EMPLOYMENT TRIBUNALS

Claimant: Carole Nuttall

Respondent: PKW LLP

Heard at: Manchester via CVP On: 4 August 2021

Before: Employment Judge Serr

Representation
Claimant: Mrs Nuttall in person
Respondent: Mr Middleton (Solicitor)

JUDGMENT having been sent to the parties on 5 August 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

Issues

1. The Claimant was employed with Respondent from 1989 until her eventual resignation on 11th August 2020. She brings a claim for unfair constructive dismissal under s.95 (1) (c) Employment Rights Act 1996 ("ERA").

2. Previously an order had been made by Employment Judge Slater that the Claimant further particularise her claim. She was to detail all the things she says the Respondent did or failed to do either individually or cumulatively which constituted a breach of the implied duty of mutual trust and confidence. She was required to give the date of the incident, a brief description of the incident, who did what and if there was a last straw causing the Claimant to resign what that was. The document produced by the Claimant in response to that order was somewhat long and discursive. The Tribunal attempted to analyse that document. Following this it was canvassed with the Claimant at the outset of the hearing and agreed with both parties that the matters constituting a breach of the implied term of trust and confidence were as follows:

   (i) Being furloughed when others were not.
   (ii) Not contacted while on furlough.

(iii) Given too much work on return.
(iv) Expected to do a receptionist's job.
(v) Excluded from other staff on return.
(vi) An inadequate response at a grievance hearing.

3. Accordingly, the Tribunal focused its attention on these six issues. In addition, the Tribunal had to consider if a fundamental breach of contract did take place, did the Claimant resign at least in part because of that breach (causation) and whether the Claimant waived any breach through delay or other actions (waiver). The issue of remedy (other than contributory fault) was left to be dealt with at a further hearing if necessary.

The Facts

4. The Tribunal had a bundle of 112 pages and had witness statements and oral evidence from the Claimant herself and Mr Wild and Mr Pickup for the Respondent. It received some written submissions from the Respondent which it also considered. It made the following findings of fact based on the balance of probabilities.

5. The Respondent is a small accountancy firm. It has 11 members of staff in total. The 2 senior partners are Mr Pickup and Mr Wild. The Claimant was employed with the Respondent and its predecessor in title since 1989 as a tax senior. Her work included corporate accounts, self-assessments, some capital gains tax, inheritance tax and pay roll work.

6. On 24th March 2020 the national 'lockdown' was declared by the United Kingdom government as a result of the global pandemic. The coronavirus job retention scheme (CJRS) was also introduced at this time allowing employees to be placed on furlough leave. Employers would receive 80% of the employees salary up to a cap of £2 500 which they would pass on to employees. Employees furloughed under the scheme were not permitted to do any work for their employer other than some limited training. Agreement was required to be reached in respect of being placed on furlough and any salary reduction.

7. On 25th March 2020 the Claimant wrote to Mr Wild by email stating that she had some concerns regarding her work situation. She was worried about the health and safety of staff including herself. She wished to be placed on some form of home working. She said at this time of the year there were not many longer jobs to do at home until the new tax year started.

8. On 26th March 2020 the Respondent, through its employee Mrs Laura Livesy, wrote to the Claimant indicating that she was to be placed on furlough as of 25th March 2020. The Respondent's reason for placing the Claimant on furlough, which the Tribunal accepts as being accurate, was firstly because the Respondent did not have the IT systems set up to allow home working for the Claimant at that time, secondly because the point in the tax cycle meant that there was less work for the Claimant to do in the

view of the Respondent (which the Claimant herself had to some extent indicated in her email) and thirdly because the Respondent was considering overall its requirements going forward and business need in the short term.

9. The Claimant was not the only member of staff to be furloughed nor was she the only fee earner to be furloughed at this time. Keith Ogden and Roger Oldfield were two fee earners who were also furloughed. It later transpired that they were furloughed for a shorter duration than the Claimant. In addition, both receptionists were furloughed. There were 6 staff in total furloughed.

10. On 6th April 2020 the Claimant signed to confirm her agreement to being placed on furlough and for the salary reduction that would follow on from that. The Tribunal rejects the suggestion, so far as it is made, that the Claimant was placed under duress to sign the agreement. The Claimant herself in her witness statement said she signed it after thinking it through carefully. The Tribunal notes it was also signed following some amendments made to the original agreement by the Claimant on 3rd April 2020.

11. On 15th May 2020 the Claimant received a staff update COVID-19 email from the Respondent indicating the current position for staff both at work and on furlough. It also gave some information about taking holiday, the length of the furlough scheme and the possibility of returning to work. It stated that "it may be that in July/ August if the workload begins to increase we may bring our staff to come back on reduced hours".

12. Discussions took place with the Claimant about return to work in mid June 2020. The Claimant did in fact return to work on 22nd June 2020 following the decision of Mr Wild.

13. The Claimant makes a complaint about the amount of work that she faced on her return and that there was a significant backlog. While the Tribunal accepts that there would have been something of a backlog on her return to work the Tribunal does not accept that she was overloaded with work from this point. She required no overtime, took no sick leave and there is no evidence that she sought to employ the assistance of another member of staff. The Tribunal does not accept that she was not coping.

14. When the Claimant returned to work there had been some reorganisation of the office lay out. She was the only person working downstairs other than Mr Wild. The Tribunal does not find that the reorganisation was designed to isolate the Claimant or target her in some way. Rather it was connected to the requirement for social distancing and other changes necessitated by the pandemic and business need.

15. Only 1 receptionist was brought back from furlough and only for three days per week. While this necessitated the Claimant occasionally answering the reception door on the two days the receptionist was not there, this was

entirely justified by the circumstances. The Respondent anticipated that there would be a reduction in footfall as a result of the pandemic and lockdown and asked clients to make an appointment before attending and to do so only where strictly necessary. The Claimant was not the only person to answer the door- Mr Wild answered it as well on occasion. The circumstances of the pandemic meant that, as with so many other businesses, everyone working for the Respondent was to some extent expected to show some flexibility in respect of their roles and duties.

16. On 15th July 2020, the Claimant approached Mr Pickup and said she wanted to talk to him regarding a 'personal matter'. She expressed that she had some grievances against the business. The Tribunal accepts her main concern was the decision to place her on furlough. Indeed, that remains her main concern to this Tribunal. The Tribunal has seen notes of that meeting from both parties. The Tribunal accepts Mr Pickup's notes as being a broadly accurate note of the meeting.

17. The Tribunal accepts that the Claimant appears to have had a personal falling out with Mrs Amanda Neild a co-worker on her return. The precise reasons for this falling out are unclear to the Tribunal. The Tribunal is however clear that the Respondent (in the form of Mr Wild and Pickup and other co-workers) were not to blame for this falling out which was a personal matter between the Claimant and Ms Neild.

18. On 31st July 2020 the Claimant by a letter raised a formal grievance. She set out five points that she said she was concerned about. These included being placed onto furlough, being left with a large backlog of work on her return, the way that the Respondent discussed her situation with Amanda Neild her colleague and being made to feel insecure about her job and doing reception duties.

19. On 11th August a formal grievance meeting took place with the Claimant Mr Pickup and Mr Wild. The Claimant recorded the meeting surreptitiously and produced a transcript which was included in the bundle. The Respondent does not take serious issue with the accuracy of that transcript which is said to be a broadly accurate record of the meeting. The Tribunal has read the transcript and Mr Middleton, the Respondent's solicitor, took the Claimant through extracts from it in cross examination. The Tribunal is satisfied that the Respondent through Mr Pickup and Mr Wild gave reasonable answers to the queries that the Claimant raised including an explanation for why she was placed on furlough and an explanation for a physical reorganisation of the premises and a promise to consider how the burden of answering the front door could be shared.

20. On 11th August at 7:00 PM, the same day as the grievance meeting, the Claimant sent an email to Mr Wild and Mr Pickup. Within that email she confirmed that she was resigning and that was confirmation of something she had verbally indicated at the meeting. She gave 6 weeks' notice and

would take annual leave as part of that. The Claimant's last day of work for the Respondent was 21st August 2020.

21. She obtained a new job on 25th August 2020 in a similar capacity with another accountancy practice and began work on 14th September. The Tribunal finds that this job was first mooted with the new employer on 19th August through an informal chat, although she had been seeking new employment before that.

22. The Claimant went to ACAS early conciliation on 12th December and issued her claim form on 20th December 2020.

The Law

23. The ERA does not use the term constructive dismissal. S. 95 deals with circumstances in which an employee is dismissed. S.95 (1) (C) ERA states

(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.

24. The classic statement of what must be established in a constructive dismissal is still contained in *Western Excavation (ECC) Ltd v Sharp* [1978] IRLR 27 that is a Claimant must prove: (1) that the employer acted in breach of his contract of employment; (2) that the breach of contract was sufficiently serious to justify resignation or that the breach was the last in a series of events which taken as a whole are sufficiently serious to justify resignation; (3) that he resigned as a direct result of the employer's breach and not for some other reason; and (4) that the Claimant did not waive the breach or affirm the contract.

25. While the test is not reasonableness but one of contract there is a term implied into every contract of employment "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."

26. In *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach.

Conclusions

27. The first question for the Tribunal is whether the Respondent was in fundamental breach of the Claimant's contract of employment. The Tribunal considered the 6 issues identified at the outset, being careful to consider them cumulatively as well as individually.

(i) Being furloughed when others were not. The Tribunal refers to the facts as found. The Claimant was not the only person to be furloughed and the Tribunal is satisfied that there was a good business case for the Claimant being furloughed. Further, the Claimant agreed to be furloughed and freely and without wrongful inducement entered into a written furlough agreement on 6th April 2020. So far as necessary the Tribunal would have found this constituted a waiver of any breach.

(ii) Not being contacted while on furlough. The Tribunal is of the view that the Respondent was not obligated to keep in regular touch with the Claimant as it would have been had she for example being on sick leave. Indeed, it is of note that the requirements of CJRS meant that the Claimant could not perform any work and regular contact may arguably have breached this provision. In any event the Tribunal is quite satisfied that the Claimant was kept in touch with to the extent that at least she was written to on 15th May 2020 giving full information about the current state of the Respondent's business and later on in June contacted about a return to work.

(iii) Given too much work on return. The Tribunal refers to the facts as found. There was some backlog of work but the Claimant was not required to work overtime did not seek the assistance of any other employees to help her and was not required to take sick leave at any point. The Tribunal is not of the view that the Claimant was overburdened with work such that it constituted individually or cumulatively a breach of her contract.

(iv) Expected to do the receptionist job. The Tribunal refers to the facts as found- the Claimant only had to cover the reception on the two days that the receptionist was not working. There was a reduction in footfall necessitated by the lockdown and pandemic and therefore less people attending the Respondent's premises. The Claimant was not the only person that covered reception Mr Wild was there as well and any other person presumably who was passing at the time within the ground floor. This was simply part and parcel of the changes necessitated by the pandemic

(v) Excluded from other staff on return. So far as the Claimant was physically excluded the Tribunal refers to the facts as found, the physical re-organisation of personnel was necessitated by business need and the need to socially distance. It was not done to target or isolate her. The Respondent was not at fault for any interpersonal difficulties the Claimant was having with Ms Neild and did what it could to make sure there was harmony amongst the staff.

(vi) Inadequate response at the grievance hearing. The Tribunal rejects the suggestion that there was no adequate response at the grievance hearing. The Respondent through Mr Pickup and Mr Wild gave answers to queries raised and evidenced an open mind in respect of trying to address problems that the Claimant had raised. The Claimant's resignation coming as it did immediately after the grievance hearing precluded the Respondent from taking any meaningful additional steps to address her concerns.

28. For the aforesaid reasons the Respondent was not in fundamental breach of contract and the Claimant's claim fails. It is unnecessary for the Tribunal to consider the other issues of causation and waiver (although the Tribunal has already indicated that in respect of the Claimant's primary concern the signing of the furlough agreement would have constituted a waiver in respect of any breach). While it is regrettable that the Claimant's very long career ended with the Respondent in the circumstances it did the Respondent was not at fault and it is reassuring that the Claimant obtained a new role as quickly as she did.

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Employment Judge Serr

Date: 29 August 2021

REASONS SENT TO THE PARTIES ON

14 September 2021

FOR THE TRIBUNAL OFFICE