



# EMPLOYMENT TRIBUNALS

**Claimant:** Aiden McCarthy-Paul

**Respondent:** Mayday Personnel Services Ltd

**Heard at:** Southampton (by video)

**On:** 01-03 December 2021

**Before:** Employment Judge Housego

## Representation

**Claimant:** In person

**Respondent:** Camille Ibbotson, of Counsel, instructed by Ashfords LLP

# JUDGMENT

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The claims are dismissed.

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# REASONS

## Background

1. The Claimant was a long serving and highly regarded recruitment consultant for a small recruitment agency. At the start of 2020 the company was bought by two individuals from its previous owner, who was very a “hands-off” owner. The new owners were fully involved in the business. They made some redundancies, partly as the previous owner of the company had its employees do some work for another business she had. Things were beginning to settle down when Covid-19 lockdown 1 arrived. On her partial return from furlough the Claimant felt that her job had been taken from her and her managers distant and rude, and resigned. She claims notice pay and unfair dismissal.

## Claims made and relevant law

2. The claim is of unfair constructive dismissal<sup>1</sup>. The Claimant must show that the Respondent is guilty of a fundamental breach of contract showing that it does not intend to be bound by it. She must show that she resigned because of that breach, in a reasonable time and without affirming the contract before doing so. The last matter complained of need not itself be a breach of contract.
3. In this claim the only issues are to establish the facts and to decide whether those facts amount to a fundamental breach of contract, or not.
4. The Claimant also claims notice pay, which is a claim dependent on her unfair dismissal claim.
5. The burden of proof for these claims is on the Claimant on the balance of probabilities.

## Evidence

6. There were witness statements from the Claimant, Beryl King (the previous owner of the Respondent), and former colleagues Liam Brady, Karen Murley and Sheila Fisher. The Respondent did not challenge the evidence of three of the witnesses, and so only Liam Brady gave oral evidence.
7. For the Respondent the two new owners of the company (Alexandra Palmer and Ivan Carter) and Annemarie Foreman (who continues in employment) gave oral evidence.
8. There was an agreed bundle of documents, a cast list, a chronology and an agreed list of issues.

## The hearing

9. The hearing was a virtual hearing, which had some technical challenges which were successfully overcome.

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<sup>1</sup> S95(1)(c) of the Employment Rights Act 1996

## Submissions

10. The Respondent's position was that this was a resignation, which was regretted. A positive working relationship had been established between the new owners and the Claimant in the short time before Covid-19 lockdown 1 on 23 March 2020. That lockdown had caused a reduction in revenue of over 80%. In June 2020 another (less expensive) employee had been brought back to work, full time, then in July the Claimant, 2 days a week. She was the best salesperson and was asked to deal with that for all those two days a week, for the time being. These were extraordinary times and there was no fundamental breach of contract in asking her to do that part of her role for that part of the week she was in work. The facts asserted were not accepted to have occurred, but if they had that was not a fundamental breach of contract.
11. The Claimant felt that there was a lack of communication while she was furloughed, and when she did come back she was met with silence, told to sell and do nothing else, excluded from any existing client contact (when she had won and previously serviced many of them), and her job had been taken from her and given to Annemarie Foreman, who she had trained. She feels that she was driven out, in order to avoid paying her notice pay and a redundancy payment, which would have been substantial. The Claimant puts it thus:

*"I believe the bullying behaviour in meetings and ostracization within the office were deliberate tactics to force me out of the business to avoid paying me redundancy. The respondents acted in such bad faith, the trust between us was irrevocably broken. They also failed in their duty of care when I raised the issues of their unacceptable treatment towards me. They removed my role from me without any consultation or consent and passed this to a junior member of staff who in the respondents' words was cheaper. After a total of 56 days in the respondent's employment my position in the office became untenable due to the respondents bullying and I was left with no choice but to resign."*

## The agreed list of issues

12. This is as follows:

### 1. Constructive Unfair Dismissal

- 1.1 Was the Respondent in fundamental breach of the Claimant's contract of employment? The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of her employment contract relating to mutual trust and confidence. The Respondent understands the alleged breach(es) were as follows:
- (a) The Respondent's failure to ask for the Claimant's consent to be processed via the Coronavirus Job Retention Scheme;
  - (b) The Respondent's failure to communicate with the Claimant more regularly whilst the Claimant was on furlough between 24 March 2020 and 15 July 2020;
  - (c) The Claimant allegedly being greeted with hostility by Alex Palmer on 15 July 2020;
  - (d) The Claimant allegedly being ignored by Alex Palmer on 15 July 2020 until Annemarie Foreman arrived;

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- (e) The Claimant's being told on 9 July 2020 that her role was temporarily passed to Annemarie Foreman;
- (f) The Claimant being told by Ivan Carter not to contact clients she had dealings with prior to business closing on 24 March 2020;
- (g) The Claimant being stripped of all her previous duties and responsibilities in her role as Industrial Manager on 15 July 2020;
- (h) The Claimant being ostracized by Alex Palmer and Ivan Carter commencing on 15 July 2020;
- (i) The Claimant allegedly being ignored by Ivan Carter on the days the Claimant was in the office;
- (j) The Claimant being used to secure new business but not being involved with the clients or candidates placed historically;
- (k) Ivan Carter allegedly recording a meeting with the Claimant on 12 August 2020 on his iPad without permission;
- (l) The Claimant being told not to use LinkedIn on 12 August 2020, which she considers to be a tool for her job;
- (m) The Claimant allegedly being excluded, isolated, and subjected to hostility by Alex Palmer and Ivan Carter since her return to work on 15 July 2020;
- (n) The Claimant allegedly being told by Alex Palmer on 12 August 2020 the office was nasty and toxic every Wednesday and Thursday she was in the office;
- (o) Ivan Carter allegedly remarking to the Claimant on 30 July 2020 "Yes I do, mind your own fucking business" when asked if he had a second name;
- (p) The Claimant allegedly being told on 17 September 2020 by Ivan Carter she should use the phone more and not email or LinkedIn;
- (q) The Claimant allegedly being told on 17 September 2020 that Alex Palmer and Ivan Carter had not decided whether the Claimant would continue to be furloughed or she would be needed to work full time;
- (r) The Claimant allegedly being told by Alex Palmer on 17 September 2020 that they only want people back if they are working and not wasting their money;
- (s) The Claimant allegedly being told by Alex Palmer on 17 September 2020 that the Claimant will not be resuming her role as Industrial Manager and she will be working on Business Development for the foreseeable;
- (t) Ivan Carter allegedly shouting 'shit' loudly and aggressively when the Claimant excused herself from the meeting on 17 September 2020.
- (u) The Respondent terminating the Claimant's contract without a disciplinary hearing.

1.2 Does the Claimant rely on each of the above alleged breaches in isolation or cumulatively? If cumulatively which does she say is the 'last straw' upon which she relies?

1.3 Was any breach sufficiently serious to warrant a repudiatory breach of the Claimant's terms and conditions of employment so as to justify the Claimant's resignation?

- 1.4 Did the Claimant resign because of that repudiatory breach? The Respondent will argue in the negative and that the Claimant resigned because of her refusal to accept a change in the management.
- 1.5 Did the Claimant tarry before resigning and therefore affirm the contract?
- 1.6 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Employment Rights Act 1996? The Respondent will argue that the reason for the alleged dismissal was some other substantial reason due to a breakdown in relationship caused by the Claimant's refusal to accept a change in the management.

## **2. Wrongful dismissal**

- 2.1 The breach of contract claim is dependent upon the constructive dismissal claim. The Claimant contends she is owed notice pay.
- 2.2 It is not in dispute that the Claimant's statutory entitlement was to 12 weeks' notice based on 12 or 13 years' service.

## **3. Remedy**

- 3.1 What remedy should the Claimant be awarded, if any?
- 3.2 Should any compensation awarded be reduced to reflect the Claimant's failure to follow to the ACAS Code of Practice of Disciplinary and Grievance Procedures, and if so, by how much?
- 3.3 Should any reductions should be made to award for the Claimant's contributory conduct?
- 3.4 Should any reductions be made pursuant to Polkey v AE Dayton Services Ltd [1987] ICR 142?

## **Facts found**

13. The Respondent is a small but successful recruitment company founded over 40 years ago. The Claimant had worked there since 2009. It was owned by Beryl King. She came to the office perhaps once or twice a week. She also had a small property management business which the staff at the Respondent helped her with.
14. Beryl King agreed to sell her company to Alexandra Palmer and Ivan Carter (with a company they both own involved). The staff were not informed of this intention, or of the sale itself, until 24 December 2019.
15. After the change of ownership at the start of January 2020 (it was a company sale not a TUPE transfer) some people were made redundant. This was inevitable, because the two new owners were involved in the business full time, and because the Respondent ceased to do work for Beryl King's property management company. However, Liam Brady was recruited to try to build up a new line of business, for drivers.
16. The Claimant's job was "Industrial Manager". Some six years ago Annemarie Foreman had joined and was trained by the Claimant. While the Claimant is described as a "manager" and Ms Foreman as a "consultant" and while they worked as a team, the Claimant was not the line manager of Ms Foreman. It is too small a business to have extended line management. The titles mean

only that the Claimant was regarded as senior to Ms Foreman, and was paid some £6,000 a year more.

17. The start of the working relationship was tense, partly as there had been no communication before the change of ownership, and partly because of fear of the unknown, with the knowledge that there would be changes. The redundancies were not easy for those who remained as they were all friends as well as colleagues.
18. Things settled down and the Claimant agreed that by mid March 2020 the working relationship with the new owners was harmonious, more so with Ms Palmer than with Mr Carter. She was in the office full time, he 3 days a week, and he was having some issues in his private life which were distracting for him.
19. When Covid-19 lockdown 1 started all the staff were furloughed, on 24 March 2020, save one, who dealt with furlough arrangements for the staff placed through the agency and billing the clients. While consent was required, and the letter said the Claimant would be furloughed unless she objected, her email in response indicated consent. It could hardly be otherwise for the alternative would inevitably have been redundancy.
20. In June 2020 Ms Foreman was returned to work full time, and the Claimant remained furloughed. By July 2020 the Respondent decided to bring the Claimant back 2 days a week on "*flexi-furlough*". There was one short telephone conversation a week before to arrange this, between Ms Palmer and the Claimant.
21. Unfortunately, during furlough there had been little to no meaningful communication between the Respondent and the Claimant about work. Ms Foreman and the Claimant had stayed in contact and that was how she learned that Ms Foreman had returned to work.
22. So it was that when the Claimant returned on 15 July 2020 it was not a prepared return. She arrived at the office first, and opened it up. Ms Parker arrived about 8:51, and greeted the Claimant only with the single word "*Hiya*" and then sat down and fired up her computer and then went to the kitchen to make a cup of tea for herself. This staggered the Claimant who immediately exchanged some text messages with a former colleague. This contemporaneous exchange is proof of the Claimant's account. Ms Foreman arrived towards 9:00, and then all three had a meeting.
23. The Claimant is entirely correct to be taken aback by this lack of conversation after 3 months away from work, particularly after the want of meaningful contact in that period.
24. The Claimant was told that Ms Foreman was doing all that needed doing to look after the few clients who were still active, and the staff placed with them. She was to devote her Wednesdays and Thursdays (which were the 2 days a week she was at work) to trying to find new business, by following up on previous clients. She was to log her activity on the "*Aspire*" system. She was to aim to make about 40 contacts in those two days a week.

25. In principle the Claimant had no issue with this: plainly new work was needed and she was good at getting it.
26. This became a problem when, against the background of no contact, not being told (save by Ms Foreman) that Ms Foreman was returning to work a month before she, and full time against her two days a week, Ms Palmer spoke to Ms Foreman about existing clients to the exclusion of the Claimant, and the Claimant was told not to deal with existing clients.
27. Mr Carter was preoccupied with issues in his personal life as well as the problems inherent in trying to keep afloat a business deprived of 80% of its turnover overnight. He was not in the office as much as Ms Palmer, and in the less than 3 months before the lockdown had not established as much of a rapport with the Claimant as had Ms Palmer. Understandably, the Claimant found him remote to the point of hostility.
28. There was an unpleasant moment when middle names were being discussed on 30 July 2020. The Claimant asked Mr Carter if he had one: he replied “Yes, *mind your own fucking business.*” He says he has no recall of this, but says that such language was common in the workplace when they arrived, and if he did say it would have been intended in a jocular way. I accept the Claimant’s evidence of this. Perception is reality, and given what was on Mr Carter’s mind, any jocularly was muted to the point of invisibility.
29. This situation was worsened when on 12 August 2020 Mr Carter told the Claimant not to use LinkedIn as a mechanism to contact people. Email was preferred and, best, telephone contact. The Claimant has long relied on LinkedIn – it is, after all a platform designed expressly for people to keep up business contacts – and thought this not sensible. The more so, as many people were working from home, but still had access to LinkedIn on their phones.
30. The day they had this discussion, Ms Palmer made the observation to the Claimant that the office atmosphere was “toxic” when the Claimant was in the office on Wednesdays and Thursdays.
31. The crunch came for the Claimant on 17 September 2020. She was in a meeting with Ms Palmer and Mr Carter, of about 45 minutes. The Claimant described it thus at paragraph 20 of her witness statement:

*“On September 17th I questioned Ivan on his behaviour towards me since my return as it was becoming worse. I asked when I would be returning to my role as Industrial Manager to which both replied I wouldn’t be. I stated they had taken my role as Industrial Manager from me without discussion or my consent and told me I would be working on solely on Business Development and Annemarie would be running the desk going forward. Alex made a remark ‘You never ran the Industrial desk, you and Annemarie did.’ I corrected her and that I ran the desk and Annemarie was a valuable resource that supported me and but in Annemarie had never been a sales person. It felt that Alex was trying to undermine my position I held in the office prior to COVID-19. I asked if in October would I be returning to work full time as the furlough rules were changing, Alex replied it was undecided as they only wanted people back in the office that*

*were prepared to work. As I was excused from this meeting Ivan shouted "SHIT" as I left the boardroom."*

32. I found the Claimant a truthful witness. She has long kept a diary and there were notes in it that were contemporaneous (I do not consider it remotely likely that these were later entries, both as an assessment of the Claimant as a witness, the other contemporaneous messages, and the impartial evidence of Mr Bradley (who had no reason to embellish his evidence), and also because if they were later entries they would have been far more precisely aimed at the issues now raised). In contrast the Respondent's witnesses do not recall, or not with any detail, or deny. While it is impossible to give clear evidence to show that something has not happened, on the balance of probabilities the Claimant's account is made out.
33. The maximum the Respondents ever said to the Claimant was that she would not be reverting to her old role *"for the foreseeable [future]"*. The Claimant does not say otherwise. However, she took what was happening, and the way it was happening, as a clear road map for a future where she was simply a target driven sales person, deprived of subsequent client contact, working in a hostile environment.
34. The Claimant went off sick at the end of 17 September 2020 and resigned by email dated 30 September 2020. It is well drafted, and clearly lays out the claim for fundamental breach of contract, and the nub is:

*"I have endured hostility and isolation which has made my position at the company untenable. Since Mayday Personnel was bought in January it has become very apparent my role as Industrial Manager has been taken away from me without discussion or consent."*

35. The Respondent relies on a human resources consultant. She told them what they should do, and herself wrote to the Claimant on 02 October 2020:

*"Thank you for your letter of 30th September 2020 tendering your resignation. We accept your desire to resign, however, you are reminded that you that you are contractually required under clause 10 of the written statement of employment terms that you are required to give the 12 weeks' notice to your employer. You are currently in breach of contract.*

*We would ask you to report back to work on Wednesday 7th October, when we will discuss the points raised in your letter in more detail and treat it as a formal grievance with the hope to agree / resolve matters.*

*Ivan and Alex look forward to seeing you at 9.00 on Wednesday 7th October 2020."*

36. This is both incompetent and ill advised. Someone who has resigned cannot be told that they have not done so. It may be that a resignation may be in breach of contract, but telling someone they cannot resign and must come back to work is singularly unlikely to have a positive outcome. The Claimant had attended a grievance brought by another employee held by this consultant, and (having read the papers in the bundle of documents) agree with the Claimant that the human resources consultant cannot be regarded as



*“independent”* (and if that were the case she would not be writing letters to former employees on company notepaper).

37. After some communication back and forth a letter (from Mr Carter dated 07 October 2020) said that the Claimant was dismissed with immediate effect, and that appeal could be made to that human resources consultant. It was the human resources consultant who drafted it and told the Respondent what to do. This was also incompetent. You can't dismiss someone who has left. (In the vernacular it is shutting the stable door after the horse has bolted.) It said that the Claimant was held to her restrictive covenants (and there is no allegation that she did not do so fully, whether obliged to do so, or not.)
38. By late 2020 Liam Bradley had resigned, seeking other avenues as he was not going to be able to set up a line of business for drivers given no activity save for national delivery companies unlikely to use the Respondent as agents. He spoke with Ms Palmer at some point and asked her if she had ever intended the Claimant to return to her role as consultant. Understandably he could not recall the exact words, but the essence of it, overlain with his own impression, was that Ms Palmer had decided not because the Claimant had too much sway with clients, as the last of the old guard, had too much control and they wanted a more malleable office to oversee, such that she was a problem not an asset, and was better removed.

## **Conclusions**

39. This is a case in which lack of communication skills have caused unnecessary loss, stress and distress all round.
40. I do not underestimate the strain of dealing with the pandemic for the Respondent. They had acquired the business only a few weeks before lockdown 1, and the entirety of their investment, and futures, was at existential risk because on 23 March 2020 the world of recruitment ceased to turn in any meaningful way, with no idea when normality would return. Then there was the furlough scheme which to be understood, then required payment to be made, and subsequently recovery claims made to the government.
41. The strain for the employees of such a business is also profound, for they have the worry of job loss (with the difficulty of getting another), but without any power to make any decision to make any difference.
42. Whatever the strains on managers, it is their job to manage. The Claimant should have been kept informed while on furlough. Time should have been taken before she returned to bring her up to speed (not just one short telephone conversation). There could hardly be a less welcoming return but to sit in silence with your boss until a more junior colleague arrived, that colleague having been doing your job while you have been furloughed.
43. The other matters set out above further undermined the relationship, until the Claimant felt obliged to leave.
44. So, on the matters of fact, largely I accept the Claimant's account of what happened and when.

45. The issue is whether this was a fundamental breach of contract by the Respondent – a breach of the duty of mutual trust and confidence which is fundamental.
46. The Claimant says she was forced out to avoid another redundancy payoff. That was the consequence of her resigning, but I do not think this was the intention.
47. It is common ground that Beryl King was largely removed from day to day running of the business (which is no criticism – she had confidence, and with good reason, in the Claimant who was in effect CEO of the business).
48. The Claimant had sourced most of the clients, looked after them, and was good with candidates. Ms Palmer and Mr Carter say (and there is every reason to believe them) that they regarded the Claimant as a major asset to the business they were buying. It was not like buying the owner run business from the retiring owner, whose skills depart with him or her. They had made redundancies among the staff pre-Covid: so giving themselves space in the business. The two key people for delivering value were the Claimant and Ms Foreman, and neither was made redundant pre-Covid. So, in good time post Covid, the Claimant was an asset they would want to keep for the future. The personal relationship pre-Covid had matured and the Claimant said that by the end of March she was happy with this. It was not that Covid provided an unexpected opportunity to shed someone it was desired should leave the Respondent.
49. In lockdown, the skills of someone like the Claimant in gaining new clients are even more important – it is a matter of survival not just how good the business can be. There is no logic in trying to get that key asset to resign.
50. While the Claimant was asked to make 40 attempts to contact people in her two days a week, this was only ever aspirational. There were no KPIs or written targets, or any suggestion of disciplinary action if it was not done, or if insufficient results came from that activity. This is not the hall mark of a campaign to drive someone out.
51. The Claimant also points to the way her resignation was dealt with. Ms Palmer and Mr Carter sought and followed what they regarded as expert advice. I accept their evidence that this is what they did: it is unfortunate that the advice was not better. There might have been a better chance if the letter said how shocked they were that she felt this way, that they were sorry that she did feel like that, and were sorry for anything they had done (or failed to do) that had contributed to it, and that she was really valued, that Covid had been a torrid time for them, and could she come in and chat to see if matters could be retrieved? The Claimant loved her job: it is hard to see how she would not have responded positively.
52. While this can shed light on previous matters, the response to the resignation cannot be a breach of contract, because the resignation ended that contract.
53. The Claimant was working two days a week. She was being asked to spend all those two days doing something that was part of her full-time job. The position would be different if the Claimant had returned full time to do only part of her job. I cannot see it as a breach of contract to say come back to

work 40% of a week, and in that 40% of the week do the 40% of the job that was sales generation. (The exact percentages are to make the point – there was no evidence as to the split of work pre pandemic).

54. I also agree with the Claimant that it appears suboptimal to have a gap from Thursday afternoon to the following Wednesday morning to follow up leads. That may or may not be bad management, but if it is bad management that is not a breach of the Claimant's contract of employment. The Claimant was experienced at managing the business and inevitably would do it differently to Ms Palmer and Mr Carter: whether better or worse is not to the point as it is their business.
55. That also deals with the point about the Claimant not adding resilience by backing up Ms Foreman. There is also a logic to the reply – they say Claimant can do sales work immediately and we need sales, and there have been a lot of changes and to catch up with them all for two days a week will consume much of that time.
56. It is also logical to bring back Ms Foreman full time first. She was a cost to the business of £6,000 a year less than the Claimant (plus NI), and had grown (doubtless at least partly through the Claimant's tutelage as Ms Foreman agreed) into a competent person with skills necessary to manage clients.
57. I take full note of Mr Bradley's evidence. He was someone who it was not suggested had any reason to be other than truthful, and I am sure he told me exactly what he thought at the time. That is not the same as finding that his impression was wholly accurate. "*For the foreseeable...*" is not necessarily permanent but can be indefinite (in the sense of not having a defined end), and hindsight has proved Ms Palmer and Mr Carter right, as lockdowns 2 and 3 and now Omicron show: little was accurately foreseeable in summer 2020.
58. It seems likely that the way the Respondent managed the Claimant caused the Claimant to resign, and to that extent the Claimant is exactly right. However, to succeed it must be shown that the way the Claimant was treated was a fundamental breach of contract which showed that the Respondent no longer intended to be bound by it. That is not the case here, for the reasons given above, and so I am obliged to dismiss the claims.

Employment Judge Housego  
Date: 3 December 2021

Judgment & reasons sent to parties: 20 December 2021

FOR EMPLOYMENT TRIBUNALS