



EMPLOYMENT TRIBUNALS

Claimant

Miss K Burrows

v

Respondent

New Look Retailers Limited

Heard at: Bury St Edmunds (by CVP)

On: 02, 03 & 04 August 2021

Before: Employment Judge Laidler

Members: Mr N Boustred and Ms I Sood

Appearances:

For the Claimant: Mr R Burrows (Father).

For the Respondent: Mr T Kirk (Counsel).

JUDGMENT having been sent to the parties on 24 August 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The ET1 in this case was received on 27 August 2019 following a period of ACAS Early Conciliation between 27 June and 10 August 2019. An email from Mr Burrows of 23 August 2019 was treated as further particularisation of the claim. In its response the respondent denied all the claims.
2. A telephone preliminary hearing was heard before Employment Judge Moore on 21 April 2020 at which Mr Burrows attended and the respondent's then solicitor. At that hearing this Hearing was listed and the issues clarified. The Tribunal has been to the issues in the bundle at various times throughout this hearing and it has been important to keep reminding the parties that this Tribunal is only determining those issues which are as set out below.

"Constructive unfair dismissal"

- (i) Was the claimant dismissed, that is:
 - a. Was there a fundamental breach of the contract of employment; if so
 - b. Did the claimant nevertheless affirm the contract of

- employment before resigning; if not
- c. Was the fundamental breach of contract a reason for the claimant's resignation?
- (ii) The acts and omissions that the claimant relies upon as amounting to a fundamental breach of contract are:
- a. Being made always to work in the delivery area, rather than a customer facing area of the business and/or the shop floor;
- b. Being made always to work in the delivery area despite it being a dark and lonely area of the business;
- c. Other members of staff talking unpleasantly about the claimant behind her back;
- d. The respondent's failure to take account of and mitigate the fact that the temperature in the delivery area is excessively cold in winter and excessively hot in summer;
- e. The respondent's failure to mend the heating in the delivery area during the winter of 2017/18 or provide the claimant with alternative reliable heating;
- f. The respondent's failure to offer the claimant any promotion opportunities.
- g. When the claimant was off sick:
- (a) Arranging meetings at only 2-3 days notice;
- (b) Refusing to allow Mr Burrows (her father) to accompany the claimant to certain meetings;
- (c) Holding meetings with Ms Liz Bloom, with whom the claimant had a difficult working relationship;
- (d) Proposing the claimant have a "back to work" meeting with a manager who had no experience of dealing with somebody suffering from anxiety and depression.
- (iii) If the claimant was dismissed, what was the principal reason for the dismissal and was it fair or unfair in accordance with the Employment Rights Act 1996?

Disability

The claimant has the condition of scoliosis. She claims that she

was treated unfavourably because of something arising in consequence of her scoliosis (contrary to section 15 of the Equality Act 2010). That is, she claims that she was made to work in the delivery area rather than a customer facing area of the business and/or the shop floor because “she has a lump on her back” and because of her short-term memory. The issues that arise are therefore:

- (iv) Was the claimant a disabled person in accordance with the Equality Act 2010 at all relevant times by reason of her scoliosis?
- (v) Was she made to work in the delivery area rather than a customer facing area of the business and/or the shop floor because “she has a lump on her back” and/or because of her short-term memory?
- (vi) Does the appearance of the claimant’s back and/or her short-term memory arise in consequence of her scoliosis?
- (vii) Did being made to work in the delivery area rather than a customer facing area of the business and/or the shop floor amount to unfavourable treatment?
- (viii) Can the respondent show that that treatment was a proportionate means of achieving a legitimate aim?
- (ix) When did the respondent find out, or could reasonably have been expected to know, that the claimant suffers from scoliosis?
- (x) Accordingly, has the respondent shown that it did not know, and could not reasonably have been expected to know at the relevant time that the claimant suffers from scoliosis?

It should be noted that:

- (xi) When considering the potential application of section 20 of the Equality Act 2010 Mr Burrows stated that as far as he was aware, the claimant, with the condition of scoliosis, was not put at a particular disadvantage in relation to the temperature and working conditions in the delivery area as compared to people who do not suffer from scoliosis.
- (xii) It was not suggested that the claimant suffers from a separate disability of short-term memory loss and/or of anxiety and depression.

3. In addition to clarifying the issues the Judge made orders for disclosure of all relevant documents, preparation of the final bundle and exchange of witness statements. There was a link in the summary to Presidential

Guidance on case management, available online. This contains specific guidance on witnesses and witness statements at Guidance Note 3. In particular at paragraphs 15 - 20 how the statement should be set out and what it should contain. At paragraph 14 is an explanation that a witness statement should be prepared for each witness and "this includes the claimant".

4. At the outset of this hearing the Tribunal had a bundle and three witness statements from the respondent. It was referred to a witness for the claimant Miss Vernon and a document from her was at page 236 addressed "To Whom It May Concern" which was used as her witness statement. There was no witness statement from the claimant. The respondent explained that the date for witness statements had been extended and the respondent sent its witness statements to the claimant on 3 February.
5. The Tribunal was referred to email correspondence passing between the parties and in particular a letter from Miss Nicholson, the solicitor then acting for the respondent, of 16 October 2020 explaining exactly what was required of a witness statement from each witness including the claimant. That email came in response to one from Mr Burrows of 9 October when he referred to various emails he had sent referencing documents 7.1 and 7.2. In January and February 2021 Mr Burrows sent various emails to the respondent's solicitor with very little information in and he appeared to rely on these emails at this hearing as witness statements.
6. It was submitted at this hearing on behalf of the respondent that in accordance with the orders made as there was no witness statement the claimant should be debarred from giving evidence. Alternatively, that she should just be subject to cross examination on the list of issues.
7. The Tribunal adjourned to consider the position and had sent to it in the break copies of the relevant emails relied upon by the claimant. The Tribunal concluded that in accordance with the overriding objective which requires the Tribunal and the parties to act in ways that are proportionate and fair to all concerned it was appropriate to try and proceed with this Hearing. The respondent could put questions in cross examination to the claimant. That would then be taken as her evidence. Mr Burrows would not be able to assist her in giving that evidence, he would however be able to cross examine the respondent's witnesses. The Tribunal did not consider it proportionate to adjourn the hearing or alternatively to debar the claimant from giving evidence when as a litigant in person she may not have understood what was required. An adjournment would only add further significant delay to the hearing of a claim started in 2019. It seemed to the Tribunal that a proportionate way to proceed which would not disadvantage either party was to have the claimant cross examined.
8. The Tribunal adjourned to read the respondent's witness statements and some of the documents in the bundle. It had a digital bundle of 266 pages. All references in these Reasons to page numbers are to those electronic pages.
9. On the afternoon of the second day of this hearing Mr Burrows referred to

the claimant's bundle that he had sent recorded delivery to the Watford Employment Tribunal. That was the first mention of it. The Judge had in fact made enquiries of Watford prior to this hearing about whether there were any other documents and was told there were not. Mr Kirk confirmed the respondent did not have a claimant's bundle. It was not therefore before this tribunal. From the evidence heard the Tribunal finds the following facts.

The Facts

10. The claimant's contract of employment was seen in the bundle at page 53. She commenced work on 13 September 2004, her role was to work in the stockroom 20 hours a week. Mr Burrows tried to raise various matters which occurred in 2009 and 2011 about the claimant's hours but the Tribunal has not made findings in relation to those as it is not required to do so to resolve the agreed issues before it.
11. What the Tribunal did see was the claimant's application form to the respondent in which she ticked the box that she did not have a disability, gave no information in the section about medical history of operations, serious illnesses or accidents and did not require any adjustments for the interview. The wording on the form was that the respondent would offer employment irrespective of physical or mental disabilities wherever possible and explained that the question was there to assist in its aim to ensure any special arrangements or assistance were provided if the applicant came for interview.
12. The claimant did state on the application form she had worked for Wilkinson's previously and did not note on the application form any absences from work.
13. In setting out her qualifications the claimant showed three GCSEs at Grade G, Mr Burrows suggested in his submissions that it would have been obvious to anyone seeing those grades that the claimant had learning difficulties. The Tribunal does not accept that a reasonable employer would automatically without further information or evidence make that assumption. The claimant confirmed that it was her signature on the application form.
14. The claimant's hours changed over the years and latterly she had been working 6-9 am in the delivery area and then till 11am in the store primarily in the fitting room area. The Tribunal accepts the evidence of the respondent that the claimant received very positive feedback from customers for her assistance in that area. From the evidence heard the Tribunal is satisfied that the delivery bay was upstairs from the store, but the claimant was rarely on her own there. Both Miss Bloom and Miss Hoyle worked in there also and although there may have been occasions when the claimant was there on her own when she finished in the delivery area she would go to work in the fitting rooms in the store.
15. The Tribunal heard from Miss Vernon, a good friend of the claimant who had worked previously with the respondent. It was established that she must have left in or about 2013 and therefore although she could give

some evidence about the stockroom she was not working there at the time the claimant complains about.

16. The Tribunal does not accept that the area was dark and dingy as suggested by the claimant and her witness. It has no evidence before it of any incidents occurring as a result nor matters being escalated by the claimant or any colleagues due to concerns with the environment. The claimant and her colleagues may well have had discussions amongst themselves about it being too cold or too hot on occasions. but no formal complaints were made. It was a delivery area with stock coming in and out and inevitably it was not going to be as comfortable a working area as the shop floor itself. There is of course a duty on an employee as well as the employer when it comes to Health & Safety to take all reasonable steps to protect themselves as well as others.
17. The Tribunal also saw messages from Miss Bloom recommending the wearing of coats on occasions and even the claimant accepted she did sometimes do that.
18. With regard to the shutters in that area, the Tribunal accepts that they could be opened but that had to be by management due to security issues if it was hot to allow air to come in. Staff had to ask the manager to do that.
19. There is an allegation that the respondent failed to mend the heating in the delivery area in 2017/2018 but the Tribunal does not accept that. It saw call out logs (page 113) November 2017, a service sheet at page 111 and various attempts by the respondent to sort out heating issues. There is a log of calls to the Bedford store for the whole period 2017 to December 2020. Stephanie Baird gave evidence which the Tribunal accepts that in or about 2016 they introduced an energy management system because of the onus on all companies to become more efficient in their operation. This meant they went onto a timer that controlled the whole store. It could not be overridden as it previously had by pushing buttons and only the main controls worked the whole store.
20. The claimant alleges that people talked unpleasantly behind her back. In cross examination she said she overheard one supervisor in the delivery area. This is the first time it was mentioned, it was not mentioned in any of her meetings with the respondent, that the Tribunal has heard about in these proceedings. The claimant in cross examination said she had mentioned it but could not remember to who. Miss Vernon said that in 2017 some years after she had left she was attending the store with her mother and overheard staff talking about someone. She did not know who the staff were, she inferred they were talking about the claimant. There is no evidence about what they were saying. She says she told the claimant about this but again there is no evidence of the claimant raising this with anyone.
21. The claimant alleges that the respondent failed to offer her any promotion opportunities. From the evidence it has heard the Tribunal is satisfied that the claimant never expressed an interest in promotion opportunities and never applied for vacancies. These were mentioned in morning team talks

and were displayed on the noticeboard in the staff room. There was no evidence that the claimant ever suggested to managers she would like to progress to another role.

22. The claimant went off sick in September 2018 never to return to work. The Tribunal saw sick notes starting on 12 September 2018 describing low mood (page 123) this was for 2 weeks absence. Neither this nor any other sick note suggested any adjustments the employer could make to assist the claimant returning to work. The next sick note on the 26 September 2018 described depression and low mood. In the next note of 23 October, it stated the same but said the claimant was waiting for a counselling appointment.
23. The Tribunal saw text messages between Miss Bloom and the claimant starting on 8 November 2018 in which Miss Bloom suggested they meet either at the claimant's home, somewhere in town, a coffee shop or somewhere else. The claimant indicated she would prefer to meet in town and Miss Bloom stated she would ask HR to arrange it.
24. On 23 November Liz Bloom sent a text to the claimant stating that she should not get stressed about the meeting as it was just a chat to see how she was, and they were happy for the claimant's father to accompany her. She ended stating that if the claimant had any questions 'don't be afraid to ask me' and finished the text with a row of kisses. This is not the type of exchange the Tribunal would expect to see between a member of staff and someone that she later said was bullying her. It is also the type of relationship where the claimant could have raised issues if she had any.
25. A meeting was scheduled for 26 November at the Bedford store to discuss how they could support the claimant and facilitate her return to work. The letter indicated that they would like to contact the claimant's General Practitioner and possibly refer to Occupational Health and enclosed a form requiring the claimant to consent to the obtaining of a medical report. The claimant was reminded of her right to be accompanied. This was re-arranged to 14 December so the claimant's father could accompany her and subsequently to 17 December when it did take place.
26. The only times when there was allegedly short notice was when the meetings were yet again re-arranged to accommodate the claimant and her representative.
27. The meeting that took place on 17 December 2018 attended by Mr Burrows. He objected to the respondent taking notes and Miss Bloom therefore tried to summarise as best she could the meeting afterwards and emailed this to HR. The claimant read out a prepared note, but Mr Burrows would not allow the respondent to take a copy. Again, Miss Bloom tried to summarise this, and the claimant had said that the last 18 months had been the worst for her. She stated that her managers did not care about her working conditions and had caused her depression and anxiety. Mr Burrows alleged that heating had been turned off to save money. Mr Burrows told them the claimant has scoliosis and a rod in her back and that she had mentioned it at her interview.

28. Miss Bloom's records note that she stated she was unaware of this prior to that meeting. The claimant could not remember if she had told anyone since. Miss Bloom suggested that they could try and change the claimant's shifts and her role to help her come back to work but the claimant did not think anything could help. Mr Burrows said that he would take the medical consent form with him but that they would not fill it in. Miss Bloom recorded how she had found this to be a very unusual meeting and felt that Mr Burrows had come across as rude and abrupt.
29. There was a letter sent by HR to the claimant on 10 January 2019 with a summary of the meeting stating they would continue to keep in touch with her. She was then invited to a meeting on 18 January and emails were passing between the parties for some time re-arranging the dates to fit in with the claimant's father. The meeting eventually took place on 19 March, which was the meeting that should have taken place on 18 January.
30. This meeting took place with Stephanie Baird the Regional Business Manager. It was suggested in the list of issues she did not have experience to conduct such a meeting but the Tribunal accepts that she is trained to that level and was working with HR advice.
31. Unfortunately, the first set of minutes of the meeting were set in tabular form and the initials of the speaker did not always align with the text. The respondent endeavoured to correct this and a second set of minutes were produced which although still slightly unaligned do make for easier reading and by the context it is usually possible to understand who is speaking.
32. Miss Baird tried to understand whether if the environmental concerns in the delivery bay were to be sorted whether the claimant could come back to work but the claimant did not think so. Mr Burrows alleged that the claimant had been bullied. Miss Baird set out in a letter of 2 April her summary of that meeting making it clear they would like to meet again to discuss the claimant's return to work and again making it clear that they would really be helped if they could have access to the GP to obtain medical advice to help them support the claimant.
33. The respondent wanted to meet the claimant again on 10 April but again this was re-arranged on numerous occasions and eventually the final date of 21 June was settled on. The claimant however resigned on 18 June and the full content of her resignation email seen at page 212 stated as follows:

"Dear Employee Relations Team,

After two meeting with HR my confidence in my employment has totally gone. With all the letters i have received you just do not give me any hope that i will be treated any differently, As far as i am concerned you have not gave me any hope that it will change. Therefore i am forced to give you my notice to leave.

My reasons for leaving is for the way i have been treated over the past few years by management. Their lack of understanding and their attitude when i complained about my working conditions and your grievance procedure.

Also the last straw for me is the winter of 2017/2018 (beast from the east) and a very hot summer 2018 management showed no concerns about my working conditions as apposed with the conditions with the shop floor. The last meeting with Leanne Reymes - Cole, her report states that i am not in a position to return to work until i have some answers, therefore i will not attend any more meeting until Leanne has got back to me with a report which i never received. I believe nothing has changed. I will be seeking advice from C.A.B about my next step to take. I understand that New Look is an equal opportunities employer, You have never given me this opportunity by various managers.

Kim Burrows.”

The Relevant Law

34. The Tribunal accepts the legal position as set out by Mr Kirk in his skeleton argument where he sets out the established principals. Of fundamental importance are the following.
35. The starting point in a constructive dismissal is still the decision in Western Excavation (ECC) Ltd v Sharp [1978] IRLR 27 in which it was held:

‘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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract’

36. It is now well recognised that the breach of contract may be that of the implied term of mutual trust and confidence. The test for the tribunal to consider is that set out in Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462 HL where it was stated that the employer must 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.”

37. In London Borough of Waltham Forest v Omilaju [2005] IRLR 35 the court dealt with the issue of ‘the final straw’ and held that:

The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

38. As stated in Western Excavating the employee must 'make up his mind soon after the conduct of which he complains' otherwise it will he will have affirmed the contract.
39. The definition of disability is found at section 6 of the Equality Act 2010 (EA) and provides
- A person (P) has a disability if –*
- (a) P has a physical or mental impairment, and*
 - (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
40. The tribunal must and has had regard to Schedule 1 of the EA and the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)

The Tribunals Conclusions

41. Dealing firstly with issues of credibility, the Tribunal accepts the submissions made on behalf of the respondent that the claimant's evidence in the main lacked credibility and where it varies to that of the respondent's witnesses the evidence of the respondent is to be preferred. Even taking on board that the claimant may have some learning difficulties (of which there is no medical evidence) many of her answers were evasive and this was particularly apparent when the questions appeared inconvenient to her case. For example, she was taken by counsel to points in discussions with the respondent which could be said to be supportive of her and she would always answer that she could not remember but then she would be confident that she had remembered something that had happened several years previously. Some points raised by her had no corroboration be it in any of the documents in the bundle, any notes or even her own claim form. A lot of the evidence contradicted the contemporaneous documents in the bundle. There was a suggestion that the claimant would have declared her disability when applying but the application form shows to the contrary with the box clearly ticked that she did not have a disability. An allegation was made by Mr Burrows late on in the hearing that this application form must be a forgery without there being any evidence to support that allegation and it never having been made before.
42. The claimant has not established a breach of any express or implied term of the contract of employment. None of the matters relied upon amounted to a breach. The claimant was employed to work in the delivery bay. It may at times have been cold and others hot, but the respondent did try to address these issues when they were made aware and the employees themselves needed to adapt to varying conditions. There is no evidence of the claimant having made complaints to management that were not acted upon. It is not accepted that the claimant was in the area entirely on her own although she may have been there alone occasionally.

43. The claimant and her witness gave very little detail of people talking behind her back and this is not something raised by the claimant at the time.
44. Vacancies were discussed at Team Talks and advertised internally but the claimant never put herself forward for any opportunities.
45. The claimant was given appropriate notice of meetings, the only times it was 2 or 3 days' notice was when the original meeting had been re-arranged several times to accommodate the claimant and her father.
46. It follows that the claimant resigned and was not in law dismissed and the claim of constructive dismissal must fail and is dismissed.

Disability

47. Dealing then with the other claim brought by the claimant, the preliminary hearing made it clear that the claimant only relies on scoliosis and not short term memory loss or anxiety and depression. There is no doubt that the claimant has scoliosis and that it is long term however there is absolutely no evidence whatsoever from the claimant or from any medical records that it has a substantial and adverse effect on her ability to carry out normal day to day activities as required by the definition in the Equality Act 2010. It follows on that basis alone that the claimant's disability claim fails and is dismissed.
48. Dealing though with the allegation that is made that the claimant was made to work in the delivery area because of the lump on her back being the 'something arising' in consequence of disability this was not factually the case. The claimant was employed to do that work and worked there in accordance with her contract.
49. Another issue regarding the disability claim is that it is significantly out of time. The claimant had not had to work in the delivery area since going off sick in September 2018, yet the claim was not issued until August 2019. It was therefore significantly out of time.
50. The respondent's alternative position was that the last possible date that time could run from was the meeting on 17 December at which the respondent made it clear that it could make adjustments for the claimant but even taking that date as the date on which time ran from a disability claim is significantly out of time. No evidence has been adduced as to why it was not possible for the claimant to submit the claim in time and why it would be just and equitable to extend time.

51. There was no claim before this Tribunal that the resignation and the alleged constructive dismissal was in any way related to disability. It follows therefore in view of those conclusions that all claims fail and are dismissed.

Employment Judge Laidler

Date: 17 September 2021

Judgment sent to the parties on

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For the Tribunal office