EMPLOYMENT TRIBUNALS

Claimant: Mrs S Sudbury

Respondent: Metspin Limited

Heard at: Bristol (by video)

On: 14, 15 & 16 July 2021

Before: Employment Judge Maxwell

Appearances
For the Claimant: In person
For the Respondent: Mr Crow, Counsel

REASONS

1. Oral judgment and reasons dismissing the Claimant's claims having been given on 16 July 2021 and written judgment having been sent to the parties on 23 July 2021, these written reasons are provided pursuant to the Claimant's application of 23 July 2021.

Preliminary

Claims

2. By a claim form presented on 4 October 2020, the Claimant brought claims for:

   2.1.unfair dismissal (constructive)

   2.2.redundancy payment.

3. The Respondent denied the claims.

Evidence

4. The Tribunal was provided with:

   4.1.an agreed bundle of documents running to 145 pages;

   4.2.additional documents from the Claimant:

      4.2.1.an undated letter from T Moss;

4.2.2.screenshots of text messages;

4.3.additional documents from the Respondent:

4.3.1.digital photographs and the associated meta data.

5. The additional documents were admitted by consent, although the Respondent flagged its position with respect to the letter from T Moss that the Tribunal should attach reduced weight to this given: it was in substance a witness statement and it's maker was not attending to allow for cross-examination; the lateness of its production limited the obtaining of rebuttal evidence.

6. The Tribunal heard evidence from:

6.1.Sara Sudbury, the Claimant;

6.2.Simon Donovan Lane, the Respondent's Chief Executive and owner;

6.3.Sarah Louise Lane, a Director of the Respondent;

6.4.Luke Kendall, the Respondent's Technology Specialist.

7. After the evidence concluded, the Tribunal received:

7.1.1.a written summary, from the Claimant;

7.1.2.a skeleton argument from the Respondent.

Issues

8. At the beginning of the hearing there was a discussion of the issues arising on the Claimant's claims. The issues as set out below were agreed.

Constructive unfair dismissal

9. 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 matters relied upon in this regard are set out in the particulars attached to the Claimant's claim form and comprise:

9.1.the Claimant being removed as first point of contact for customers;

9.2.the Claimant having been in charge of HR matters, being removed from that, instead having to forward any issues to the owners, which also led to confusion about her responsibilities and the Claimant being unable to resolve employee's problems when these were raised with her;

9.3.the Claimant having been removed as first point of contact for suppliers;

9.4.the Claimant's authority to deal with supplier finances, authorising payments by the Respondent and advising suppliers when payments due to them would be made, was removed;

9.5. all financial responsibilities were removed from the Claimant, except for petty cash;

9.6. the Claimant's emails to the owners about matters she had dealt with previously were not always responded to;

9.7. being removed as a key member of the sales team and excluded from the new sales email address;

9.8. the Claimant having been asked to sign a new contract and raising issues in this regard, clarification was provided to others but not her;

9.9. in connection with the new responsibility given to the Claimant to prepare the VAT return:

9.9.1. impatience and rudeness from Mr Lane to the Claimant;

9.9.2. questioning the Claimant as to the accuracy of the VAT return she completed;

9.9.3. Mr Lane commenting to colleagues that he "refused to babysit" the Claimant;

9.10. when the Claimant took sick leave:

9.10.1. a heavy-handed email response from Mr Lane when the Claimant sent through her second GP fit note;

9.10.2. when the Claimant's subsequently advised Mr Lane she would consult her GP with a view to coming back sooner, Mr Lane's heavy-handed response, adopting the position she could not come back to work without a full doctor's report and return to work interview;

9.10.3. Mr Lane stating the Claimant said her anxiety was not attributable to events at work, which statement she had not made;

9.10.4. Mr Lane expressing his opinion on a medical matter, namely questioning how the Claimant would get to work if groggy as a result of medication.

10. The Tribunal will need to decide:

10.1. 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

10.2. Whether it had reasonable and proper cause for doing so.

11. Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

12. Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

13. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

Redundancy

14. If dismissed, whether this was wholly or mainly attributable to the matters within section 139(1)(a) or (b) of the Employment Rights Act 1996.

Remedy

Unfair Dismissal

15. What basic award is payable to the Claimant, if any?

16. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

17. If there is a compensatory award, how much should it be? The Tribunal will decide:

17.1. What financial losses has the dismissal caused the Claimant?

17.2. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

17.3. If not, for what period of loss should the Claimant be compensated?

17.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

17.5. If so, should the Claimant's compensation be reduced? By how much?

17.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

17.7. If the Claimant was unfairly dismissed, was that caused or contributed to by blameworthy conduct? If so, would it be just and equitable to reduce the compensatory award? By what proportion?

17.8. Does the statutory cap of fifty-two weeks 'pay apply?

Redundancy

17.9. The amount of any redundancy payment due.

Facts

Background

18. The Claimant commenced her employment on 30 March 2005. During her time with the Respondent, she was promoted and occupied a senior position. As at early 2020, the Claimant was Office Manager and PA to the Managing Director, Mr Cousins (who was also the owner).

19. Mr Moss acted as Financial Controller of the Respondent, although he was not an employee, rather he provided services by way of his accountancy business, Moss & Co (Direct Accounts) Limited, attending the Respondent's premises once a week.

20. The Claimant's duties included:

    20.1. responsibility for HR matters;

    20.2. being first point of contact for customers;

    20.3. being a key member of the sales team;

    20.4. being first point of contact for suppliers;

    20.5. dealing with supplier finances, including authorising payments and advising when these would be made.

21. Whilst the Claimant was given a high degree of day to day autonomy in the conduct of her duties, final authority with respect to matters such as hire and fire, employee contracts, the prices agreed with customers and payments to suppliers, rested at a higher level, namely with Mr Cousins, whether in practice he exercised that authority or left the Claimant to make certain decisions. Such a conclusion is supported by Claimant's answers in cross-examination. She said she was aware the Respondent was in breach of its duty under section 1 of the Employment Rights Act 1996, to provide an initial statement of employment particulars, as none of the Company's employees had written contracts of employment. This is something she had wished to remedy (pursuant to her HR responsibility) but it did not happen because of the MD's decision. Similarly, when it was put that it was Mr Cousins who had been responsible for recruitment, the Claimant said he made the "ultimate decision". With respect to financial matters, whilst the Claimant said that Mr Cousins delegated everything, she agreed he had the authority to tell her what to do if he disagreed.

<u>New Owners</u>

22. By early 2020, Mr and Mrs Lane were exploring a potential purchase of the Respondent from Mr Cousins. In the course of discussions and meetings in relation to this transaction, they met the Claimant. Mr Lane's impression was that she was not enthusiastic about the prospect of new owners taking over but he was unperturbed by this, as he had previous experience of joining new businesses, was familiar with there being existing relationships or 'politics' that had to be managed and believed he would be able to deal with this successfully.

23. On 10 March 2020, a purchase of the Respondent was completed. Mr Lane became Chief Executive Officer and Mrs Lane, a company director. The Lanes held a meeting with all of the employees on their first day in charge to introduce themselves and offer assurance that no jobs would be put at risk.

24. Whilst Mr Lane was familiarising himself with the business, he had informal discussions with the Claimant about her role. The lack of written contracts or job descriptions was a cause of confusion and something he wished to remedy.

May 2020

25. In May 2020, new written contracts, a confidentiality agreement and job descriptions were issued to employees. The Claimant's job description, the content of which had been informed by the discussions she had with Mr Lane, set out a new job title of Commercial Office Manager and listed her various duties.

26. Whilst the Claimant declined to sign the new contract, this was because of specific clauses which she believed were inaccurate or obligations she did not wish to enter into. The Claimant rejected the statement of her hours, as she did not believe this accurately reflected her working pattern, in particular the start time. She objected to a mobility clause as she did not wish to be under an obligation to work at different premised. The Claimant did not, however, take issue any with the job description.

27. When it was put in cross-examination that the Claimant had not objected to the job description, she said that this was because what had been included was not the problem and Mr Lane said the description had been condensed for the sake of clarity. Asked whether it occurred to her that something was missing, the Claimant said she had not been concerned at the beginning and it was only later that she realised things had been removed from her. When particular listed duties were raised with the Claimant as evidence that she still had those responsibilities, she said it did not accurately describe the position.

28. I find that as at the point in May 2020 when the Claimant received the job description, she did not then believe any significant responsibilities had been removed from her in practice or that the document listing her duties included any pertinent omissions. Given the Claimant was willing to challenge relatively minor matters, such as her start times and a mobility clause that was not in prospect of being exercised, I have no doubt she would have made her opposition clear in the event the job description did not reflect her discussions with Mr Lane, or if it appeared to diminish her role.

29. The Claimant did not subsequently, during her employment at least, raise any concern with Mr Lane about the removal of her duties. I prefer the evidence of Mr Lane in this regard. Whilst the Claimant said in cross-examination she had raised issues such as no longer being the first point of contact for customers, there is nothing in the contemporaneous documentary evidence to support this. Furthermore, I note it was not referred to in her resignation letter. The first time this point was raised was in post-termination correspondence.

30. The Claimant consistently accepted that Mr Lane as the new owner managed the business in a proper way. When it was suggested to the Claimant that Mr Lane had good reason to do as he did, for example seeking to control expenditure at a time of very difficult trading because of the pandemic, she readily agreed. More than once the Claimant said she took no issue with it being appropriate and within "his rights" for Mr Lane to act as he did, her point was simply that in practice this was different from how things had been before and, therefore, her position became redundant. The lack of any complaint during the Claimant's employment about her duties and role is consistent with her belief that he was proceeding reasonably. When the Claimant was cross-examining Mr Lane, one of her questions began "all your reasoning was totally and utterly acceptable ". In any event, I am satisfied and find that any variation in the Claimant's duties was minimal and can be fairly characterised as Mr Lane taking a more 'hands on' approach to supervision than

did his predecessor, rather than amounting to a significant removal of responsibility from her.

31. The Claimant remained the first point of contact for customers, in as much as she was the person primarily responsible for reading and responding to sales enquiries. Mr Lane and Mr Kendal also had access to the main sales email inbox. Mr Lane would check the inbox at least once a day, usually after hours, so as to keep abreast of new developments and in case there was something that needed to be responded to urgently. To the extent that Mr Cousins never looked into the sales email inbox at all and Mr Lane's approach differed, this was a minor change and it is likely, contemporaneously, the Claimant viewed it as such, given the absence of any complaint from her then. The Claimant's job description provided expressly for her to be the "first point of contact for customers". Whilst the Claimant contended that the creation of a new email address salesteam@metspin.com, to which she was not given access, proved she had been sidelined, when the Respondent's case was put, namely that this was created to become a receptacle for junk email when signing up to bulletins, the Claimant did not contradict this and it would seem she did not ask about it at the time. More tellingly, however, the main sales email address (i.e. the one she complained Mr Lane had looked at) continued to be used for receiving sales enquiries, she was the primary user of this and the automated signature for it was hers. Such an approach is inconsistent with the Claimant's responsibility for sales being removed.

32. A similar position applied with respect to suppliers and associated finances. The Claimant continued to be heavily involved in supplier dealings, as is evident from the related email traffic included in the Tribunal bundle. The Claimant appeared to be saying that whereas she was previously left to make all necessary decisions herself, now she had to involve Mr Lane, to seek information or permission from him. This proposition is an oversimplification. The Claimant had not been left by Mr Cousins to make all purchasing decisions. The ordering of sheet materials had been dealt with by one colleague, the ordering of consumables by another. In the course of cross-examining Mr Lane, the Claimant did not suggest that she had been responsible for all purchasing decisions, rather she said had purchased office supplies and some raw materials, whereas other decisions had been made on the "shop floor" (i.e. by other staff). The authority to decide on matters of supplier expenditure and finances must have rested with Mr Cousins as MD, rather than with the Claimant as PA and Office Manager, whether or not he allowed her to make such decisions during his tenure. Again, to the extent that Mr Lane wished to be involved in and approve decisions about matters such as whether suppliers were paid immediately or at the end of the period allowed for in their payment terms, this was a matter of increased supervision or management style, rather than the removal of a responsibility from the Claimant.

33. The Claimant continued to have financial responsibilities and her dealings in this regard went beyond petty cash. In one important respect, her duties increased in this area. Whereas the Respondent had previously relied on external support for its VAT returns, going forward Mr Lane wished the Claimant to deal with them. Indeed, fees were paid the new accountants, MMO, so that the Claimant could receive extensive training on the Sage accountancy product. This new area of bookkeeping responsibility and the cost of providing training supports Mr Lane's evidence, which I accept, that he valued the Claimant's experience and wished to

keep her in the business and develop her skills (she had suggest he was plotting all along to remove her).

34. The Claimant made a generalised allegation that Mr and Mrs lane did not always respond to her emails. She gave no example of this. Whilst it may be there were occasions when an email the Claimant sent went without a response, I can make no specific finding in this regard.

June 2020

35. The first VAT return the Claimant had to prepare was due at the end of June. She had training in this regard from an accountant at MMO. Although the Claimant and Mr Lane both referred to discussions about this in their witness evidence, few specific dates were identified and the documentary evidence did not tie it down.

36. There was an occasion in June when Mr Lane asked the Claimant for data from Sage. The Claimant explained that she was busy and is would take a few days to provide this. Mr Lane was dissatisfied and said that if she could not provide it he would need to get the accountant in to do so. This conversation occurred within earshot of others and it would have been clear to all that Mr Lane was not happy. Later that day, Mrs Lane said to the Claimant that her husband was stressed and had a lot on his plate. Later still, Mr Lane approached the Claimant again asked for the data, saying how important it was. The Claimant explained various difficulties she had, including building work in the office and Mr Lane making other requests for receipts and the like. The Claimant was unhappy about the way that Mr Lane had spoken to her, which she believed was impatient and rude.

July 2020

37. The Accountant came back in during July to give the Claimant further training. The Accountant told the Claimant she believed she understood what she needed to in order to complete the VAT returns but could always contact her again by phone or email for further support.

38. Toward the end of July, Mr Lane prepared a second draft of the Claimant's contract, including revised start times and a more circumscribed provision with respect to her place of work and mobility. Mr Lane also withdrew the confidentiality agreement entirely, which a number of employees had complained about. There was a general staff meeting at which Mr Lane explained the revisions to the standard contract (i.e. that used as a starting point for individual terms and conditions) which the Claimant did not attend because she was not at work that day. In the event, there was no individual discussion with the Claimant about the second version of her contract because she began a period of sickness absence shortly thereafter.

39. On about 30 July, Mr Lane and the Claimant spoke about the VAT return which was then due to be submitted. The Claimant was, justifiably, pleased at having successfully completed this challenging new task. When told of the VAT payment amount, however, Mr Lane was surprised, as it was much higher than in previous months (at least those since he had been running the business). He made a sharp intake of breath and asked the Claimant whether she was sure the figure was correct. He also asked whether she had checked the figure with the accountant. This enquiry was very deflating for the Claimant. During cross-examination, when it

was put that Mr Lane's response had been an understandable one given his surprise at the figure, the Claimant said she objected not to the content of what he had said, but rather his tone. Whilst the Claimant's perception is understandable, so is Mr Lane's expression of surprise which caused it.

40. The Claimant was upset by this exchange. She took herself off with a cup of tea and began to cry. When she met some of her colleagues a short time later they could tell that she was upset. One colleague in particular, Rob Paige, asked whether she was OK and she told him about the exchange with Mr Lane.

41. Despite Mr Lane's denial, I am quite satisfied that Mr Paige did indeed report to him that the Claimant was upset, as it is the only plausible explanation for his response. Mr Lane said words to the effect that he was not going to "babysit" the Claimant. There was a dispute as to the precise formulation of this utterance, the Claimant said she was told (she did not hear it herself) that Mr Lane said he refused to "babysit her". Mr Lane's evidence was that he said "I can't babysit everybody here, all of the time, people need to do their jobs properly". Given the lack of any contradictory evidence from a party to the conversation, I accept Mr Lane's formulation, it is quite clear, however, that the baby-sitting comment referred to the Claimant and being told of her reaction to their recent exchange. The Claimant was, not unreasonably, upset on learning of this remark.

42. The Claimant says that the Lane family were, thereafter, very distant. Indeed she goes further and now alleges that Mr Lane had always sought to engineer her departure from the Respondent because she was a member of the "old team". For his part, Mr Lane now says the Claimant never accepted his management and was always looking to leave. He even goes as far as to suggest she was only staying to extract confidential information for Mr Cousins or Mr Moss. I do not find either of these characterisations remotely persuasive. In my judgment both the Claimant and Mr Lane are looking at events with the very considerable benefit of hindsight, taking into account the unfortunate endpoint that was reached. My finding is that the Claimant genuinely wanted to make a go of working for the Respondent under new ownership. Unfortunately, she found Mr Lane's interventionist style and abrupt manner difficult to adjust to. Equally, it is quite clear that Mr Lane did think the Claimant had knowledge and skills that were of value to the business and which he wished to retain, as is consistent with him investing so as to build her skillset and develop her role.

Sickness Absence

43. By an email sent early on the morning of 3 August 2020, the Claimant advised Mr Lane that she would not be at work that morning as she had a doctor's appointment. He in turn thanked her for letting him know. In the early afternoon, the Claimant emailed Mr Lane again to say she had been signed off work for a week and would send the fit note once it was received. She asked that this be kept in confidence. He replied thanking her again and saying this would be kept to "ourselves". The Claimant sent a scan of the fit note the following day. This recorded "anxiety and sleep disruption" and stated she would be unfit for work until 10 August 2020.

44. On 10 August 2020 at 4.12pm, the Claimant sent through a further fit note. This again recorded "anxiety and sleep disruption". She was signed off for two weeks on this occasion, through to 24 August 2020.

45. The Claimant relies on the emails she received subsequently as causing or contributing to a repudiatory breach of contract. Given the importance attached to this exchange, I will set out much of it in full.

46. On 10 August 2020, Mr Lane wrote:

> Dear Sara,
>
> Thank you for your email.
>
> Can you please ring me tomorrow afternoon to discuss. In particular I'd like to understand why you took in excess of 8 hours to inform me (via email) that you weren't coming in to work today? You will note that the procedure that has been in place since before our ownership is to contact your line manager, ie me, between 7am and 8am. Last Monday at 07:34 you managed to comply with this regulation so I am somewhat bemused at why you did not replicate this.
>
> I will be available after 14:00 tomorrow, please ring me then.

47. Replying the same day, the Claimant wrote:

> Dear Simon,
>
> I wish someone had got in touch with me this morning and I could have cleared this up.
>
> I didn't contact you until this afternoon as I didn't have my doctors appointment until around 2.45, however if you check last weeks note that I sent in you will see that it covered today and I was not due back to work until tomorrow.
>
> Hopefully that clears everything up now,

48. In his witness statement, Mr Lane says that with the benefit of hindsight, some of his emails (plural) could have been softer. Asked about this comment, he said it referred only to his email of 10 August, which was a mistake based on his incorrect understanding of when the Claimant's existing fit note expired and but for that mistake would not have been sent. Mr Lane's evidence on this point was unsatisfactory and suggests vacillation. The witness statement paragraph reads, quite plainly, as a general observation about the tone of more than one email he sent. The narrow concession he now makes could easily have been expressed, if that was as far as he was prepared to go.

49. Later still on 10 August 2020, Mr Lane replied:

> Dear Sara,
>
> Thank you for your email.
>
> As per first email can you please ring me tomorrow afternoon after 14:00

50. On 11 August 2020 the Claimant and Mr Lane spoke on the telephone. She told him that she was not waking up until midday and didn't function until two in the afternoon. During this conversation, Mr Lane asked the Claimant whether there

was a connection between her illness and work. Beyond finding that her response was ambiguous, I am unable to make a finding as to her precise words as the evidence in this regard was unsatisfactory from both sides.

51. On 15 August 2020, the Claimant wrote:

> Hi,
>
> The last day or two I feel has made a difference and I'm aiming to come back to work earlier than my last note instructed.
>
> I need to have a review with my doctor this coming week and intend to try to speak to him Monday/Tuesday with a view to coming back on Tuesday of this coming week, rather than next.
>
> I'm aware I have a lot to do and am thinking now that getting stuck into my work is probably the next positive step for me.
>
> I will be in touch early in the week,

52. on 17 August 2020, Mr Lane wrote:

> Hello Sarah,
>
> Thank you for your email, which I have been considering carefully over the weekend. I would have preferred you to have rung me on Friday as instructed previously, however you obviously chose not to adhere to this.
>
> Whilst I am glad to hear that you think that your condition has dramatically improved in the last couple of days, this has given rise to considerable surprise yet concern on my behalf. Only a matter of days before you wrote this email you told me that you were still suffering from extreme anxiety. Additionally you stated that your medication is making you feel so bad that you are not able to function until the afternoon.
>
> Now, just a few days on, you would like to come to back to work? How will you actually get to work? Surely if you cannot function until the afternoon on your medication you are not safe to drive a car early in the morning - and you have already told Sarah and I that you are a very nervous driver. Then there is the matter of you being around people operating large machinery. It cannot be wise for the Health and Safety of you and everyone else for you to be around such equipment.
>
> Therefore given your medical condition, the medication you are taking and the original instruction from your doctor to refrain from work for a further week, I think that it is wise that you see out your most recent medical certificate and stay away from work. In any case I cannot allow you to return to your normal duties without a full report from your GP, explaining to me that you are now fit to work safely, in an industrial environment. I am responsible for everyone's Health and Safety, not just yours, which is a duty that I take very seriously.
>
> Take the time to consult with your GP this week and understand with him the implications of your condition. I will require a full letter of explanation though, not just a simple note.

In the meantime, as you state there is a lot to do. Do not worry about this for now, just concentrate on your mental health. We have the majority of your workload covered and have obviously put contingency plans in place to manage during your absence. I have also developed a plan for improving things moving forward in the long term, which I shall explain to you on your eventual return to work. You stated to me last week that you cannot attribute your anxiety to events or conditions at work, however these planned changes have been designed as a precautionary measure to assist you. They will minimise any potential anxiety for you that may arise from the perfectly normal practices of working in an office environment.

When you and your GP have arrived at a date that is suitable and safe for you to recommence working, along with a full report as indicated above, then you may return to work. However I require you to give me two days advance notice of this so that I can plan my schedule accordingly. Your first day back will of course entail a Return to Work Interview, where we will discuss how we will move forward together. This needs to happen before you actually start work on that particular day, therefore to fit in with me this will be at 11:00.

I trust that this clarifies my position and that you understand everything above perfectly. If you have any questions then you may of course contact me on my mobile directly.

I will also arrange for a copy of this letter to be posted to your home address for your records.

52.1. on 17 August 2020, the Claimant wrote:

Hi Simon,

Thank you for your email.

l appreciate your concern, as you are aware I have booked the first week of September off annual leave, I was trying to come back earlier than planned, rather than only be back for a couple days before being off on booked holiday, so that I could catch up with my duties and put work first,

I'm relieved that you say you have covered my workload and have contingency plans in place for the future, this is welcome news.

I think in retrospect you are quite right, I'm trying to come back too soon and will keep in touch with the doctor and consequently yourself when I have further news.

I do apologise for not calling you on Friday, I wasn't aware that we had made a firm plan, just to be in touch later in the week - which I did by emailing you on Saturday.

Thank you for your support

Resignation

53. Shortly thereafter, on 19 August 2020, the Claimant resigned by email with immediate effect:

Good Afternoon,

After taking a couple days to absorb your email - Please see my reply below.

I need to correct an error, you state that I have said that I did not contribute my current anxiety issues to work - this is untrue, when you asked me the other day if there were any work related issues I wanted to talk about, my reply was that l didn't want to talk about anything at that point.

I have been working under the premise over the last couple weeks of "least said, soonest mended" It was clear to absolutely everyone at Metspin on my last Thursday at work that I was upset, it was clear enough to yourself too as you spoke to a few members of staff about it and concluded that you did not wish to acknowledge or deal with the situation with me, stating that you were not here to babysit me - this broke, in my opinion, your Duty of Care, an employers legal requirement, it also made an upsetting situation even more difficult as the only Grievance Policy stated is to speak to your manager, so what was I to do?

After a few nights of worrying about my job, worrying about the lack of support l was getting, I saw the doctor and tried new medication - it's taken a while, but the medication side effects are wearing off and I'm able to sleep without lying awake worrying for hours upon end.

Having taken myself away from the situation that was upsetting me and causing me to feel unwell, having been to the doctor and taken his advice, recovery from a short term anxiety issue should have been going well. I could have come back to work and put aside the problems, as nothing has been said - no bad feeling caused, no accusations made.

However, this is clearly not the case Simon, since being off I have received various emails from you, with an intimidating tone - one of them even demanding why I hadn't been in touch for 8 hours etc etc.. to find you that had the dates wrong-?? Emails instructing me to call you at certain times, Emails berating me for not calling you on a certain day, emails stating versions of conversations that were not accurate, etc. None of which I personally consider to be appropriate to an employee who is off work with anxiety related issues.

I didn't want to put any of this down in black and white, as I said - least said, soonest mended. However, I no longer feel comfortable in the thought of coming back to Metspin, all employees need their managers support and I don't feel I have it. I could write a great deal more about how we came to this situation, but I really don't want to get involved in a lengthy debate about who is right and who is wrong, the bottom line is I took some time off work, unwell, and I don't feel comfortable coming back.

Please accept this email as my letter of notice, with immediate effect.

l am owed a weeks holiday, which I would appreciate being paid on the next pay run, also please forward my P45 as soon as it is available.

I could go back to the doctor and ask for further notes etc, or a full report as you have requested (something I had not heard of before) however, this will only serve in

> dragging an awkward situation out even further and there is no need, as you state my work load is covered and you have made contingency plans too.

54. I note that the focus of the Claimant's resignation email is the way in which she had been dealt with during her sickness absence. I find that this was the main reason for her resignation. She also referred to the "last couple of weeks" when she was at work before becoming unwell, which period would encompass events on 30 July 2020 and explains that she chose not to raise her concerns about this because she thought that would make matters worse rather than better (least said, soonest mended). There is, however, no reference to the alleged removal of her duties and diminution of her role.

Post-Termination

55. By an email of 24 August 2020, Mr Lane said that he wanted to treat the complaint in the Claimant's resignation letter as a grievance, to be determined by Mrs Lane.

56. The Claimant replied on 25 August 2020, declining to take part in the grievance and, for the first time, complaining that her role had been diminished

57. By a letter of 3 September 2020, the Respondent provided an outcome to the grievance meeting (which was conducted in the Claimant's absence and without any participation by her). The "grievance" was rejected and Mrs Lane's rationale for this decision rejected the suggestion that the Claimant had been dealt with in a harsh or unsympathetic manner, or that her job role had been reduced

58. On 23 September 2020, the Claimant sent a lengthy email commenting on Mrs Lane's grievance decision and setting out the duties she said had been removed from her.

Law

Constructive Dismissal

59. So far as material, section 95 of the **Employment Rights Act 1996** ("ERA") provides:

> **95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if...
>
> (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 the employer's conduct.

60. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).

61. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

62. In order to prove constructive dismissal four elements must be established:

    62.1. there must be an actual or anticipatory breach by the respondent;

    62.2. the breach must be fundamental, which is to say serious and going to the root of the contract;

    62.3. the claimant must resign in response to the breach and not for another reasons;

    62.4. the claimant must not affirm the contract of employment by delay or otherwise.

63. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

> The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

64. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232 the EAT** held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

65. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

66. Furthermore, the decision in Buckland confirms that a repudiatory breach cannot be remedied; per Sedley LJ:

> 40. This account of the alternative courses which may be taken in response to a repudiatory breach leave no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends.

67. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

68. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see **W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT**.

69. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Nottinghamshire County Council v Meikle [2004] IRLR 703**.

70. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Redundancy

71. As to redundancy, ERA section 139 provides:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to...
>
> (b) the fact that the requirements of that business--
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish.

72. The leading authority on the definition of redundancy is **Murray v Foyle Meats [1999] IRLR 562 HL**. Lord Irvine said of section 139:

> "My Lords, the language of para. (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."

Conclusion

Repudiatory Breach

73. As set out above, I am not satisfied there was any significant change to the Claimant's duties and responsibilities. She had previously been PA to the MD, a role she did not continue for Mr Cousins as CEO, but makes no complaint about that. With respect to the matters the Claimant does rely upon, I find she did continue to: be the first point of contact for customers and suppliers; deal with supplier finance issues; deal with HR matters (albeit not the drafting of the contractual terms she was asked to agree); be a key member of the sales team. The changes, such as they were, amounted to a different more hands-on approach by Mr Lane, who wished to know what was going on, especially with money-in and money-out during a most difficult trading period. Mr Crow, for the Respondent, makes a fair point in this regard, namely that Mr Cousins would have been entitled to adopt such an approach during his tenure and had he done so, the Claimant could not have pointed to such a change and said it amounted to a breach of contract.

74. Even if I were wrong about the nature of the change and it had amounted to a significant variation of the Claimant's duties, I still would not have been satisfied this led to the conclusion there was a repudiatory breach.

75. When Mr Lane became CEO he found himself in the unenviable position of taking over a workforce where there were no employment contracts, job descriptions for employees, or other written particulars. The way he sought to deal with this in the Claimant's case was through discussion. The job description he produced reflected what he had been told by and agreed with the Claimant about her role. Despite a disagreement over certain contractual matters, the job description was never disputed. Whatever the position previously, from March until the end of July 2020, the Claimant carried out the same role, without any challenge to or dissent from its composition. This is very far from a case where a new and different role is imposed unilaterally upon an unwilling employee and without consultation.

76. In these circumstances, I could neither be satisfied that the Respondent had acted in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, nor that it acted as it did without reasonable and proper cause. In fairness to the Claimant, she accepted unconditionally that Mr Lane proceeded as he did for good reason.

77. As far as the June 2020 exchange about Sage data is concerned, the exchange in this regard was a modest one. Mr Lane may have appeared impatient. There is, however, no suggestion that he did not require the accounting information urgently on this occasion. I was not satisfied that Mr Lane was positively rude and an element of impatience in isolation cannot make any significant contribution to showing a repudiatory breach of contract.

78. With respect to the 30 July 2020 incident, the first part of this appears innocuous. Whilst the deflating effect on the Claimant of Mr Lane querying the VAT sum is understandable, so is his immediate reaction when presented with what will have seemed to him to be a surprisingly large sum on money. Wanting to be sure this was right before submitting it to HMRC is entirely proper. His "babysitting" comment was, however, a demeaning remark that ought not to have been made. Mr Lane did not have reasonable and proper cause to say this. Whilst in isolation this comment would not tend to have the proscribed effect, it is the sort of conduct, which if taken together with other similar matters might do.

79. I turn finally to how the Claimant's sick leave was dealt with.

80. Mr Lane's email of 10 August 2020 was heavy handed. Even if he had been right about the existing certificate expiring, an appropriate response would have been for him to enquire of the Claimant earlier in the day why she had not attended for work. To lambast the Claimant for her lateness, in circumstances where she had just provided a new fit note showing that she continued to suffer with anxiety would have been excessive in any event. Given her existing fit note had not expired, it was entirely inappropriate.

81. I can understand why Mr Lane's email of 17 August 2020 will have appeared to the Claimant as being rather formal and rigid. Certainly some good employers might have adopted a softer tone and lighter touch. Looking at the substantive content, however, for the most part this does not appear to be unreasonable. Given a conversation with the Claimant (about which no complaint is made) in which she

told Mr Lane about her late waking and difficulty functioning, coupled with a fit note signing her off for longer than before with the same anxiety and sleep disruption, the sudden turnabout from the Claimant will have come as a surprise. Mr Lane might reasonably wonder if the proposed course was wise and wish beforehand for a view from the Claimant's GP. To the extent Mr Lane spoke about whether the Claimant could function and would be safe, he was not purporting to give a medical opinion, he was simply referring to what the Claimant herself had told him very recently. Suggesting a return to work interview would need to be held was also a sensible measure. Give the nature of the Claimant's recent illness, it would be reasonable for Mr Lane to wish to explore whether this might be exacerbated by the workplace and / or to consider making adjustments. Different considerations would apply to returnees who had been absent for other reasons, such as because they had come into contact with someone suffering with Covid, where there would be no obvious need for a discussion on their return. Asking the Claimant not to return immediately but instead to seek further GP advice was a proper course, albeit the point could have been made with more measured language. Requiring a GP report / explanation letter at this time was, however, unjustified. This was not yet a very lengthy absence period. The Claimant had been signed off twice by her GP for short periods. A reasonable and sufficient course would have been to ask her to get a further fit note from her GP confirming she was now well enough to return to work.

82. The Claimant's immediate response suggests she could see the sense in Mr Lane's suggestion that she go back to her GP. Subsequently, having turned matters over in her mind she resigned.

83. Whilst as Mr Crow said, it is not the function of the Tribunal to look microscopically at every minor workplace sleight and roll these up to establish a repudiatory breach, in this case I must look at the matters the Claimant complains of collectively as well as in isolation. The potentially significant matters in my judgment are:

    83.1. the babysitting remark on 30 July 2020;

    83.2. the heavy handed email on 10 August 2020;

    83.3. the requirement for a GP report on 17 August 2020.

84. For the reasons set out above, the Respondent did not have reasonable and proper cause to do these things. I am not, however, persuaded that these matters, even taken together, amount to conduct calculated or likely to destroy or seriously damage the trust and confidence between employer and employee. Each incident is not in itself a very great wrong. On the other hand, neither were these trivial matters. They are precisely the sort of thing which, if repeated often enough, may establish a repudiatory breach of contract and employers would do well to avoid such behaviour. I cannot, however, say that these three particular incidents were of a sufficiently severe character such that their accumulative effect was, objectively, to undermine necessary trust and confidence in the employment relationship or evince an intention to do so. As such, there was no repudiatory breach of contract.

<u>Unfair Dismissal</u>

85. Accordingly, the Claimant did not resign in circumstances where she was entitled to treat herself as having been dismissed. Without a dismissal her unfair dismissal claim must fail.

Redundancy

86. For the same reason, not having been dismissed, the Claimant's redundancy payment claim also fails.

87. I should add, however, there was no redundancy situation. There was, as at 19 August 2020, no diminution in the Respondent's requirement for employees to do the work done by the Claimant, namely that she had been doing from March to July 2020, which itself was not significantly different from that which she had done previously. I note also, the Claimant resigned because of the manner in which her sick leave was dealt with and to a lesser extent how she had been treated on 30 July 2020, rather than because of a change in her role.

Employment Judge Maxwell
Date: 11 August 2021

Sent to the Parties: 23 August 2021

FOR THE TRIBUNAL OFFICE