EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Bonney Baggaley **v** **Just Enough UK Ltd**

Heard at: Aylesbury Employment Tribunal (via CVP)

On: 26th February 2021

Before: Employment Judge King

Appearances

For the Claimant: In person
For the Respondent: Mr P Knight (Director)

JUDGMENT having been sent to the parties on 4th March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the judgment of the Tribunal in the above matter which was given orally with full reasons on the day. The case was listed for a 1 day commencing 26th February 2021. The claimant requested written reasons and the respondent also requested written reasons as he would like to read them. The judgment having been sent promptly after hearing for payment or enforcement the reasons have taken longer to provide due to the workload of the Tribunal. In between the claimant has notified the Tribunal that the respondent is now insolvent.

2. The claimant represented herself. The respondent was represented by Mr Knight a Director. I heard evidence from the claimant and submissions from both sides including Mr Knight Director of the respondent. The claimant prepared a witness statement and bundle which ran to 52 pages to which I had regard in the hearing.

3. At the outset of the hearing the claims were identified as unfair dismissal (constructive) and the claimant wanted to bring a claim for £5,000 in

respect of her shareholding under a shareholder's agreement. The Tribunal explained that the Tribunal does not have jurisdiction to hear such claims as this was not for breach of contract arising out of the contract of employment but one which the claimant brought arising out of her status as a shareholder and not as an employee. That claim is not one that arose or was outstanding on the termination of employment of the claimant. It was not one for damages for breach of contract of employment or any other contract connected with employment. The claimant had section 3(2) of the Employment Tribunals Act 1996 and Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 brought to her attention. For completeness these are set out in the law section below. This claim did not continue as it was identified as being outside of the Tribunal's jurisdiction. The Tribunal went on to consider instead the sole remaining claim of constructive unfair dismissal.

The issues

4. As dismissal was in dispute, the respondent asserted that the claimant simply resigned, this was the first issue the Tribunal had to determine and a list of issues was discussed at the outset of the hearing as follows.

5. **Was the claimant dismissed? Was there a fundamental breach of contract in the alleged ultimatum given in either a breach of the implied term as to mutual trust and confidence or as a change in terms and conditions?**

6. **Was any such breach of contract waived and the contract affirmed?**

7. **If not did the claimant resign in response to the respondent's conduct?**

8. **If the claimant was dismissed what was the principal reason?**

9. **Was a fair process followed?**

10. **What is the appropriate remedy?**

The law

Unfair Dismissal

11. Dismissal under Section 95 of the Employment Rights Act 1996 is in dispute as this is a constructive unfair dismissal case. S95 states as follows:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—*
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*

(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.
(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—
(a) the employer gives notice to the employee to terminate his contract of employment, and
(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;
and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

12. Under Section 94 of the Employment Rights Act (ERA) 1996;

(1) An employee has the right not to be unfairly dismissed by his employer.

13. Section 98 of the ERA states that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –
(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—
(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Case law

14. There are also a number of cases relevant to the issues which I discussed with the parties as follows:

Western Excavating (ECC) Ltd v Sharp [1978] ICR 221
Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121
East Sussex County Council v Walker (1972) IITR 280
Hogg v Dover College [1990] ICR 39
Alcan Extrusions v Yates and others [1996] IRLR 327
Wadham Stringer Communications (London) Ltd v Brown UKEAT/322/82
Nottinghamshire County Council v Meikle [2004] IRLR 703
Malik and another v Bank of Credit & Commerce International SA (in compulsory liquidation) [1998] AC 20

Shareholder's claims

15. As set out above the claimant cannot bring these claims before the Employment Tribunal by virtue of the following provisions.

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 Article 3 says "

"Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b) the claim is not one to which article 5 applies; and
(c) the claim arises or is outstanding on the termination of the employee's employment."

16. S 3 Employment Tribunals Act 1996 says:

***S3 Power to confer further jurisdiction on [employment tribunals]*[1] .**
(1) The appropriate Minister may by order provide that proceedings in respect of—
(a) any claim to which this section applies, or
(b) any claim to which this section applies and which is of a description specified in the order.
may, subject to such exceptions (if any) as may be so specified, be brought before an [employment tribunal][2] .

(2) Subject to subsection (3), this section applies to—
(a) a claim for damages for breach of a contract of employment or other contract connected with employment,
(b) a claim for a sum due under such a contract, and
(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

(3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.

(4) Any jurisdiction conferred on an [employment tribunal][2] *by virtue of this section in respect of any claim is exercisable concurrently with any court in England and Wales or in Scotland which has jurisdiction to hear and determine an action in respect of the claim.*

(5) In this section—
"appropriate Minister" , as respects a claim in respect of which an action could be heard and determined by a court in England and Wales, means the Lord Chancellor and, as respects a claim in respect of which an action could be heard and determined by a court in Scotland, means the Lord Advocate, and
"personal injuries" includes any disease and any impairment of a person's physical or mental condition.
(6) In this section a reference to breach of a contract includes a reference to breach of—
(a) a term implied in a contract by or under any enactment or otherwise,
(b) a term of a contract as modified by or under any enactment or otherwise, and
(c) a term which, although not contained in a contract, is incorporated in the contract by another term of the contract.

Findings of fact

17. The claimant was employed from 4th April 2016 as Chief Operations Officer of the respondent. The claimant resigned on 28th February 2020 and her employment terminated on 3rd April 2020.

18. The claimant's contract provided for two days at the respondent's premises in London and three days a week from home. In September 2019 a number of staff from the respondent were made redundant and the claimant worked from home.

19. Mr Knight had sought a buyer for the company of Academia in Enfield. This sale has subsequently fallen through due to the lockdown. Mr Knight has set up a new company The Social Book Club and this was said in the shareholders meeting on the 21st of September 2020 to in due course absorb (including liabilities) the respondent in this case Just Enough UK Limited. However, at the time of this hearing Mr Knight confirmed that the respondent was still in existence and that this had not happened. With the parties during the hearing, we conducted a search at Companies House and were able to together confirm that the company was still active on Companies House and not in administration or liquidation. This was done at the outset of the hearing.

20. On the 25th February 2020 Mr Knight called the claimant to discuss her future as either work in the office (Academia in Enfield) five days a week to manage the sales team or if London life was not for her, to leave and he would buy her shares for £5,000. The claimant asked Mr Knight to put this in writing. He duly did so on 26th February 2020. His email confirmed that "As per our conversation yesterday, these are the two ways forward I see working with Just Enough being in Academia. 1. my preferred choice – you can come down and live nearby [this then outlined that she would be in the office 5 days a week and other terms]. 2. not my preferred choice - if you feel London life is not for you, I would like to offer you £5,000 for your share or you can keep it and as the company grows you can cash out at that point [the email set out the need to do a handover to Academia]. A meeting was arranged for later in the week for the claimant to confirm which of these it was to be.

21. Mr Knight says but he discussed other options with Mike CEO of Academia including maintaining the current relationship but this was never put to the claimant. The first the claimant heard about this was in the hearing. The respondent had not provided any witness statements outlining such matters in advance.

22. On 28th February 2020 the claimant resigned as she could not relocate her family and did not want to commute five days a week. She referenced the two options given to her and as a consequence she would need to leave. She set out that there was no solid platform and that over the past few months things had changed on a daily basis. She also outlined that she had been offered a role with a different company. The claimant's evidence was that she felt she had no choice to do so as she could not commute or move her family and that she saw it as an ultimatum, one choice or the other, effectively having no choice, which I accept.

23. The claimant gave evidence about the alternative role she had secured. She had been looking for alternative employment for some time given the situation and the uncertainty with her position at the respondent. She was offered another role with a charity around this time. She received a contract on the 26th February 2020 for the offer which she viewed on the 27th February 2020 and accepted and signed on the 27th February 2020. Her evidence was had she not been given the ultimatum she would have stayed with the respondent but felt she had no choice but take the role offered as it was better than no role. Long term she had only taken it to avoid having no role at all and ended up only staying a while as her gut instinct that it was not right was borne out but she felt she had little choice at the time.

24. The claimant commenced a new role on 14th April 2020 and informed the Tribunal her only losses were a week's pay at the gross sum of £604.00. I accept this evidence. There were no payslips produced on either side but the claimant did have some to hand when we discussed her net pay.

25. The claimant submitted her claim on 24th June 2020 following a period of ACAS early conciliation between 10th June 2020 and 12th June 2020.

Conclusions

Constructive Unfair Dismissal

Was the claimant dismissed? Was there a fundamental breach of contract in the alleged ultimatum given in either a breach of the implied term as to mutual trust and confidence or as a change in terms and conditions?

26. In accordance with *Western Excavating v Sharp* the test of whether or not there has been a repudiatory breach is an objective one, whether or not the employer intended to breach the contract is irrelevant. The circumstances which led to the employer being in breach or the circumstances which led the employee to accept such repudiation should

not be taken into account when determining if there has been a breach for example economic pressures in accordance with *Wadham Stringer Communications (London) Ltd v Brown.*

27. The issue is whether there was a dismissal or resignation in this case. Being forced to accept a change in contractual terms for example where an employer imposes radically different terms on the employee than the original contract can mean it is effectively terminated and an employment tribunal can construe this as a dismissal in accordance with *Hogg v Dover College [1990] & Alcan Extrusions v Yates and others [1996].*

28. Where an employee is told you will be dismissed if you do not resign this can also be a dismissal in accordance with *East Sussex County Council v Walker (1972)*.

29. Here the claimant relies not on an express dismissal but a breach of express terms namely had terms and conditions and location of work alternatively a breach of the implied term of trust and confidence. Here the claimant was told to either work in London or leave he said she thought she had no choice but to resign.

30. The respondent sought to rely on the fact the claimant had not spoken to him before resigning or given him a chance to explain if she was unhappy with the two options he presented to her. It is not possible for an employer to cure a repudiatory breach of contract by attempting to make amends or undo what has been done. Unless the employee has waived the breach or affirmed the contract the employee has an unfettered right to choose whether to treat the breach as terminal in accordance with *Buckland v Bournemouth University Higher Education Corporation [2010].*

31. The respondent told her she either had to work out of London or leave but this would have been a change to her place of work which had been fully home based for some time and prior to that home based in part. She was being told that the working location had to change but it had not yet done so. The other way the claimant puts her case as a breach of implied term of mutual trust and confidence which in my view is the stronger case. The general principle was set out in *Malik and another v Bank of Credit & Commerce International SA (in compulsory liquidation) as "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 trust and confidence between employer and employee"* if the employers conduct is likely to destroy trust and confidence, the employee does not also have to show that the employer intended (or calculated) to destroy it.

32. Here the respondent presented the claimant with two choices and a fait il compli. The respondent's approach to implementing changes in terms and conditions and the way it went about the matter and its conduct as a whole, with no consultation, can be said to be likely to seriously damage trust and confidence. This conduct undermined the relationship of trust and confidence and I do not accept that even if the respondent had discussed

other options this information was ever passed onto the claimant. She had a simple choice to make and was presented with the option of relocation or commuting to be in the office 5 days a week or leaving and she chose her family.

33. I find having heard the claimant's evidence of the discussions and seen the correspondence that the respondent's conduct was a breach of the implied term of mutual trust and confidence entitling the claimant to resign.

Was any such breach of contract waived and the contract affirmed?

34. The claimant can choose to accept the breach of contract by resigning. The claimant could have done this or risk staying and affirming the contract. The claimant resigned promptly. The call took place on the 25th February and the email was received on the 26th February. The claimant resigned on the 28th February.

35. I do not consider a matter of days in this case to be fatal or that this could amount to an affirmation by the claimant. When faced with an ultimatum she quite rightly had to consider which option to elect for.

If not did the claimant resign in response to the respondent's conduct?

36. The claimant must only resign in response, at least in part, to the employers fundamental breach but it does not have to be the effective cause of the resignation in accordance with *Nottinghamshire County Council v Meikle [2004].*

37. The claimant had another job offer before she resigned but this is not material. I accept her evidence that she had started looking for another role because things were uncertain that the respondent. Further I accept her evidence that had it not been for the ultimatum she would have stayed at the respondent as she had at that point had a good working relationship with Mr Knight. This was evident in the correspondence and her evidence before me.

If the claimant was dismissed what was the principal reason?

38. The respondent asserted that there had been no dismissal but that economic factors were at stake. The respondent did not submit but this was a redundancy situation. The respondent also made the submission that the claimant should have come back to him and he could have offered her the same as her previous contract namely two days in the office and three days from home if she had asked. This is illustrative that this was not a redundancy situation. The claimant's role was still there to be done but it was him choosing where the claimant should do it unilaterally without consultation. The respondent just wanted her in the office five days a week or she had to leave.

39. As such, the respondent did not have a fair reason within the meaning of section 98 the Employment Rights Act 1996 to dismiss the claimant.

Was a fair process followed?

40. There was no process followed merely the ultimatum issued and followed up by email. There was no fair reason to dismiss the claimant and as such it follows there was no fair process followed.

41. Given my conclusions above, the claimant has been unfairly dismissed and is entitled to a remedy in this case.

What is the appropriate remedy?

42. The employment tribunal must consider what is just and equitable in this case as set out in s122 of the Employment Rights Act 1996. The respondent was a small employer and I had to consider what it was just and equitable to award in this case.

43. The claimant did not act unreasonably in turning down the offer of alternative employment in London as she was unable to meet this due to family commitments. The respondent did not put any other proposals to her.

44. Once the decision on liability was delivered to the parties, we discussed the suitable remedy. The cap on a week's wages at the relevant time was £525 per week. The claimant's actual gross weekly sum exceeded this amount but must be capped at that amount for the purposes of the basis award. The claimant had three complete years of service at the time of her resignation and therefore I consider it just and equitable to award her a this amount as a basic award. Her effective date of termination was later but I consider this the just and equitable approach to take. The sum awarded is £1575.00 in respect to the basic award.

45. The claimant started a new role after just one week on a higher package. She started her new role on the 14th April 2020. The claimant claimed the sum of £604 in her schedule of loss for lost earnings. This was in fact a gross sum not the net sum and the Tribunal awards instead what she has lost which is the net sum.

46. There were no payslips from either side in the bundle but the claimant was able to produce pay slips in the hearing and the claimant confirmed her net pay was £429.46. As such the claimant was awarded the net sum of one week salary so £429.46 as a compensatory award. It is not just and equitable to award more.

47. The total sum the respondent should pay to the claimant is therefore the sum of £2,004.46 in respect of her constructive unfair dismissal claims. Any claims in respect of the shareholders agreement would need to be

brought elsewhere as the tribunal did not have jurisdiction to hear the same.

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Employment Judge King

Date: 04/10/2021…….

Sent to the parties on: 12 October 2021

For the Tribunal Office