



# EMPLOYMENT TRIBUNALS

## Claimant

Mrs E Rickman

v

## Respondent

Fortem Solutions Ltd

**Heard at:** Watford ET Centre (via CVP)      **On:** 28 January 2022

**Before:** Employment Judge Conley

## Appearances

**For the Claimant:** Mrs E Rickman, in person

**For the Respondent:** Miss Alice Beech (Counsel)

## RESERVED JUDGMENT

The Claimant's claim of constructive dismissal fails.

## REASONS

### BACKGROUND

1. By a claim form presented to the Employment Tribunals on 21<sup>st</sup> April 2021, following a period of early conciliation between 12<sup>th</sup> February 2021 and 26<sup>th</sup> March 2021, the Claimant sought to pursue a complaint of unfair constructive dismissal against the Respondent.
2. The claim was resisted by the Respondent and they presented a Response on the 14<sup>th</sup> May 2021 which included comprehensive Grounds of Resistance to the Claim.

### SUMMARY

3. In outline, the case is brought by the Claimant who was, for approximately 2 years and 7 months, employed by the Respondent as an Administrator.
4. The Respondent is a company that operates as a 'national property solutions provider', whose services include repairs and maintenance

contracts, which are predominantly long-term arrangements with local authorities and residential social landlords across the United Kingdom.

5. Mrs Rickman was happy in her work with the Respondent and made friends at the company, and it had been her intention to remain there indefinitely. However, following incidents at the company Christmas party in 2019, her conduct and performance came under increased scrutiny which, she asserts, caused her to become unhappy and anxious at work - a situation which continued and indeed worsened during the course of 2020.
6. In essence, she complains that she was unfairly targeted for criticism by her line manager, Ms Tracey McCombe, over trivial matters, which amounted to bullying. Over time this made her depressed and unwell.
7. Eventually, on 13<sup>th</sup> November 2020 she tendered her resignation, which she says she was forced to do because of the actions of the Respondent and accordingly she was constructively dismissed.
8. The Respondent denies this and asserts that this was a genuine resignation and that they had not committed any repudiatory breach of contract. The reason the Claimant resigned, says the Respondent, is that she knew that she had failed to improve her performance on a 'Pathway to Success' programme and that as a result she knew that she would be facing a disciplinary procedure which might have resulted in her dismissal; and so decided to resign as a pre-emptive measure.

## **THE EVIDENCE**

9. The evidence in this case came from the following sources:
  - a) The written and oral evidence of the Claimant;
  - b) The written and oral evidence of Angela Brown, on behalf of the Claimant;
  - c) The written statement of Katherine York;
  - d) The written and oral evidence of Tracey McCombe, Admin Centre Manager, on behalf of the Respondent;
  - e) The written statement of Jo Broom, Senior Employee Relations Specialist, on behalf of the Respondent;
  - f) A comprehensive bundle of documents amounting to 280 pages.

## **FINDINGS OF FACT**

10. The Claimant commenced employment with the Respondent as an Administrator on the 16<sup>th</sup> April 2018, which was terminated on 13<sup>th</sup> November 2020 when she resigned. Accordingly, she had acquired statutory employment rights by virtue of the fact that she had been continuously employed by the Respondent for a period greater than 2 years.
11. Her annual salary was £23,000 and her net average monthly wage was £1650.00.

12. The Respondent's core services consisted of repairs and maintenance, energy services, and planned project work. It has a centralised "SMART Hub" which provides scheduling, call centre and administrative support for its branches across the country, and the Claimant was employed in this unit as an Administrator.
13. For at least the first year of her employment, the Claimant was a happy, contented employee who played an active part in her team.
14. During the latter part of 2018 and early 2019, there were a number of instances of absence through sickness which resulted in the Claimant being placed on an Attendance Improvement Plan (AIP) on 1<sup>st</sup> April 2019. This was discharged in September 2019; however, following a further absence in November 2019, an investigation was initiated on 26<sup>th</sup> November 2019.
15. At the company Christmas Party in December 2019, two incidents occurred in relation to the Claimant's conduct. Firstly, a junior member of staff, who wished to remain anonymous, made a complaint to Ms McCombe regarding the Claimant's inappropriate behaviour towards him; and secondly, Ms McCombe (and others) were found to have taken leftover wine home without permission.
16. The investigation in relation to absence led to a Disciplinary Meeting taking place on 28<sup>th</sup> January 2019, chaired by Jake Swift, Service Manager. The Claimant attended and was accompanied by an Employee Companion, Regina Van Der Leeuw.
17. As a result of that Meeting, on 11 February 2020 the Claimant was issued with a 12-month First Written Warning for attendance. The Claimant was given the opportunity to appeal this decision but did not do so.
18. Also in January, the Claimant had requested permission to take birthday leave on an alternative date in order to enable her to take her mother-in-law away for her 90<sup>th</sup> birthday. This request was initially approved by Tracey McCombe. However, following a directive from Jamie Thomson, a senior manager, Ms McCombe sent out an email on 23<sup>rd</sup> January 2020 to the whole of the SMART Hub team advising them that birthday leave could only be taken on the day of the birthday itself, or on the nearest Friday or Monday if it fell on the weekend. However, because the Claimant's leave had already been approved, she raised the matter with HR who allowed her day of leave to be taken, as an exceptional case.
19. The Claimant perceived that Ms McCombe resented the fact that the Claimant had 'gone over her head'. I found no evidence of this.
20. In May 2020, the Claimant received a reduced annual bonus, in accordance with the Respondent's policies, in view of the fact that at that time she had a live written warning on her record.
21. On 27<sup>th</sup> May 2020, Ms McCombe contacted Claudette Gough, the General Manager of the Smart Hub, outlining a number of issues of concern regarding

the Claimant's behaviour and performance over the preceding weeks. On 11 June 2020 she had a one-to-one meeting with the Claimant at which she outlined these issues and invited the Claimant to respond to them. The Claimant acknowledge that the errors had been made and indicated that she was upset that she had made them. She explained that she had been struggling with lockdown and back problems. She 'took on board' the issues and identified some training needs. She also draw Ms McCombe's attention to some positive feedback that she had received which was noted on the one-to-one review form.

22. It was recorded that the Claimant's performance would be kept under review but if there was no improvement the next stage would be to put her on a Pathway to Success/performance management programme.
23. On 27<sup>th</sup> July 2020, a further one-to-one meeting took place with the claimant and Ms McCombe at which a number of issues concerning her performance and behaviour were drawn to her attention with several examples given. A number of the complaints that were the subject of discussion had been drawn to Ms McCombe's attention by Martin Roach, a colleague of the Claimant.
24. On 24 August 2020 Ms McCombe placed the Claimant on a Pathway to Success programme, which clearly identified eight specific areas in which the Claimant's performance and conduct fell below the standard expected of her. These were defined clearly and were evidenced with examples. The PTC plan set out the reasons for concern, together with agreed actions and timescales for improvement. This plan was to be reviewed at monthly intervals with a final review date of 23<sup>rd</sup> November 2020.
25. At the review on 15 October 2020, the Claimant was advised that her conduct and improvement would continue to be monitored and that improvement was still required. A final date for review was provisionally scheduled for 23 November 2020, and she was told that if improvement was not achieved then disciplinary action could be taken.
26. On 19 October 2020 the Claimant tendered her resignation in the following terms:

*"It is with regret that I must inform you I with [sic.] to terminate my employment with Fortem. I can either work 4 weeks' notice and leave Friday 13th November or I am willing to help and work until end of November leaving Friday 27th November. Please could you let me know which you would prefer. I have very much enjoyed my time at Fortem but think now is the right time for me to leave."*
27. On 3<sup>rd</sup> November 2020 the Claimant contacted Jo Broom (Employment Relations Specialist) and asked for a confidential meeting, which took place on 4<sup>th</sup> November 2020. At this meeting the Claimant complained that her line manager was the cause of her resignation.
28. The Claimant's effective date of termination was 13<sup>th</sup> November 2020.

29. The Claimant sent a number of e-mails to Mrs Broom in which she alleged that her line manager had bullied her, and on 18<sup>th</sup> November 2020 asked what was being done about her complaints. She was invited to put a formal grievance, and on 26 November 2020 she confirmed that she wished to do so.
30. A grievance hearing took place on 20<sup>th</sup> January 2021 chaired by Rebecca Mardell (Central Support Manager). At this meeting the Claimant described various matters occurring between Christmas 2019 and the date of her resignation which she alleged constituted bullying.
31. Following an investigation her grievance was not upheld on the basis that there was no evidence that the Claimant's line manager had acted outside of normal process and had not treated the Claimant differently to others. She was given a written outcome on 18<sup>th</sup> February 2021 and given the opportunity to appeal.
32. The Claimant appealed against the decision but asked for additional time to gather witness statements which the Respondent agreed to. She later declined to attend a grievance appeal meeting and relied instead on written submissions. Her appeal was considered in her absence by Claire Holland (Head of Central Support). Ms Holland carried out an investigation / reinvestigation into the Claimant's allegations but found no reason to overturn the grievance outcome. She communicated the reasons for her decision to the Claimant in a letter dated 28 April 2021.

## THE LAW AND CONCLUSIONS

### Constructive Unfair Dismissal

33. Subject to any relevant qualifying period of employment (two years in this case) an employee has the right not to be unfairly dismissed by her employer (Section 94 of the Employment Rights Act 1996). The Claimant plainly had worked the relevant qualifying period at the point of her resignation.
34. The relevant law is contained within Section 95 of the Employment Rights Act 1996, which reads as follows:  
*(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –*  
...  
*(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.*
35. An employee will be considered to have been constructively dismissed where the employee shows that:
  - a. The employer has committed a repudiatory breach of contract;
  - b. The employee resigned in response to such a breach;
  - c. The employee did not affirm or waive the breach prior to resigning.

### Repudiatory Breach

36. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship.
37. Whether or not an employer's actions or omissions amount to a repudiatory breach of a term of the contract is an objective test (*Bournemouth University Higher Education v Buckland* [2009] IRLR 606)
38. A breach of the implied term of trust and confidence is always repudiatory. The 'duty of trust and confidence' was defined in the well-known decision of *Malik and Mahmud v BCCI* [1997] ICR 606, HL as being an obligation that the employer shall not:  
    "...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
39. The Claimant claims that she was forced to resign by reason of the Respondent's conduct, and that as a result, this was in fact a dismissal for the purposes of Section 95, rather than a resignation.
40. When looking at the manner of an employer's conduct, "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" (*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, EAT).
41. It is for the Claimant to prove that there was no reasonable and proper cause for the Respondent's actions (*RDF Media Group plc and anor v Clements* [2008] IRLR 207, QBD).
42. *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, CA noted that a fair disciplinary procedure when viewed objectively could not destroy or seriously damage the relationship of trust and confidence.

#### Course of Conduct

43. Where an employee relies on a course of conduct, the Tribunal must look at the totality of the evidence and consider whether, when taken as a whole, the employer's conduct as amounted to a breach of the contract (*Lewis v Motorworld Garages Limited* [1985] IRLR 465)
44. A constructive dismissal is not automatically unfair (*Savoia v Chiltern Herb Farms Ltd* [1982] IRLR 166). As a consequence, the Tribunal must look at the basis for the employer's conduct and whether or not they were acting reasonably. The Tribunal must also look at the conduct of the employee and all the surrounding circumstances in their assessment.

#### Breach must have caused resignation

45. The employee must resign at least in part because of the professed breach (*Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859).

Breach not affirmed

46. The breach must not have been waived or affirmed prior to resignation (*Kaur*).
47. Where an employee relies on a course of conduct, they must identify a last straw which precipitated their resignation *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, CA, the last straw:
- a. Must, objectively, be more than entirely innocuous;
  - b. Should be an act in a series whose cumulative effect amounts to a breach of the implied term; and
  - c. Must add at least something to the breach of the implied term.
48. If the last straw relied upon is found to be entirely innocuous, a constructive dismissal claim will only succeed where there was previous conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to the unaffirmed, previous breach (*Williams v Governing Body of Alderman Davies Church in Wales Primary School* EAT 0108/19).
49. *Kaur* offers guidance in cases where an employee who alleges that the implied term has been breached because of the cumulative effect of ongoing conduct.
- a. 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?
  - b. Has he or she affirmed the contract since that act?
  - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
  - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? If so, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.
  - e. Did the employee resign in response (or partly in response) to that breach?
50. In certain circumstances, a dismissal may be 'fair' notwithstanding the fact that it came about because of a repudiatory breach of contract by the employer, if it was for a potentially fair reason, and that, if so, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee, as per Employment Rights Act 1996, Section 98(1) and (4) which reads as follows:
- 98 (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.*
- ...

*(4) 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.*

51. In this case, the Claimant has identified a series of incidents from November 2019 until the termination of her employment approximately one year later which she submits support her claim that she was the subject of unfair treatment amounting to bullying by her line manager Ms McCombe which individually and cumulatively amounted to a breach by the respondent of its duty of trust and confidence towards her. These incidents can be summarised as follows:

- i. The Respondent's reaction to her repeated absences from work: resulting in an investigation, an Attendance Improvement Plan, a disciplinary procedure, and ultimately the imposition of a written warning;
- ii. The Respondent's reaction to events at the 2019 Christmas party (and in particular the reaction of Ms McCombe);
- iii. Events concerning the Claimant's request to take her birthday leave on a day other than her birthday in January 2020;
- iv. The perceived lack of support that the claimant received from the respondent in the early stages of lockdown;
- v. The denial of a part of her bonus in May 2020;
- vi. Ms McCombe's perceived uncaring attitude towards the Claimant when she was unable to drive to work following a back injury in June 2020;
- vii. The excessive scrutiny of the Claimant's work by Ms McCombe when the Claimant was placed on a Personal Improvement Plan by Ms McCombe;
- viii. The perception that the Claimant was being set up to fail the PIP and that it was all part of an attempt by Ms McCombe to 'build a case' against her.

52. The Respondent seeks to rebut these claims, and asserts that the course of conduct complained of did not, viewed objectively, was reasonable in all the circumstances and did not amount to a repudiatory breach of the implied term of trust and confidence:

- i. In relation to her attendance, the Claimant had been placed on an absence improvement plan and, following a further absence, was issued with a final written warning by Jake Swift.
- ii. Regarding the December 2019 Christmas party it was proper for Ms McCombe to ask the Claimant and her two colleagues to return the wine taken from the party.



- iii. As to the January 2020 birthday leave, Ms McCombe did not single out the Claimant out but emailed the whole team on the instructions of another colleague;
- iv. The Claimant said that she felt it was better for her alone to attend the office from March 2020 onwards;
- v. The Claimant received a bonus at a reduced rate as she had a live written warning;
- vi. No pressure was placed on the Claimant to take public transport and a Ms McCombe referred the Claimant to Occupational Health in order to support her through this period;
- vii. Regarding performance management, Ms McCombe did not bully the Claimant or conduct meetings in a bullying way. She had genuine, ongoing concerns about the Claimant's performance. Ms McCombe managed these first informally and then under the Pathway to Success programme. The Claimant's performance did not improve. In particular, she delivered a process document which fell short of the required standard on the day before she went on her annual leave which put substantial pressure on others in the team. This was raised in the first Pathway to Success programme as an example of where improvement was needed;
- viii. At the second review meeting of 16 October 2020, Ms McCombe informed the Claimant of what was likely to happen next in light of her performance on the Pathway to Success programme. Her tone was appropriate. The documentary evidence suggests that Ms McCombe supported and managed the Claimant appropriately.

53. I can take my conclusions in relation to this matter shortly. I am satisfied that that the Respondent approached the matters of discipline in relation to both conduct and performance in a robust, but appropriate, consistent and procedurally fair way. I did not find any evidence that the Claimant had been 'singled out', bullied or mistreated by the Respondent in general or by Ms McCombe in particular.

54. I accept that the Respondent's policy on absence may have been strictly enforced against the Claimant in circumstances where she had a relatively small number of absences for which she appeared to have valid explanations; but this does not appear to me to amount to unfairness. I have no evidence before me to suggest that this was anything other than standard procedure. I note that the Claimant was offered the opportunity to appeal against the disciplinary finding but chose not to do so.

55. I also accept that, in the unprecedented circumstances of the pandemic, which negatively affected so many people in myriad ways, the Claimant felt unsupported. I accept as genuine the anxiety that she felt about coming into work at that time, travelling on public transport and her evidence that trying to discharge her duties on a small laptop when she was accustomed to working on two screens in the office was extremely challenging. These factors almost certainly did have an impact on her performance, and it seems likely to me that her sense of grievance comes in part from the belief that she was doing her best in difficult circumstances.

56. For these reasons I am not unsympathetic to the Claimant. However, I must be guided by the evidence, which I'm afraid does not support her numerous complaints against Ms McCombe or the Respondent. In fact the evidence sets out quite comprehensively that, in dealing with the Claimant's issues of conduct and performance, the Respondent acted fairly and reasonably.
57. In relation to issues of performance, the Claimant is wrong to say that the level of scrutiny of her was either unwarranted or heavy-handed. The documents in the bundle demonstrate that the Claimant had made a number of potentially serious mistakes, and that others in the team had complained about her. Indeed, the Claimant herself, in cross-examination, acknowledged that she made errors which were more than merely trivial. The emphasis of the PIP was towards training and future error-avoidance rather than discipline. The fact that a possible consequence of 'failing' the PIP might have been disciplinary action is not in and of itself unreasonable. I found no evidence that the Claimant was being set up to fail.
58. I did not derive much, if any, assistance from the evidence of Katherine York or Angela Brown. Ms Brown, who gave evidence before me, resiled somewhat from her written Statement, and was prepared to accept from Miss Beech (Counsel for the Respondent) that, after a process of reflection she was less willing to conclude the Ms McCombe was a 'bully'; rather, that she (Ms McCombe) was 'trying to do her job but it was unpleasant'.
59. The Claimant has failed to demonstrate that there was a repudiatory breach in this case, either individually or cumulatively, and therefore I do not need to go on to consider other matters in depth.
60. However, I will go on to say that I am also not satisfied that the decision of the Claimant to resign was caused by the professed repudiatory breach. The fact that the Claimant indicated a willingness not only to work out her contractual notice period but indeed a longer period of notice 'to help', coupled with the absence of any reference to her alleged mistreatment suggests to me that she recognised that disciplinary proceedings were inevitable and dismissal was a distinct possibility. This was in my judgment an acknowledgement of that fact and a pre-emptive decision to resign.
61. This claim fails.

Employment Judge Conley

Date: 29 March 2022

Sent to the parties on: 1 April 2022

For the Tribunal Office