



EMPLOYMENT TRIBUNALS

Claimant: Mrs Dorothy Roach

Respondent: Boots Management Services Ltd

Heard at: Liverpool **On:** 21 April 2021

Before: Employment Judge Ord

Representation:

Claimant: Mr S Pinder (Solicitor)
Respondent: Ms S Bowen (Counsel)

RESERVED JUDGMENT

The Claimant's complaint of unfair dismissal is not well-founded.

Reasons

Claims and issues

- 1 The claimant brought a claim for unfair dismissal.
- 2 The issues, which relate to constructive dismissal, were agreed at the start of the hearing as follows:
 - What is the conduct of the respondent, which is said to be a breach of the implied term of trust and confidence?
 - Did the claimant resign in response to the alleged breach?
 - Was that breach a fundamental breach?
 - If so, what was the reason or principal reason for the fundamental breach of contract?
 - Did the respondent have reasonable and proper cause for its actions?

- If not, when viewed objectively, was the respondent's conduct calculated or likely to destroy or seriously damage trust and confidence?
- Was the claimant constructively dismissed or did she simply resign?
- Did the claimant affirm the contract before resigning, by delay or otherwise?
- What adjustment if any should be made to any compensatory award to reflect the possibility that C would have been dismissed in any event and if so when?
- Would it be just and equitable to adjust the basic award because of any blameworthy or culpable conduct before the dismissal pursuant to s 122(2) ERA and if so to what extent.
- Did the C by blameworthy or culpable conduct cause or contribute to dismissal to any extent and if so by what proportion if at all. Would it be just and equitable to reduce the amount of any compensatory award pursuant to s123(6) ERA.

Evidence heard and procedure

- 3 On behalf of the claimant, the tribunal heard evidence from the claimant and Jane Poultney. On behalf of the respondent, it heard evidence from Daniel Hird.
- 4 The tribunal also had before it a 129 paged bundle of documents and a photograph of the shop floor.
- 5 It was agreed at the hearing that closing submissions would be submitted in writing and an agreed timetable for submissions was set out in a Case Management Order dated 22 April 2021. In accordance with that Order, the claimant and respondent exchanged and submitted closing submissions to the tribunal. The respondent also submitted comments on the claimant's submissions, as permitted by the Order.

Findings of Fact

Background

- 6 The claimant worked for the respondent for over 14 years from 9 August 2006 and had a good work record. At the material time she was a Healthcare Assistant at the Newton-le-Willows branch, which was a small store employing only a few staff. She resigned on 22 October 2020 and claimed constructive dismissal on the basis of breach of trust and confidence.

Key events

- 7 On the afternoon of Tuesday 13 October 2020 there was an incident relating to how a customer at the pharmacy counter was treated by a member of staff. The customer did not have English as her first language and was having difficulty making herself understood. This is discussed below.

- 8 The customer was being served by Joanne Kelly, the store manager, although the complaint was not against her. Ms Kelly was having difficulties understanding the customer and raised her voice to the customer in an attempt to communicate.
- 9 Also working on the pharmacy counter at the time were colleagues, Jane Poultney and someone by the name of Harry. Ms Poultney, who was on the telephone at the time, asked Ms Kelly on a couple of occasions to lower her voice, as she was having difficulty hearing on the telephone.
- 10 The claimant was serving a colleague, Caroline Tinkler, at the healthcare counter around this time, although she went over to the pharmacy counter briefly to speak to Harry about an issue with the computer system.
- 11 Shortly afterwards on that afternoon, the respondent's customer care centre received a telephone call from another customer, who complained that she had overheard certain racist comments being said by a member of staff at the Newton-le-Willows branch. The most relevant details of the complainant are:

"I'd like to make a complaint about some racist comments that were made by a member of Boots staff today.there was a woman ahead of me in the queue, who didn't speak very good English, and um one of the pharmacists was trying to ask her name and address and they weren't having much luck, and another member of staff said to a customer "I don't speak Taliban" and then she also carried on to say "they're annoying, I'm sick of them". Then she looked at me as I was waiting, she went "Won't be long love, we're just having technical issues" and then nodded her head towards the woman who couldn't speak English."

- 12 The complainant went on to say that the member of staff who made the comments was called "Dot". The claimant's name badge said "Dorothy".
- 13 Customer Services passed the complaint to the store manager Ms Kelly that Friday, and she spoke to the customer and took notes of their conversation. There are some discrepancies in the notes taken by Ms Kelly and the transcript of the complaint to customer services, the main one being about the person who was serving the customer at the time. However, despite this, Ms Kelly's note largely reflects the complaint and records that it was "Dot" who made the alleged comments.
- 14 The respondent is committed to racial equality and has diversity, equality and inclusion policies, which it takes seriously. Therefore, as a result of the complaint, an investigation was launched and an investigating officer was appointed, namely Danny Hird, who was the store manager at the Wigan Grand Arcade branch.

The investigation

- 15 Mr Hird asked Ms Kelly whether she had heard anything racist, but as she confirmed that she had not, he did not conduct a formal interview with her or take notes of their conversation. He similarly asked Ms Poultney had

she heard anything and she answered that she had not. Again, no formal interview was conducted or notes taken of the conversation.

- 16 Mr Hird interviewed the branch pharmacist, Caroline Tinkler, on 21 October. The complaint was read out to her and she stated that she recalled hearing the offending words being said by the claimant, although she did not remember the claimant nodding towards the customer.
- 17 Harry was not approached for comment.
- 18 Mr Hird did not consider the full transcript of the complainant's conversation, but he did consider the pertinent parts of the complaint.
- 19 Mr Hird reviewed CCTV footage, which covered the healthcare counter. The CCTV did not cover the dispensary where the incident occurred and there was no audio. The CCTV footage was not available to the tribunal. However, there was evidence to demonstrate that it recorded the claimant at the relevant time serving Ms Tinkler at the healthcare counter and then her moving off camera for a short while.

Investigatory Meeting with the Claimant

- 20 The claimant was in work during the three days following the incident (from Wednesday to Friday). She then took a pre-arranged short break and returned to work on Wednesday 21 October.
- 21 Shortly after arriving at work that day, the claimant was told by Ms Kelly that there had been an allegation that the claimant had made a racist comment, and that she would need to attend an investigatory interview that morning. The claimant attended the interview, which was conducted by Mr Hird. She was accompanied by her colleague, Ms Poultney.
- 22 Mr Hird read the allegation to the claimant, who strenuously denied it. However, she confirmed that she understood why an investigation was needed. She was asked whether there was anything she could think of that might make someone say this and the claimant said no. She was also asked whether she understood the severity, if the allegations were found to be true, and she confirmed she did.
- 23 The claimant was told there was another witness statement that supported some of what the customer said, and in particular the words "I don't speak Taliban". The claimant was also shown the CCTV footage.
- 24 The interview was adjourned so that Mr Hird could check out certain matters with the respondent's HR advice line. The claimant was left waiting in the staff room for one and a half hours and because of this delay she left the store and went home. She agreed to resume the interview on the following day.
- 25 At the resumed hearing on 22 October, Mr Hird told the claimant that it was a member of staff who had collaborated the customer's complaint regarding the comment about "Taliban". He also explained that because a witness was supporting the customer's complaint, he would need to undertake a disciplinary hearing.

- 26 The claimant responded by saying she was not going to be a scapegoat for someone else and she was not being disciplined. She was of the opinion that she had already been found guilty. Mr Hird told her that undergoing a disciplinary process did not mean she was guilty, but that there was a need for more investigation. However, the claimant said that for health reasons she could not go through with it. She resigned verbally with immediate effect and left.
- 27 The claimant was given a cooling off period and invited back to work on the basis that she went through the disciplinary process. She refused to return unless the disciplinary process was stopped and she received an apology. The respondent was unwilling to meet those terms and therefore the claimant's last day of employment was 22 October 2020. By e-mail dated 3 November the claimant confirmed her verbal resignation of 22 October.
- 28 Thereafter, the claimant's solicitor made enquiries about whether the complainant was related to a member of staff in the Newton-le-Willows store and whether the complainant was now employed by the respondent. These matters were not raised at the investigation stage.

Law

- 29 As per s95(1)(c) Employment Rights Act 1996, an employee is dismissed 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”.
- 30 In ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA***, the Court of Appeal ruled that an employer's conduct must amount to a repudiatory breach of contract to give rise to a constructive dismissal. Lord Denning put it as follows:
- 31 *“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.”*
- 32 A resignation in response to conduct by the employer which falls short of being a breach of a fundamental term, is simply a resignation. The Court of Appeal expressly rejected the argument that s95(1)(c) ERA introduces a concept of an employer's reasonable behaviour into contracts of employment. Consequently, a constructive dismissal claim based simply on an employer's behaviour without a fundamental breach, will not amount to constructive dismissal.
- 33 In ***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT*** Mr Justice Browne-Wilkinson put it this way:

“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 with it."

- 34 Whilst this case went on to the Court of Appeal, this point was not on appeal.
- 35 In ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL***, Lord Steyn formulated the implied term of trust and confidence as being an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.
- 36 In ***Frenkel Topping Ltd v King UKEAT/0106/15/LA*** the EAT warned about the dangers of setting the bar too low. That decision makes it clear that acting in an unreasonable manner is not sufficient.
- 37 The tribunal's attention was also drawn to the following caselaw by the parties:
- 38 ***Cautaulds Norther Textiles Ltd v Andrew 1979 IRLR 84, EAT***, which held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner "*calculated and likely to destroy or seriously damage the relationship of confidence and trust between the parties*".
- 39 ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT***, which reinforced the test in ***Woods*** that the subjective intention of an employer in a constructive dismissal case is not determinative of whether it had breached the implied term of trust and confidence.
- 40 ***Spafax Ltd v Harrison [1980] IRLR; Western Excavating v Sharp***, which held that lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relations terms.
- 41 ***Bournemouth University Higher Education Corporation v Buckland 2020 ICR 980, CA***, where Lord Justice Jacob observed that the range of reasonable responses is not relevant.
- 42 ***Savoia v Chiltern Herb Farms Ltd 1982 IRLR 166, CA***, which held that a constructive dismissal is not necessarily an unfair one.
- 43 ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA***, where the Court of Appeal concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation.
- 44 ***Wright v North Ayrshire Council 2014 ICR, CA***, which held that the breach of contract must be an effective cause of the resignation.
- 45 ***Abbeycars (West Horndon) Ltd v Ford EAT 0472/07***, which concluded

that the breach of contract must be an effective cause of the resignation.

- 46 ***Epsom and St Helier University Hospitals NHS Trust v Starling UKEAT/0069/18/LA***, a case involving a constructive dismissal claim being upheld when the respondent failed to comply with its own disciplinary policy.
- 47 ***Nicholson v Hazel House Nursing Home Ltd UKEAT/0241/15/LA***, a case involving a constructive dismissal claim being upheld in the context of a failure on the part of the employer to deal with a grievance.
- 48 Whilst the tribunal was referred to ***Orr v Milton Keynes Council 2011 ICR 704, CA***, and ***Mitchell v St Joseph's School EAT 0506/12***, and ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55***, the former two cases were mainly about reasonableness, and the latter related to the reason for dismissal.
- 49 The tribunal was asked on behalf of the claimant to have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures, paragraph 4, which amongst other things says *“Employers should carry out any necessary investigations, to establish the facts of the case.”*

Conclusions

- 50 The claimant resigned because Mr Hird told her that she would need to undergo a disciplinary process in regard to racial allegations he understood had been made against her by a customer. She was not prepared to be subjected to a disciplinary procedure and protested her innocence, saying she was being made a scapegoat for someone else's actions.
- 51 Nonetheless, a serious complaint of racism had been made and the complainant had identified the perpetrator of the alleged racism as “Dot”. Whereas the claimant's name-badge showed her name as “Dorothy”, this does not mean that the complaint was not genuine. Also, the Newton-le-Willows store was small and only had a few staff, and the reference to “Dot” would not have been to anyone but the claimant.
- 52 During the investigation a store colleague, Ms Tinkler, had confirmed that she heard the claimant say the racist words complained of, although she had not seen the claimant nodding towards the customer, who was the subject of the remark. Although the words of the complaint were read out to Ms Tinkler before she confirmed her recollection, this does not mean that her evidence was not credible. Ms Tinkler had no motivation to lie and none was suggested. This was important corroborating evidence that Mr Hird was entitled to use as a basis for moving on to the disciplinary stage.
- 53 In the absence of any convincing explanation as to why the customer and Ms Tinkler might have been mistaken, Mr Hird on behalf of the respondent, was entitled to conclude that it was necessary to undertake a disciplinary process. Consequently, Mr Hird acted with reasonable and proper cause.

- 54 Although the claimant believed that she had already in effect been found guilty at the investigatory stage, there was no justification for this. Mr Hird had sought to reassure her that undertaking a disciplinary process did not mean she was guilty, but that more investigation was needed.
- 55 There were flaws in some procedural aspects of the investigation, including the omission to formally interview Ms Kelly, Ms Poultney and Harry. However, the investigatory stage does not need to be an art of perfection and there would have been opportunities to correct these flaws at the disciplinary stage, if the process had run its course. These flaws were not likely to cause any significant damage to the relationship of trust and confidence, whether on their own or taken together with what happened subsequently. Consequently, they do not amount to a breach of contract.
- 56 It is argued on behalf of the claimant that Ms Kelly's behaviour impacted on and misdirected the actions of Mr Hird and that her state of mind should be attributed to the respondent. This appears to be an argument that goes to the question of reasonableness rather than whether Ms Kelly's actions could amount to a breach of contract by the respondent. Considering the matter objectively, there is nothing in what Ms Kelly did that could be construed as such a breach.
- 57 The claimant suggests that Ms Kelly and Ms Tinkler had a duty to raise a complaint if they had witnessed racism. She submits that the fact they did not, gives rise to the presumption that nothing of note happened, and Mr Hird should have taken this into account. However, Ms Kelly did not witness the event and Ms Tinkler may have been reluctant to report it, given the potential repercussions from others in a small store. In any event, such a presumption is without reasonable foundation and is unjustified.
- 58 The argument was also put forward that consideration should have been given to the possibility of the complainant being mistaken and someone else having said the racist words. However, no complaint was made against anyone else and there was no evidence to suggest that someone else was responsible.
- 59 Whilst it was argued that the CCTV footage would have assisted the tribunal in understanding the locations of the various staff and customers concerned, it did not have any audio and there was a short time period when it did not cover the claimant's movements. Therefore, it is highly unlikely to have changed the outcome of the tribunal hearing.
- 60 Bringing these matters together, the reason for the claimant's resignation was the decision to instigate a disciplinary process. The respondent's investigation provided a reasonable basis upon which to make that decision, and the respondent proceeded in this way with reasonable and proper cause. It did not breach the implied term of mutual trust and confidence and there was no repudiatory breach entitling the claimant to resign. Consequently, the claimant was not constructively dismissed and her claim for unfair dismissal is not well-founded.

Employment Judge Liz Ord

Date 23 June 2021

JUDGMENT SENT TO THE PARTIES ON

12 July 2021

FOR THE TRIBUNAL OFFICE

Notes

Neither party objected to the hearing taking place on a remote video platform.