



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Goldstein

Respondent: Easywellbeing Limited

Heard at: Watford Employment Tribunal by CVP On: 25 March 2021

Before: Employment Judge Cowen

Representation

Claimant: Mr Goldstein (huband)

Respondent: Mr Lonergan (consultant)

JUDGMENT having been given orally to the parties on 25 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant claims constructive unfair dismissal and a failure to provide written terms and conditions of employment.

The Facts

2. The Claimant started to work for the Respondent in 2009 as a shop assistant in their health foods shop in Radlett, Hertfordshire. The Respondent company is owned and run by Mr Shah and his wife. The Claimant worked there 3 days per week. She worked alongside Mr Sharma, who worked 6 days per week.
3. In 2015 Mrs Shah sent the Claimant a proposed contract of employment which included terms as to pay, notice, holiday, sickness etc. The Claimant returned the contract unsigned raising a number of issues which she wanted to negotiate. No

response was received and the matter was never resolved. The parties continued to be engaged as employer and employee until early 2020.

4. There was no appointed manager in the shop, but Mr Shah allowed and expected the staff to work together to ensure that it was run effectively. They met with sales representatives, ordered stock, closed and opened the shop. It was a small team who were given huge responsibility by an owner who was at 'arms length' for most of the time. The Claimant took it upon herself to act as a senior member of staff and issued instructions to others. Sending text messages to Mr Sharma on her non-working days. This was seen by Mr Sharma as over-bearing and he didn't like it. However, he did not mention this to the Claimant, nor to Mr Shah, as he did not want to get the Claimant into trouble and felt that he could deal with it.
5. On 8 January there was an incident where the Claimant asked Mr Sharma to pass on instructions to others about tidying up around the shop. Mr Sharma felt he could not take any more of the Claimant's instruction and when she arrived at work on Monday 13 January he took the opportunity to highlight to her that he did not want to be stuck between the Claimant and the other staff. He then took the opportunity to also tell the Claimant of a number of issues which he was unhappy about; including the fact that customers and sales representatives who visited the shop did not like the Claimant and that she undermined Mr Sharma and was rude to him in front of customers. The Claimant found the conversation to be threatening and unpleasant.
6. This, understandably caused a bad atmosphere in the shop for the rest of the day, but nothing was said to either Mr Shah or Mrs Shah when each of them visited the shop later in the day. The Claimant believed that Mr Sharma, having had his say would feel better and they could work through any difficulty and return to what she believed was a good working relationship.
7. Unfortunately, the next morning, Tuesday 14 January, when the Claimant arrived at work, Mr Sharm raised the conversation again telling her he was aware of an incident two and a half years ago, where she took stock from the shop, wrote in the shop diary that she had taken some snacks, but never quantified this, nor paid for it. He also told the Claimant that he could no longer work with her. In response to this, the Claimant took her coat, put £30 in the till for the snacks and left the shop. At that point she did not resolve to resign, but took herself to a local coffee shop to calm down. She attempted to contact Mr Shah by text to tell him what had happened, but was not available. An hour later, the Claimant sent a further text message to Mr Shah saying that she did not like being disrespected so would 'go' – meaning she would resign. This was a reference to the breach of trust between her and her colleague. Mr Shah responded saying he would call her later. He clearly did try to call, but the Claimant missed the call. The next day the Claimant dropped her shop keys back to Mr Shah. This was an indication that she had clearly thought about her response and intended to resign.
8. Mr Shah called the Claimant on Wednesday 15 January and discussed the situation with her. He hoped to persuade her to sit down with him and Mr Sharma, to resolve the issue. However, the Claimant was not willing to do this. Whilst the Claimant said that she wanted to have a one-to-one discussion with Mr Shah, that was not offered. Mr Shah said in evidence that he hoped to persuade the Claimant to stay, by altering the working pattern or location, but admitted that he did not offer to do so in the call.

Both sides were therefore stuck with the resignation of the Claimant.

The Law

9. Under s.95 Employment Rights Act 1996 (ERA) the employee is dismissed if;
“(c) the employee terminates the contract ... (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct”
10. The leading authority on the topic of constructive unfair dismissal is *Western Excavating v Sharp* [1978] Q.B. 761 which indicated that the burden is on the employee to prove constructive dismissal. In order to establish that she has been constructively dismissed, the employee must show:
 - a. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;
 - b. the employer's breach caused the employee to resign, and
 - c. the employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.
11. The Tribunal must also take into account in this case the concept of vicarious liability, for which an employer is responsible for the actions of an employee, within his remit of employment.
12. The law in relation to S.1 ERA indicates that a statement of the written particulars of their employment must be provided to an employee at the start of their employment.
“(1)Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.
(2)Subject to sections 2(2) to (4)—
(a)the particulars required by subsections (3) and (4) must be included in a single document; and
(b)the statement must be given not later than the beginning of the employment.
(3)The statement shall contain particulars of—
(a)the names of the employer and worker,
(b)the date when the employment began, and
(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
(4)The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—
(a)the scale or rate of remuneration or the method of calculating remuneration,
(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c)any terms and conditions relating to hours of work including any terms and conditions relating to—
(i)normal working hours,
(ii)the days of the week the worker is required to work, and
(iii)whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.
(d)any terms and conditions relating to any of the following—

- (i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
 - (ii)incapacity for work due to sickness or injury, including any provision for sick pay, ..
 - (iia)any other paid leave, and
 - (iii)pensions and pension schemes,
- (da)any other benefits provided by the employer that do not fall within another paragraph of this subsection,
- (e)the length of notice which the worker is obliged to give and entitled to receive to terminate his contract of employment or other worker's contract,
- (f)the title of the job which the worker is employed to do or a brief description of the work for which he is employed,
- (g)where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
- (ga)any probationary period, including any conditions and its duration,
- (h)either the place of work or, where the worker is required or permitted to work at various places, an indication of that and of the address of the employer,
- (j)any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made,...
- (k).....
- (l)any training entitlement provided by the employer,
- (m)any part of that training entitlement which the employer requires the worker to complete, and
- (n)any other training which the employer requires the worker to complete and which the employer will not bear the cost of."

Decision

13. In relation to the claim under s.1 ERA for failure to provide written particulars. The law does not require that the employee accept or agree to the terms, merely that they are sent by the employer to the employee. The contract sent to the Claimant on 23 August 2015 contained what the Respondent wanted the contract to say. I am satisfied that this was the first time such a contract had been sent. Whilst not within the first two months of the employment, the Claimant was shown the contract the Respondent believed them to be working within. The Claimant voiced her disagreement but continued to be bound to the Respondent as an employee. By sending the contract on 23 August 2015 the Respondent fulfilled the requirement of s.1 ERA and therefore this claim fails.
14. The events of 13 and 14 January show a breakdown of the relationship between work colleagues. The Claimant and Mr Sharma had worked together for approximately 5 years at the point where Mr Sharma decided to tell the Claimant what he believed were her flaws. Mr Shah had applied a light touch of management to the shop and therefore the Claimant had taken it upon herself to act as senior to other staff and to issue orders and instructions to them. This was not liked or appreciated by Mr Sharma, who did not want to raise the matter formally but who felt increasingly ill-will towards the Claimant as a result of her behaviour.

15. The Friday prior to the incident the Claimant had once again asked Mr Sharma to reprimand others for their actions. Mr Sharma felt that if the Claimant wanted to do this, she should do so herself, but went along with her requests, in order to keep the peace. It meant that he received unhappy responses from the tenant downstairs from the shop. He therefore resolved to tell the Claimant that he would not be doing this again. When she arrived at the shop Mr Sharma took the opportunity to tell her that he was not happy with working to her orders, as well other issues which were irritating him and which he believed to be home truths. He did so in the genuine hope that the Claimant would avoid these actions in the future, but also because he had reached a breaking point and was not prepared to continue to be treated as subordinate to the Claimant.
16. The Claimant found this outpouring to be both surprising and threatening. She was prepared however to move on and to continue to work with Mr Sharma. At that point therefore she did not consider there was a fundamental breach which warranted her resignation. She believed it best to allow Mr Sharma to have his say – thinking that if he got it off his chest they could resolve it and then carry on. Mr Sharma's evidence was that a similar event had occurred a few years previously and they had been able to continue to work together since then.
17. Mr Sharma's comments were personal and brutal, but an honest assessment of the situation as he saw it. His issues with the Claimant may have been more properly dealt with by a grievance or informal complaint to Mr Shah, but that is not what he did. His actions took place during his employment in the context of his duties, any damage which therefore occurs as a result is attributable to the employer.
18. However, neither the Claimant nor Mr Sharma raised the issues with Mr Shah that day when they saw him, nor asked for an opportunity to do so. It was not, at that point, a fundamental breach of contract for the Claimant.
19. The following day when the Claimant arrived at work, Mr Sharma raised the issue again when he confronted the Claimant about items taken from the shop some two and a half years previously. Mr Sharma had been aware of this all the time but, had chosen not to remind the Claimant to resolve it, nor to tell Mr Shah about it. He chose to highlight this to the Claimant at this point as a further attack on her propriety and ability to be trusted by the Respondent. Mr Sharma candidly told me that he did say that he could no longer work with the Claimant. I found as a fact that he said that she should leave. Mr Sharma did not say that he was looking for a transfer or to reduce his hours. This action by Mr Sharma did amount to a fundamental breach of contract, albeit carried out by a colleague and not Mr Shah. However, Mr Sharma made his remarks in a context of work and when the parties were both at work. I find that vicarious liability for Mr Sharma's action was present.
20. It was clear that Mr Sharma remained annoyed with the Claimant about her attitude to her work, her colleagues and to her employer. He felt that the Claimant was taking liberties and that he was not prepared to continue to overlook them. The Claimant was upset at this and felt obliged to remove herself from the situation, where her colleague was not prepared to work with her. She did so and immediately tried to contact Mr Shah who was not available.

21. The Claimant's next message was not sent until 10.34am, an hour after she had left the shop. It included the fact that 'I'll go' which was understood by both sides to clearly mean that she was resigning, This was confirmed by the Claimant when she handed in her shop keys the following day. These were two very clear indications, after the Claimant had had time to consider her position, which showed that she was responding to the breach and that she was terminating her employment.
22. I am satisfied that the Claimant resigned as a result of what was said by Mr Sharma and that she did so promptly after it occurred. I am also satisfied that the actions of Mr Sharma on Tuesday 14 January amounted to a fundamental breach of the implied term of trust and confidence.
23. The actions of Mr Shah after the Claimant resigned are not of relevance to whether this was a constructive dismissal, but it is disappointing to note that if Mr Shah thought the Claimant was a valued employee that he did not do more to try to keep her as an employee. That is a matter which may be taken into account in considering remedy.
24. The Claimant succeeds on her constructive unfair dismissal, but fails on the claim in relation to s.1 ERA.

Employment Judge Cowen
28th May 2021

JUDGMENT SENT TO THE PARTIES
ON 2nd June 2021

THY.....
FOR THE TRIBUNAL OFFICE

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