, which I have read.

9. As noted, the claimant did not provide a full witness statement. She had provided a short written statement relating to remedy, and her mother had also provided a statement which related to remedy issues. Mr Kitchener, who has been representing the claimant throughout these proceedings, said that this was an oversight on his part.

10. I had written statements from Mr Steven Judson (partner of the respondent business), and Mrs Charlotte Judson (former partner of the respondent business). I took these statements as read, and heard oral evidence from both witnesses.

11. I heard oral submissions from both parties.

### **Facts**

12. The claimant worked for the respondent from 22 May 2017 until 11 February 2020 as a general administrator. She resigned on 11 February following a disciplinary process which resulted in an oral warning.

13. The claimant had various health problems, which included anxiety, depression and issues with her confidence. She also had family issues to deal with. I accept the evidence of Charlotte Judson and Steven Judson that the claimant was provided with various support to assist her with these issues. She was provided with a changed workspace, IT and phones to help with hearing and eyesight. She was given time off when needed. Her working days and hours were changed to help with home life, childcare and problems with insomnia. She was offered a time off in lieu arrangement so that her salary was not reduced by absences.

14. The claimant was given new responsibilities for administration of the eBay side of the claimant's business after another staff member left the respondent. This included answering customer emails. She did the first sweep of customer emails, answered some using template replies, and "red flagged" emails she could not answer so more senior staff could answer them. Charlotte Judson trained the claimant on this role. Her evidence is that she took a gentle and supportive approach, and training was done slowly to allow time for the claimant to get to grips with things. I have seen a copy of a "how to" book belonging to the claimant, where she wrote notes while being trained. Charlotte Judson's evidence is that the claimant had a medium level of training on answering eBay emails. It was more than a rudimentary level, but she was not expected to be able to answer more complex emails where a template response was not appropriate.

15. Steven Judson began to raise issues about the claimant's productivity in September 2019, relating to the level and quality of her eBay emails to customers. He spoke to Charlotte Judson, who spoke informally to the claimant at her desk to give feedback on 11 October and during the week of 29 October. She gave feedback about not sending enough emails, and failures to follow the correct processes. They spoke again on 29 November, although this conversation was mainly about supporting the claimant with various issues. They spoke again in December about speeding up emails. Charlotte Judson says, "*did not make a big issue of it, simply more of a guiding hand*".

16. Charlotte Judson was due to leave the respondent in April 2020. Steven Judson began to take on more active management of the claimant in December and January. A disciplinary hearing was triggered by the claimant's output on 24 January 2020, when she was answering emails at a rate of only 4 to 5 per hour. His expectation is 15 to 20 per hour.

17. The claimant received a Christmas bonus in December 2019, along with most other members of staff. I accept the respondent's evidence that this was based on her general contribution in the workplace, including organising and making birthday cards for the team, rather than her productivity. Bonuses were also given to most staff because it had been a difficult time while the business was transitioning to Steven Judson.

18. Before the formal disciplinary hearing, the claimant was asked to come to a meeting with both Steven and Charlotte Judson on 27 January 2020. They did this to support the claimant with her mental health and anxiety issues, as they thought it would be better than simply giving her a letter. The claimant was told that they intended to begin disciplinary action which may lead to a verbal warning, and was told this was because her performance had dropped and there

were gaps in output. Charlotte Judson describes in her statement how the claimant became very emotional and would not engage with the discussion. They had a break and she chatted to the claimant, which calmed her enough to continue with the meeting. The claimant was offered a copy of the notes of the meeting, but she refused.

19. A formal disciplinary meeting took place on 30 January 2020. It was intended that Steven and Charlotte Judson should deal with this together. However, Charlotte Judson was unwell after the meeting on 27 January, and was unable to prepare written evidence or attend the meeting. The intention was to send the claimant a letter before the meeting. This did not happen. The claimant was permitted to be accompanied by Mr Kitchener at the meeting, although he is a friend rather than a colleague. The claimant was asked if she wanted to postpone the meeting as Charlotte Judson could not attend, but she wanted to go ahead. Steven Judson says that he found this meeting difficult and he was not well prepared, the claimant was upset, and he did not have detailed knowledge of all of the relevant information in Charlotte Judson's absence.

20. I have seen a transcript of the recording of this meeting. I have also seen a letter dated 30 January 2020, which was discussed with the claimant part way through the meeting. This appears to be a letter that should have been provided to the claimant in advance. It begins, "*I am writing to tell you that you are currently subject to a disciplinary procedure which was commenced by verbal notice (Oral Warning) on Monday 27<sup>th</sup> January and will cover a period of 28 days from Thursday 30<sup>th</sup> January until 26<sup>th</sup> February during which time improvement of your behaviour will be expected*". The letter goes on to say, "*At this meeting the question of disciplinary action against you, in accordance with Company Disciplinary Procedure, will be considered with regards to:*

1. *Failures to complete day-to-day activities in a timely manner,*
2. *Failure to recognise that interruptions of others by chatting and talking is disruptive to their work performance and her own,*
3. *Failure to separate work and personal time effectively resulting in her using a personal mobile device during working time."*

The letter goes on to list offered support. It also explains the "*possible consequences*" arising from this meeting "*if found proved*". The letter states there is a right of appeal. It also states that the claimant will be notified of the date of the follow-up meeting.

21. The transcript of the meeting shows that Steven Judson takes the claimant through the content of this letter. There is a discussion about the issues. A number of times the claimant raises issues that Steven Judson is not able to answer, and is told she can make that the subject of an appeal. At the end of the meeting, Mr Kitchener asks Steven Judson to "*clarify that the warning had already been typed up and was already going to be issued today in spite of any discussion that was going to happen between you two today*", and he replies "*A decision had already been taken to issue an oral warning*". Steven Judson's evidence is that he was taken off guard by this question at the end of the meeting. He says the final decision to issue an oral warning would only be made after a discussion between the two partners.

22. It appears that the issues about chatting and mobile phone use had not been discussed in detail with the claimant at the meeting on 27 January, although the

notes do record some discussion about mobile phone use. The respondent's evidence is that employees should not be using their mobile phones when working, except to listen to music or audiobooks, and this policy is applied consistently. Some other employees have been required to leave their phone with a supervisor during the day due to excessive use. They made an exception in the claimant's case as she might need to take calls from her family. They proposed she should leave her phone in her bag, and set up ring tones so she could tell if her family was calling. This is recorded in the letter of 30 January.

23. In relation to chatting, Steven Judson described incidents where the claimant would chat to colleagues for 20 or 30 minutes. Some people had been referring to this as the "Tracey trap". He told supervisors they should not use this term, and addressed the issue with the claimant. Steven Judson confirmed that the oral warning itself was for performance, not the other two issues.

24. The claimant was sent typed minutes of the disciplinary meeting dated 3 February. This records the content of the meeting. It does not expressly state that the claimant has now been issued with an oral warning, although it does confirm there is a right of appeal. The claimant was never sent a further letter confirming the oral warning.

25. The claimant resigned on 11 February 2020, setting out various complaints about the disciplinary process and her treatment. The respondent replied on 14 February, and confirmed that they would look at the issues raised in detail if she wished to put them in an appeal. The claimant replied on 20 February saying she intended to file a formal grievance. She did not appeal. The respondent provided a written response on 27 February which confirmed they had reviewed the evidence and upheld the oral warning, and replied to the issues raised by the claimant.

26. The claimant had applied for a role at another employer on 27 January 2020. She was interviewed on 4 February and offered a position. She began training on 12 February, and began her full role after what would have been her notice period with the respondent.

### **Applicable law**

27. The definition of a dismissal includes circumstances where an employee is entitled to terminate their employment contract without notice by reason of the employer's conduct (Section 95(1)(c) of the Employment Rights Act 1996). This requires a significant breach going to the root of the contract, or something that shows the employer no longer intends to be bound by one or more essential terms of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA).

28. This fundamental breach can be a breach of the mutual duty of trust and confidence, which is an implied term of all employment contracts. The test is whether the employer acted without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Mahmud and Malik v BCCI*** [1997] ICR 606, HL).

29. In addition, the employee must resign in response to the breach. The resignation needs to be at least in part due to the breach, but the breach does

not need to be the significant or the only reason for resignation. In **Nottinghamshire County Council v Meikle** [2004] IRLR 703, the Court of Appeal held that the resignation must be in response to the employer's repudiation, but that the fact that the employee also objected to other actions of the employer will not vitiate the acceptance of the repudiation.

## Conclusions

30. I start with the issue of **whether the alleged breaches of contract took place**, taking the allegations in turn.

31. **Providing the claimant with insufficient training and support.** It is clear from the respondent's evidence that they provided the claimant with considerable support for her health and family issues. In relation to training, the claimant was not fully trained on eBay emails. However, she was trained on responding using templates, and was expected to "red flag" those she was not able to answer. It appears from the disciplinary meeting minutes that the claimant was not being disciplined for failing to deal with queries she had not been trained on. She was being disciplined for lack of productivity, where she was sending 4 or 5 emails an hour instead of 15 to 20. Mr Kitchener submitted that there were doubts and questions about what training had been provided, but I accept that the claimant was trained on the work that she was being disciplined for. I therefore do not find that the claimant was provided with insufficient training and support.

32. **Preventing the claimant from using her mobile phone at work, when others were allowed to do so.** The claimant was prevented from using her mobile phone at work for personal matters. However, others were subject to the same rule. It may be that others also broke this rule, but I accept that was addressed when the partners were aware of it. In addition, an exception was made for the claimant so that she could deal with calls from her family if required. Mr Kitchener submitted that this rule was not applied in the other building, but I accept the respondent's evidence that the rule was applied universally when the partners were aware of excessive use. I therefore do not find that the claimant was prevented from using her mobile phone when others were allowed to do so.

33. **Preventing the claimant from speaking with her colleagues.** The claimant was asked to limit her social chatting during working time. However, she was not prevented from speaking with her colleagues altogether. I accept Steven Judson's evidence that there was an issue with the claimant chatting to colleagues for extended periods of time, and this was addressed with her. The transcript of the disciplinary meeting records this as, "*some feedback has come to me that people find themselves engaged in conversation with you and don't feel that they can break off... I'll pass that on I'll make sure that people are aware that engaging in just chit chat often is not going to be the most productive use of their time and can particularly be disruptive to others...there are certainly those who prefer to have a chinwag and we'll just have to cut that out a little bit.*" I do not find that the claimant was prevented from speaking with her colleagues, or singled out while others were allowed to chat.

34. **Subjecting the claimant to an unfair disciplinary process**, in particular:

- a. **Not providing a written invitation to the disciplinary meeting.** This was not done. The claimant was offered a copy of the notes of the meeting on 27 January. However, she was not provided with a written

invitation to the disciplinary meeting on 30 January.

- b. ***Giving an oral warning at the start of the meeting.*** The claimant was provided with a letter near the start of the disciplinary meeting which sets out the content of an oral warning, including timescales, follow-up actions and a right of appeal. This letter is confusing. It refers to “possible consequences” and “if found proved”, which indicates no final decision has been made. However, the introductory paragraph reads as if an oral warning has already been issued, and the letter refers to a right of appeal and a follow-up meeting. During the meeting itself, Steven Judson says a number of times that matters can be raised in an appeal. He appears to confirm at the end of the meeting that a decision had already been taken. No oral warning was confirmed separately after this meeting. I accept Steven Judson’s evidence that a final decision would only be made after a discussion between the partners, and his comment about a decision already having been made was because he was taken off guard. Nevertheless, in the circumstances I accept that the claimant could have understood from all of this that the oral warning had actually been given to her near the start of the meeting.
- c. ***Failing to provide informal warnings before the formal oral warning.*** I accept Charlotte Judson’s evidence that she had a number of discussions with the claimant about her performance before the formal disciplinary process, including in relation to the productivity issues with eBay emails. She may not have called these “warnings”, but I find that there were informal discussions with the claimant before the oral warning was issued. The claimant would have been aware of the issues with her productivity from these discussions.

35. ***Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?*** I have found two potential breaches by the respondent – the failure to provide a written invitation to the disciplinary meeting, and the impression given to the claimant that she was given an oral warning near the start of the disciplinary meeting. The question is whether these issues are sufficiently serious to destroy or seriously damage trust and confidence, taken singly or together.

36. I have considered this issue carefully. The disciplinary process was something of a muddle after Charlotte Judson became unwell. There was an intention to send a letter to the claimant in advance, but this was not done. The letter of 30 January is a confusing mix of an invitation to a disciplinary meeting and a disciplinary outcome. The meeting itself was also confusing, as it discussed this letter early on and was unclear as to whether or not a decision had already been made. This is certainly not good practice. If there had been a disciplinary dismissal by the respondent, these failings may have made the dismissal procedurally unfair.

37. On balance, however, I find that these failings were not sufficiently serious to amount to a breach of trust and confidence by the respondent. This was an oral warning only. The meeting on 27 January had provided the claimant with information about the performance issues in advance, so she was aware of what would be discussed at the disciplinary meeting. I have accepted that the

respondent had not actually made a final decision before this meeting. The respondent also clearly offered a right of appeal, so the claimant knew she had another opportunity to challenge the decision. The respondent made some mistakes in a muddled process, which caused some confusion. This was not done deliberately. A fundamental breach requires conduct indicating that the employer no longer intends to be bound by one or more essential terms of the contract. The respondent's mistakes were not of that level of seriousness. I therefore find that the respondent did not act in a way either calculated or likely to destroy or seriously damage the trust and confidence between the parties.

38. Mr Kitchener also submitted at the end of the hearing that the respondent had breached its obligations of wellbeing and safety by proceeding with the disciplinary meeting while the claimant was unwell. This was not one of the issues listed at the start of the hearing, was not mentioned in the original claim, and was not put to the respondent's witnesses in cross-examination. In any event, the meeting of 27 January was held in order to support the claimant, and the claimant was offered the chance to postpone the meeting on 30 January but chose to go ahead.

39. There was no fundamental breach of contract by the respondent. This means that the claimant did not resign in circumstances where she was entitled to do so without notice by reason of the respondent's conduct.

40. ***Did the claimant resign because of the breach?*** There is no need to consider this point as I have found no fundamental breach of contract.

41. These findings mean that the claim for unfair constructive dismissal fails and is dismissed.

**Employment Judge Oliver**  
**Date: 18 May 2021**

Judgment and Reasons sent to the Parties: 25 May 2021

FOR THE TRIBUNAL OFFICE