Case No:

3313253/2019 and 3302366/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Davies	**v**	BMW (UK) Manufacturing Limited

Heard at: Watford **On:** 22 to 24 June 2021

Before: Employment Judge Lang
Members: Mrs F Betts
Ms J Stewart

Appearances:
For the Claimant: In person
For the Respondent: Mr G Self (Counsel)

JUDGMENT having been sent to the parties on 13 July 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. By claim forms issued on 20 March 2019 and 25 March 2019 the claimant brought complaints of detriment under Section 146 of the Trade Union Labour Relations Consolidation Act 1992 alleging that she had been penalised for taking part in Trade Union activities and for unfair dismissal under Section 152 of the same Act and also Section 98 of the Employment Rights Act 1996. ACAS early conciliation took place from 13 February 2019 to 20 February 2019.

The Hearing

2. At the start of the Hearing the tribunal dealt with the claimant's application to amend her claim to include a complaint under Section 100 1(c) of the Employment Rights Act 1996 and this application was refused. The tribunal had regard to the timing of the application which was made by e-mail on 22 April 2021 over two years after the submission of her complaints and following Preliminary Hearings in February and July 2020. The respondent also considered the hardship to the respondent who would be facing an uncapped claim for unfair dismissal which would require the respondent to produce

further evidence regarding the issues arising from a Section 100 1(c) complaint. The tribunal carefully considered all of the relevant factors and refused the amendment application.

3. The tribunal heard evidence from the claimant and from Mr Philip Glancey (former Shop Steward) and also heard evidence from the following for the respondent: Ian Simonson (former Process Leader), Gordon Macintyre (Group Leader), Martin Lyne, Joanna Murktas and Akhil Patel (all HR Managers). We also had an agreed Bundle totalling 383 pages.

The Issues

4. Time limits

4.1 Has the claimant brought her detriment claims (as detailed below) within the statutory time limit set out at section 147 TULR(C)A?

4.2 If not, was it reasonably practicable for the claim to be brought within the statutory time limit and if so was it brought within a reasonable time thereafter?

5. Unfair Dismissal

5.1 Was the claimant constructively dismissed?

5.2 Did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between itself and the claimant such that there was a fundamental breach of contract?

5.3 The claimant relies on the last straw doctrine, the last straw being the attendance of Mr McIntyre at her home address to deliver documents.

5.4 For the avoidance of doubt the claimant relies upon the following conduct in support of her constructive dismissal claim:

a) The two matters set out below in her detriment claim.

b) The matters raised in her grievance;

c) The outcome of the grievance on 19 March 2019.

d) Disciplinary letter dated 20 March 2019 emailed and hand delivered on 20th March

e) The personal delivery of the letter set out at (d) at the Claimant's home address on 20 March 2019.

5.5 Did the claimant resign, at least in part, in response to such breach?

5.6 Did the claimant delay/waive the breach?

5.7 If the claimant was dismissed what was the reason for her dismissal?

5.8 The claimant asserts that the principal reason for her dismissal was because she had taken part in the activities of an Independent Trade Union pursuant to section 152 (1) (b) TULRCA and that accordingly the dismissal was automatically unfair.

5.9 If the dismissal was not for a Trade Union reason but for a potentially fair reason was the dismissal fair pursuant to section 98(4) ERA?

6. Detriment

6.1 Did the respondent or any of its employees subject the claimant to any detriment by any act or deliberate failure to act for the sole or main purpose of preventing or deterring the claimant from taking part in the activities of an independent Trade Union at an appropriate time or penalising her for doing so:

a) By Ian Simonson and Lee Cook carrying out a 'recorded counselling' with no representative present with a procedure allegedly different to the norm post a mistake on a water test on 26 October 2018.

b) Allegedly by being told by Ian Simonson that the claimant was to be moved from her job role because she was at Grade 2 on 7 November 2018.

Findings of Fact

7. The claimant was employed by the respondent as an Assembly Associate at its Cowley site from 1 June 2015 until her resignation on 22 March 2019. Prior to that she had worked as an Agency Worker at the respondent's site from 2007.

8. The respondent manufactures the Mini at the Cowley Assembly Plant. The claimant reported to Ian Simonson, a Process Leader. He was in charge of the Test and Rectification areas for his shift and was a longstanding Trade Union member himself of 26 years. He in turn reported to Gordon Macintyre, Group Leader. The claimant predominantly worked in the Water Test area. The respondent recognises UNITE and has a close working relationship with the Union with two full-time conveners on site. There was no evidence of any anti-Union action by the respondent and no complaints from the trade union about the treatment of its shop stewards.

9. The claimant was elected as a Shop Steward on 11 September 2017.

10. The claimant was originally a Grade 2 pay grade but was regraded to Grade 3 with effect from 1 June 2018.

11. In June 2018 the claimant raised concerns with Mr Macintyre that ventilation fans in the indoor test track area were not working. Mr Macintyre investigated and established that the fans had been turned off on occasion. He gave instructions on or about 10 June 2018 that the extraction fans were to be switched to automatic. An earlier issue had been raised with Mr Macintyre regarding fumes being emitted when cars were warmed up on the rolling road facility. It was agreed that independent outside testers would investigate the issue. The testing was eventually carried out in January 2019 and the tester concluded that the level of fumes were within an acceptable range. The claimant had also supported this complaint and raised the issue with Mr Macintyre once or twice subsequently despite the fact that senior Union representatives were satisfied with the steps taken.

12. On 26 October 2018 it was reported to Mr Simonson that the claimant had flooded a car during a water test. He examined the car and saw that the flooding was extensive. As the claimant was a Shop Steward, he spoke to the Senior Shop Steward for the area, Mr Vestica. Mr Vestica requested that the claimant receive only a recorded conversation rather than formal disciplinary action. He also said that he didn't feel that he needed to attend a meeting with the claimant. Mr Simonson also reported the flooding incident to Mr Macintyre who agreed with the proposed sanction. The claimant was spoken to and her response was that the car must have been faulty. She did not ask for a companion from the Union to attend the meeting.

13. A Record of Counselling Form was completed and issued to the claimant. This records that the claimant was counselled and advised that a repetition or further similar offence could result in disciplinary action.

14. The respondent does not regard this record of counselling as formal disciplinary action and the tribunal accepts that this was intended to be informal action and not a level 1 recorded oral warning under the respondent's Disciplinary Procedure (which would have remained in place for 13 weeks and been subject to a right of appeal). Mr Simonson gave evidence which the tribunal accepts that he couldn't recall any previous incidents of such severe flooding.

15. On 7 November 2018 Mr Simonson spoke to the claimant about proposed monitoring of the department with a view to reducing the numbers of employees on holiday cover. He told her that this might lead to de-manning and if this was the case she might be affected as she was a Grade 2 and all other workers were a Grade 3. De-manning would not have involved dismissal but could have involved employees possibly being assigned elsewhere.

16. The claimant told Mr Simonson that she had in fact been re-graded as Grade 3. Mr Simonson was not aware of this and asked to see her payslip which the claimant produced. The claimant's account was that Mr Simonson told

her that she was going to be de-manned and made no mention of prior monitoring. The tribunal considers it more likely than not that Mr Simonson told her that de-manning was being considered and gave her a "heads up" that she might be affected as he genuinely believed that she was still a Grade 2. This was intended as a friendly warning to her. Mr Simonson thought that grading was likely to be a determinative factor in any de-manning.

17. The claimant went off sick the very next day (8 November 2018) and did not return to work thereafter.

18. An Occupational Health review was carried out on 27 November 2018. The claimant was referred for counselling for depression and anxiety and was also offered three months' free gym membership. She reported that her absences were related to specific work issues and not her work as a Shop Steward. A work impact assessment was recommended.

19. A further absence review took place on 29 November 2018 and this was followed by a work-related stress assessment review on 5 December 2018.

20. The claimant submitted a statement during that review. She said that she had had no issue with Mr Simonson before the recorded conversation but now felt that he picked on her as a result. The statement she submitted complained about the recorded conversation and the de-manning conversation on 7 November 2018. At the end of the stress assessment she asked that the counselling be removed from her record.

21. The action plan arising from that meeting was for Mr Macintyre to explain that the counselling was the lowest level of discipline, that any de-manning would not affect her and that the claimant should ask for a Trade Union representative if she required one during work meetings. All of this was dealt with and explained to her at a follow-up meeting on 11 December 2018.

22. A further Occupational Health report was prepared following an examination on 2 January 2019. The claimant asked for another meeting before she returned to work and asked to be accompanied by the Regional Union representative. The Union would not accommodate this and suggested that either Mr Vestica or a Senior Shop Steward from another shift should attend.

23. The claimant did not attend a further meeting on 16 January 2019 but was able to attend the following day (17 January 2019) and she was accompanied by Mr Wooding, another Senior Shop Steward. At that meeting she reported that she was not ready to return to work and that she wanted a Regional Trade Union Officer to review her case.

24. On 22 January 2019 the claimant complained by e-mail that people on the shop floor were aware that she had not attended the meeting on 16 January. She was reassured that only the Union plus three employees of the Respondent were aware of the appointment.

25. On 25 January 2019 the claimant raised a formal grievance. This contained the same material as the statement on 5 December 2018 with additional complaints that a Regional Union Representative was not present on 17 January and the privacy concern about the meeting on 16 January. The outcome she was looking for included the removal of the counselling record, an apology from Management and the resumption of her sick pay (which was not due to expire in any event until 28 February 2019) .

26. In the meantime, a further medical report on 29 January recommended the prompt resolution of her work-related disputes. Mr Patel was assigned to investigate the grievance.

27. In the meantime, the claimant attended another absence review meeting on 21 February 2019 and she said that she was awaiting the grievance outcome but said that the Company had been very supportive so far.

28. The grievance hearing took place on 22 January 2019 and the claimant was accompanied by Mr Vestica. The meeting was conducted by David Stanley, a Group Leader. For the very first time the claimant said at the grievance hearing that she was being targeted as she was a Shop Steward. At the grievance she admitted making a mistake with the water test. She refused to give the name of the person who she spoke to from the shop floor about the privacy issue (i.e. missing the 16 January meeting). It was explained to her that the respondent would be unable to investigate this further if she didn't say who she had spoken to.

29. She gave the name of Maurice O'Connor as someone who could substantiate her grievance. Mr O'Connor was interviewed on 1 March 2019 and it is fair to say that he was not supportive of the claimant. He said that she should have dealt with the mistake that she made and "moved on", referring to the counselling record.

30. The claimant asked for the grievance outcome letter to be sent to her by email and this was done on 19 March 2019. The outcome was that the counselling record would remain, there would be no formal apology and that she would be paid Statutory Sick Pay only going forward having exhausted her company sick pay. The claimant was not informed of a right of appeal against the outcome of the grievance in the letter.

31. On 19 March 2019 the claimant was invited to a disciplinary hearing on 22 March 2019 to discuss various allegations being, in essence, her refusal to return to work and she was told that a possible outcome of the hearing was dismissal for gross misconduct. The letter was hand delivered to the claimant by Mr Macintyre as the claimant's home address in Kidlington was on his way home to Woodstock. He simply posted the letter through her letter box and did not knock on the door. The hearing was to be chaired by another manager not Mr Macintyre.

32. The claimant attended on 22 March 2019 and submitted her letter of resignation. She referred to being targeted and referred to the counselling

letter, the de-manning issue and the privacy issue. She said it had got worse after she had made enquiries about air pollution. She had seen Mr Macintyre on her home CCTV delivering the letter and believed this to be a gross invasion of her privacy.

The Law

33. In relation to detriment Section 146 of the 1992 Act sets out the complaint and the position on time limits is set out in Section 147.

> 146 (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
>
> (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,. . .
>
> (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
>
> (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
>
> 147 (1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them] , or
>
> (b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.
>
> (2) For the purposes of subsection (1)—
>
> (a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;
>
> (b) a failure to act shall be treated as done when it was decided on.
>
> (3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—
>
> (a) when he does an act inconsistent with doing the failed act, or

(b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.]

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).]

34. In relation to constructive dismissal, in order to establish she has been constructively dismissed, the employee must show that there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning thereby affirming the contact and losing the right to claim constructive dismissal.

35. Breach of the implied term of mutual trust and confidence is probably the term most frequently relied upon in constructive dismissal cases. This term provides that employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

36. In cases where a breach of the implied term is alleged, the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

37. A breach of the implied term of trust and confidence can be caused by one act or by the cumulative effect of a number of acts or a course of conduct.

38. A last straw incident which triggers the resignation must contribute something to the breach of trust and confidence but need not amount to a breach of contract itself.

39. There is no need for there to be proximity in time or in nature between the last straw and previous acts.

40. Any breach of the implied term is a fundamental breach since it necessarily goes to the root of the contract.

41. Where a number of breaches of contract are relied upon by a claimant then the step by step approach advocated by Lord Justice Underhill in the case of Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978 should be followed -

> In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?
>
> (2) Has he or she affirmed the contract since that act ?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach ?

42. Section 152 of the 1992 Act sets out the law in relation to automatically unfair dismissals for Trade Union activities.

> 152 (1) For purposes of Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> (a) was, or proposed to become, a member of an independent trade union,.
>
> .
>
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . .
>
> (ba) had made use, or proposed to make use, of trade union services at an appropriate time,
>
> (bb) had failed to accept an offer made in contravention of section 145A or 145B, or]
>
> (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

Conclusions

43. In relation to the detriment claim, we conclude that the complaint was brought out of time and that it was reasonably practicable for the claim to have been brought in time. The claimant needed to start early conciliation by 6 February 2019 and she did not. Her complaint was submitted some six weeks out of time. The claimant was engaged with the respondent and the Union during this period and indeed had raised a grievance on 24 January 2019. The claimant could have put in her complaint within the three-month time limit.

44. We do not need to go further in relation to the detriment claim but we are in any event satisfied that the respondent has established to our satisfaction that the reason for the claimant's treatment in any event was in no sense whatsoever on the grounds of her Union activities. We accept that the claimant was properly engaged in union activities when she raised the concerns about the fans and the fumes, however the counselling record and the conversation with Mr Simonson on 7 November 2018 had nothing to do with these activities. We agree with the respondent that there was no

evidence of any anti-Union action and no complaints at all from the Trade Union about the treatment of its Shop Stewards. The flooding incident was a serious one. It was the most serious such incident that Mr Simonson had seen. Mr Simonson himself was a longstanding Union member. The counselling record was not formal action and was not a serious sanction and in the tribunal's assessment was very lenient in the circumstances. We have accepted that Mr Simonson's de-manning discussion was an honest mistake intended as a friendly "heads up" to the claimant and his misunderstanding in relation to her grade was genuine and the de-manning proposal itself had nothing to do with her Trade Union activities, apart of course from the fact that the reason it took place in the first place was that she was a Shop Steward.

45. Turning to unfair dismissal and dealing first with the alleged last straw, we are satisfied that Mr Macintyre's attendance at the claimant's home was not by itself a breach of the implied term. Mr Macintyre was simply acting as a postman and many employers in our experience adopt the same practice of asking other employees to personally deliver letters for good reasons. He did not knock at the door or attempt to speak to the claimant. He had not actually written the letter and it was an invitation to a meeting with another manager altogether.

46. Applying Kaur, we must ask ourselves if the act was nevertheless part of a course of conduct which viewed cumulatively amounted to a breach of the implied term and we conclude it was not.

47. The other matters complained about by the claimant were as follows:

48. The recorded counselling – we have concluded that this was a reasonable sanction. The claimant was not told that she could have a companion but was experienced enough to know that she could have requested one.

49. The de-manning conversation – we form the view that this was an honest mistake on the part of Mr Simonson made with good intentions.

50. The lack of a Regional Trade Union representative- this was not a matter for the respondent and it was not within the respondent's power to provide him.

51. The privacy issue – this could not be investigated fully by the respondent as the claimant would not disclose her source.

52. The grievance outcome – our view is that the grievance manager reached a reasonable conclusion in relation to sick pay, the refusal to provide an apology and the refusal to retract the counselling record – there was no right of appeal offered but the claimant would, we are satisfied, have been well aware of that right.

53. The disciplinary letter – we conclude that the respondent had reasonable and proper cause to send this letter. Matters needed to be progressed and the

claimant needed to be aware that her employment was at risk if progress could not be reached in relation to a return to work solution.

54. We found that none of these matters either individually or cumulatively amounted to a breach of the implied term. There having been no breach, the claimant was not constructively dismissed.

55. We find that the claimant's complaints are not well founded and they are dismissed.

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Employment Judge Lang

Date: …27th August 2021…..

Judgment reasons sent to the parties on

.....21st September 2021.....

.....R Darling.....
For the Tribunal office