



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101161/2020

Held in Glasgow on Monday 23 and Tuesday 24 August 2021

Employment Judge: Rory McPherson

Ms Charlene Cowie

Claimant  
In person

Bute Island Foods Ltd

Respondent  
Represented by  
T Muirhead  
Consultant

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim for constructive unfair dismissal does not succeed.

### REASONS

#### Preliminary

1. The claimant presented her ET1 on **Sunday 23 February 2020** against the respondent following ACAS Early Conciliation (receipt of EC notification on **Tuesday 7 January 2020** and issue of the ACAS Certificate on **Friday 7 February 2020**) following upon the termination of her employment, by resignation, as a Quality Assurance and Training Lead on **Tuesday 22 October 2020** following notice of termination dated **Sunday 20 October 2020**.
2. ET3 was presented on **Friday 20 March 2020**, timeously.

3. The claimant asserts a claim of constructive unfair dismissal. The claimant asserts that the respondent breached the implied duty of trust and confidence in connection with a discussion regarding the claimant's use of her personal mobile phone while at work on **Friday 4 October 2019**. The respondent resists the claim arguing that there was no fundamental breach, and the claimant did not resign in response to any fundamental breach. If there was such a breach, the claimant affirmed such a breach by reason of continuing in employment beyond that breach.
4. In relation to the claimant's claim of **Constructive Unfair Dismissal**, the issues for the Tribunal to consider whether the claimant was constructively dismissed included:
1. Did the alleged breach or breaches of contract relied upon, viewed separately or in isolation, or cumulatively, amount to breaches of the claimant's employment contract *a fundamental breach of the contract of employment, and/or did the respondent breach the implied term of mutual trust and confidence, i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?*
  2. If so, did the claimant "*affirm*" the contract of employment before resigning? To "*affirm*" means to act in a manner that indicates the claimant remains bound by the terms of the contract.
  3. If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation?)
  4. If so – was the dismissal unfair as a result of s95 of Employment Rights Act 1996 (ERA 1996). Section 94(1) ERA 1996 provides that an employee has the right not to be unfairly dismissed by his employer, section 95(1)(c) ERA 1996 provides that an employee is to be regarded as dismissed if "*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."*

### **Remedy for unfair dismissal**

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5. If the claimant was constructively unfairly dismissed and the remedy is compensation:

a. What loss is attributable?

b. Did the claimant minimise her loss?

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c. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, under Section 122(2) ERA 1996, and if so, to what extent?

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d. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, under Section 123(6) ERA 1996?

### **Procedural matters.**

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6. The unrepresented claimant attended with a note-taker, Mr. Sayers. Mr. Muirhead, an experienced consultant, represented the respondent. The commencement of the hearing was slightly delayed owing circumstances of the pandemic, the respondent representative having had an initial positive Covid test. Both parties co-operated in accordance with the overriding objective, and the respondent's representative initially attended via CVP before he was able to attend in person in the afternoon following a negative PCR Test.

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7. A joint bundle had been provided, as had a schedule of loss and counter schedule.

8. Oral evidence was given by the claimant and two of her former colleagues, who remain employees of the respondent, Ms. Carrie Ann Howie, and Mr. Martyn Lawrence. Oral evidence was given for the respondent by Ms. Debbie Dawson, who was a Director at the material time and is now a Consultant with the respondent, together with Mr. Mark Crichton and Guy Crichton, both of whom were Directors at the material time and remain Directors.
9. After the evidential element of the hearing, parties were given the opportunity to exchange written submissions with each other, before providing final written submissions to the Tribunal.

### Findings in Fact

10. The respondents operate as a family business and are manufacturers of non-dairy cheese substitute products.
11. The claimant commenced employment with the respondent on **Monday 31 October 2016** with the respondents, initially as Training Lead and Quality Assurance and latterly as a Quality Assurance and Training Lead.
12. In or around **January 2018**, the claimant had intimated an intention to leave employment with the respondents but had decided to stay.
13. From around **August 2018**, the respondent agreed to the claimant's proposal that her role was changed to that of Quality Assurance and Training Lead.
14. From around **May 2019**, the respondent agreed to the claimant's proposal that her 5-day working week was reduced to 2 days (Thursday and Friday) as the claimant had taken up alternate employment with an unconnected employer on the remaining days.
15. By **October 2019**, while the claimant's typical working day was 9 am to 4 pm, the respondent had informally agreed to the claimant's proposal that she be permitted to attend a few minutes later than her scheduled 9 am start when,

for instance, she was dropping her son off for school (the informal potential variation of start time).

- 5 16. In the claimant's role as Quality Assurance and Training Lead, she was permitted, on a limited basis, to use her own mobile phone during working hours, namely, to engage with colleagues on technical issues, including via WhatsApp.
- 10 17. Ms. Dawson, who was a director, had been advised by the respondent's Office Manager of a concern that the claimant was amongst staff who had been using their mobile phone during working hours for non-permissible reasons.
- 15 18. Ms. Dawson, before the interaction on Friday 4 October 2019, had not viewed the claimant using her mobile phone in the respondent premises.
- 20 19. On **Friday 4 October 2019**, Ms. Dawson, who would generally engage with employees, including the claimant on a friendly level, entered the Technical Office where the claimant worked, more purposefully having been advised of mobile phone usage concerns and identified the claimant was using a mobile phone. Against the background of the concern expressed to her by the Office Manager regarding personal mobile phone use, Ms. Dawson considered she required an explanation as to what the claimant was using the phone for and firmly insisted upon same. While Ms. Dawson's voice level raised, it was not unduly so, she did not shout, and her manner was neither aggressive nor
- 25 angry. The claimant felt embarrassed at what, to the claimant, appeared to be a public rebuke in the presence of 3 of her colleagues in the Technical Office. During a short, heightened exchange, the claimant explained honestly and accurately that she was entitled to use her own mobile phone for work WhatsApp messages. Ms. Dawson departed the Technical Office in the same
- 30 purposeful manner she had entered and returned to the separate Directors Office. Ms. Crichton did not stare angrily at the claimant during or after the exchange and did not stomp in or out of the Technical Office. However, the claimant's 3 colleagues in the Technical Office were taken aback at Ms. Dawson's questioning of their colleague as it appeared to them to be out

of the blue. After a short period, the claimant, who was angry at what she saw as Ms. Dawson's unjustified public upbraiding, left the Technical Office to confront Ms. Dawson.

- 5 20. The claimant's honest but mistaken perception was that Ms. Dawson had entered the Technical Office, having viewed the claimant on CCTV via cameras within the Technical Office using her mobile phone to reprimand the claimant. Ms. Dawson had not viewed any CCTV video of the claimant relevant to the subsequent interaction that day. The respondent used such cameras within the respondent business essentially as a security measure.
- 10 21. Ms. Dawson was, by the time the claimant entered the Director's Office, in a meeting with a fellow Director. The door to the Director's Office was closed, as it usually was. It was expected that employees would knock before entering as a matter of courtesy, including reflecting the confidential nature of discussions that took place in the Director's Office.
- 15 22. The claimant walked without waiting for a response or acknowledgment. Ms Dawson was in discussion with Mr Mark Crichton. The claimant asserted to Ms. Dawson, that mobile phone usage was not something that should have been raised in front of her colleagues, in a brief exchange of a few minutes, with both Ms. Dawson and the claimant speaking at the same time. Mr. Mark Crichton, in a mistaken but genuine attempt to reset the nature of the exchange, suggested that the claimant's outrage at being asked over her mobile phone use was misplaced, noting that the claimant had been in the staff canteen that day, after starting late, being a reference to the claimant arriving around 9.15. The claimant countered that she had made him coffee while in the canteen and regarded the reference to lateness as unjustified, given the informal variation to start time.
- 20 23. The claimant departed the Director's office, after around 10 minutes and returned to her workstation within the Technical Office unhappy at the interaction. After about 2 hours, she left the workplace early, although her manager did not initially identify the same.
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24. The claimant did not consider there was anything wrong in principle with an employee being asked about personal mobile usage. She had, however, formed a view the context was unjustified.
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25. On **Tuesday 8 October 2019**, a member of respondent staff, whose role including HR functions, contacted the claimant by text to ask why she left work early on Friday 4 October 2019. The claimant did not respond.
26. On **Wednesday 9 October 2019**, the claimant rang the respondent to advise she had arranged an appointment with her GP.
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27. The claimant arranged to provide a Fit Note covering the period **Wednesday 9 October 2019 to Tuesday 22 October 2019**.
28. On **Monday 21 October 2019**, the claimant was sent a text asking if the claimant would return to work on **Thursday 24 October 2019**, being the next claimant working day or if a further medical certificate would be provided.
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29. Later on **Monday 21 October 2019**, the claimant arranged for a family member to deliver a letter she had drafted on **Sunday 20 October 2019**, being her written resignation letter (the Sunday 20 October 2019 resignation letter). The Sunday 20 October 2019 resignation letter described that the resignation was brought about by what the claimant described as the unprofessional personal interaction between herself and Ms. Dawson and Mr. Crichton. She described her view that she no longer felt comfortable and credible at work because of the interaction. In the Sunday 20 October 2019 resignation letter, the claimant confirmed that her resignation was effective from what she described as the end of the GP Note on **Tuesday 22 October 2019**.
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30. On **Thursday 24 October 2019**, Mr. Guy Crichton, as Director for the respondent, accepted the resignation by letter, confirming that her employment terminated as intimated by the claimant on **Tuesday 22 October 2019**. The acceptance letter expressed thanks to the claimant for her valued contribution. Although not expressed, Mr. Guy Crichton's view was that the
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claimant's departure was not unexpected against a background that she had previously intimated an intention to resign and subsequently reduced her working pattern to 2 days to accommodate alternate employment taken up by her.

5 31. The claimant was paid 2 weeks' notice.

### **Submissions**

10 32. **The claimant's submissions** set out while that there was a dispute as to the interaction that the evidence supported her position. The claimant argued that the interactions on Friday 4 October 2019 amounted to a fundamental breach, the respondent having publicly undermined the key requirements of her job which she identified as trust, integrity and respect. She described that the resignation was tendered based solely on the events within the Technical Office, although other factors evolved. It was a direct response to what she described as the approach, and disregard for her public standing that she submitted her resignation. She described that the obstacles placed in her way 15 would have prevented her from effectively executing her job. In relation to the delay in tending her employment she set out that this was due to seeking professional help to ensure that she was not overreacting but considered that she could not find a way to overcome what had occurred.

20 33. **The respondent, in its submissions** argued that the claim should be rejected, and the respondent witness evidence preferred. The respondent further argued that taking the claimant's recall of events, which the respondent denies, there is no implied term that an employer will treat an employee in a reasonable manner, referring to EAT decision **Post Office v Roberts** [1980] 25 IRLR 347 (**Roberts**) referencing para 28, and further that the alleged conduct did not tip the balance to conduct which amounted to a fundamental breach.

34. The respondent argued that if the claim is upheld, there should be a contributory reduction to basic and compensatory awards.

30 35. The respondent had referred in the ET3 (para 28) to the Court of Appeal **Hollier v Plysu** [1983] IRLR 260 (**Hollier**). The respondent had, however



confirmed at the conclusion of the hearing that **Hollier** was not relied upon against the different factual matrix.

### **Relevant Law: Constructive Dismissal**

36. The leading case relating to constructive unfair dismissal is **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, in which it was held that to claim constructive dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach; the final act must add something to the breach even if relatively insignificant; if she does so, and terminates the contract by reason of the employer's conduct, she is constructively dismissed.
37. In a complaint of constructive unfair dismissal, Langstaff P in **Wright v North Ayrshire Council** [2014] ICR 77 (**Wright**) at paragraph 2 said *"that involves a tribunal looking to see whether the principles in **Western Excavating (ECC) v Sharp** [1978] IRLR 27 can be applied"* and sets out 4 issues to be determined:
- 1) *"that there has been a breach of contract by the employer";*
  - 2) *"that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract";*
  - 3) *"that the employee has resigned in response to the breach, and that"*
  - 4) *"before doing so she has not acted so as to affirm the contract notwithstanding the breach."*
38. As set out above, the resignation must be in response to the breach. Further, as Langstaff P confirmed in **Wright** para 10, the approach to causation was set out in the judgment of Keane LJ in **Meikle v Nottinghamshire County** [2004] IRLR 703 at paragraph 33:

5           *'...the repudiatory breach by the employer need not be the sole cause of the employee's resignation...there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job... The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the*

10           *repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation ...'* and although not quoted by Langstaff P above, Keane LJ concludes *"It is enough that the employee resigns in response, at least in part, to*

15           *fundamental breaches of contract by the employer."*

39.   The respondent referred to para 28 of **Roberts**. In **Roberts**, that claimant had requested a transfer from a Brighton branch to one in Croydon (in South London). She had been appraised as a capable worker but had been given a bad report without proper consideration. As a result, her requested transfer was refused, and the reason given entitled her to believe it was because there

20           were no vacancies. After some 6 weeks of inquiry, she was fully able to identify the true reason for the refusal to grant transfer. On those facts, the EAT found that the Tribunal had not erred in finding that she was entitled to terminate her contract by reason of the employer's conduct.

25   40.   The context to the respondent quote from **Roberts**, was that the Tribunal, at first instance, had described the existence of an implied term that an employer would treat an employee in a reasonable manner. The EAT set out at para 28 (in full) *"So expressed, in our view, such a term is too wide and too uncertain and we could not endorse any such implied term in those terms. It is, of*

30           *course, plain that there are some obligations in a contract of employment which the employer must comply with reasonably and an employee must comply with reasonably. There are other terms, such as the payment of*

5 *salaries or wages due, which do not admit of any reasonable compliance, there must be compliance. Thus, in this respect, the decision of the Industrial Tribunal went far beyond that which it ought to have gone in implying such a term. They did, however, refer to the implied term, which is to be found in authorities to which we will refer later, of mutual trust and confidence between employer and employee."*

41. As subsequently described in **Malik v BCCI SA (in Liq.)** [1997] ICR 606 (**Malik**), employment contracts contain an implied term of mutual trust and confidence, that the parties will not without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust, which should exist between employer and employee. The test for determining whether the employer has acted in breach of that mutual term is a severe one. The conduct must be, such as, to destroy or seriously damage the relationship, and there must have been no reasonable and proper cause for the conduct.

42. While it is unnecessary to make a factual finding as to the respondent's actual (subjective) intention about the contract, a finding should be made as to whether objectively the conduct complained of, was likely to seriously damage the relationship of trust and confidence.

#### 20 **Affirmation**

43. Where there has been a fundamental breach of contract by the employer, the law requires the employee to choose at some stage: either to terminate the contract or to affirm it — i.e., keep it going.

44. An employee who affirms the employment contract following the employer's repudiatory breach cannot terminate the contract and claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, the employee '*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.*' This was emphasised more recently by the Court of Appeal in **Bournemouth**

**University Higher Education Corporation v Buckland** 2010 ICR 908, CA [Buckland], although Lord Justice Jacob pointed out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there has been an affirmation.

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45. An important factor is whether the employee was at work in the interim so that they could be seen as complying with the contract in a way that was inconsistent with a decision to terminate it. In **Chindove v William Morrison Supermarkets plc** [2013] EAT 0201/13 [Chindove], Mr. Justice Langstaff, the then President of the EAT, warned against looking at the mere passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign.

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### **Witnesses**

46. The Tribunal accepts the evidence of the respondent witnesses as straightforward and credible. The claimant's colleagues were credible in recalling their perception of what had seemed to them, to be an unexpected interaction in the Technical Office.

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47. The claimant's evidence reflected her view of the respondent. However, and where the respondents contradicted the claimant's evidence, the respondent witnesses are preferred. The Tribunal would not wish these reasons to be misunderstood as implying a finding that any witness lied. The position is simply that, having heard the evidence of those witnesses, the Tribunal was unable to accept the accuracy of the honest, but the Tribunal considers inaccurate recall of matters at the relevant time compared to other accounts.

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### **Discussion and Decision**

48. In all the circumstances, the claimant's claim does not succeed.

49. The actions on the part of the employer which the employee relies upon as having caused or triggered her resignation were the events of Friday 4 October 2019, specifically the actions of Ms. Dawson and in the Technical Office and the Board room and Ms. Dawson and Mr. Crichton in the Director's office (the two engagement events).
50. The claimant returned to her workspace in the Technical Office after leaving the Director's office and continued to work for several hours, although not to the end of her shift. She was not due to return to work until the following Thursday.
51. The claimant did not affirm the contract by returning to her workspace and working part of the remaining day.
52. The claimant did not affirm the contract by submitting a Fit Note covering the period from her scheduled return to work, the claimant resigned by the expiry of the period covered by the Fit Note. In the circumstances, neither the submission of the Fit Note nor the delay in resignation amounted to affirmation. By arranging for the delivery of the Fit Note, the claimant intimated the advice provided to her that she was not fit to return to work and did not amount to affirmation. Her conduct in submitting the Fit Note did not show an intention to continue in employment rather than resign.
53. The actions of Ms. Dawson on Friday 4 October 2019 were not actions such as to destroy *or* seriously damage the relationship, and there was reasonable and proper cause for her conduct. She had been made aware by others of an issue around the use of mobile phones for personal purposes while at work. Ms. Dawson raised her genuine concerns upon entering the Technical Office. It cannot be said that there was no reasonable and proper cause for her conduct, including in raising her genuine concerns in a forceful manner. Ms. Dawson had not, so far as may be relevant, viewed any CCTV in relation to the claimant before entering the Technical Office.
54. On an objective basis, Ms. Dawson's conduct on Friday 4 October 2019, was not conduct likely to seriously damage the relationship of trust and confidence

between employer and employee, either individually or cumulatively. It did not seriously damage the relationship of confidence and trust between employer and employee. either individually or cumulatively.

5 55. The actions of Mr. Mark Crichton on Friday 4 October were not such as to destroy or seriously damage the relationship. It cannot be said that there was no reasonable and proper cause for his conduct in the raising of a concern regarding lateness, despite the informal potential variation of start time.

10 56. On an objective basis, Mr. Mark Crichton's conduct on Friday 4 October 2019 was not conduct likely to seriously damage the relationship of trust and confidence between employer and employee, either individually or cumulatively. It did not seriously damage the relationship of confidence and trust between employer and employee. either individually or cumulatively.

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57. Ms. Dawson and Mr. Crichton's actions were not repudiatory acts amounting to breach of contract either individually or cumulatively.

18 58. While the claimant resigned in response (or at least partly in response) to the actions of Ms. Dawson and Mr. Mark Crichton on Friday 4 October 2019, she was not entitled to rely upon those actions either individually or cumulatively as repudiatory breaches of contract.

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59. In the circumstances, the question of loss does not arise.

### **Conclusion**

25 60. The claimant's claim for constructive unfair dismissal does not succeed for the reasons set out above.

61. The Tribunal, in reaching these conclusions, has considered the totality of the evidence.

62. In coming to this view, the Tribunal has applied the relevant case law.

63. If there are further submissions that either party considers necessary to address supplemental to their respective existing submissions in the interests of justice. In that case, they should set out their position in a request for reconsideration under Rule 71 of the 2013 Rules.

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Employment Judge: Rory McPherson

Date of Judgment: 04 October 2021

Entered in register: 12 October 2021

10 and copied to parties