



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Thomas

Respondent: The Representative Body of the Church in Wales

Heard at: Cardiff by video **On:** 16th and 17th November 2021

Before: Employment Judge Howden-Evans

Appearances

For the Claimant: Mr Winrow solicitor

For the Respondent: Mr Curtis, Counsel

JUDGMENT having been sent to the parties on 18th November 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Employment Judge's decision was that the Claimant's unfair dismissal claim was not well founded. Her resignation did not amount to a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

The Claim

1. The Claimant's employment as personal assistant to the Bishop of Bangor, terminated on 4th September 2020, when the notice period that she had given with her resignation on 5th August 2020 expired.
2. The Claimant contacted ACAS and early conciliation started and ended on 3rd September 2020.
3. The Claimant's claim was accepted by the Tribunal on 26th October 2020. The claim form contained a complaint of unfair constructive dismissal; the Claimant was seeking the remedy of getting her old job back or being re-engaged in a different role by her former employer
4. The Claimant's claim relies upon her giving the Respondent written notice on 5th August 2020 terminating her employment with effect from 4th September

2020. She asserts her entitlement to resign her employment because of a repudiatory breach of her contract. In her letter of resignation, she identified this as *“breach of contract by my line manager in unilaterally changing my conditions of work and also his neglect of duty of care”*.

5. The Respondent denies there has been any breach of the implied term.

The Hearing

6. The hearing was conducted wholly remotely by video. Both parties were represented.

7. I had the benefit of being able to consider a bundle of documents of 205 pages. At the start of the hearing two additional documents (which were GP fit notes) were added to the bundle. The bundle was also missing the Case Management Order of Employment Judge Sharp of 24th May 2021. The employment judge and Mr Winrow had received this Order separately; a copy was provided to Mr Curtis during the first day of this hearing.

8. At the start of the hearing, we discussed the List of Issues. Both representatives agreed that the List of Issues was as set out by Employment Judge Sharp in her Order, with the addition of the further information that Employment Judge Frazer had noted in her Order of 23rd June 2021, that the “final straw” that was relied upon was the Respondent’s response to the Claimant’s complaint made in July 2020.

9. I am grateful to both representatives for providing an agreed chronology which has assisted me greatly.

10. The Tribunal heard evidence on oath from the Claimant, from Alex Glanville, Cannon Simon Lloyd and Bishop Andy John. The Claimant gave evidence with the support of a Welsh language interpreter.

11. All witnesses relied upon witness statements, which were taken as read. The procedure adopted for each witness was the same - there was opportunity for supplemental questions, followed by cross-examination, the employment judge’s questions and re-examination.

The Issues

12. By the time of closing submissions, the issues I had to determine were as follows

1. Was the Claimant dismissed? Did the Respondent do the following things:

a. It was agreed that in May 2020 the automatic email forwarding to the Claimant from the bishop’s email account “bishopandyjohn” was removed by the Respondent.

- b. Remove control of the Bishop's diary from the Claimant? It was agreed that Bishop John became responsible for the master diary in April / May 2020.
 - c. Only leave the Claimant with access to emails received in the "bishop.bangor" email address, which was an email address which received few emails? It was agreed that from May 2020 the Claimant only had access to the bishop.bangor email address (and the Claimant no longer had sight of the bishop's emails in the account "bishopandyjohn") .
 - d. It was agreed the Respondent had sent an email to Jenny Lane copied to Robert Jones about a translation on 27 May 2020.
 - e. Allow Robert Jones to arrange Zoom meetings for the Bishop during May 2020? It was agreed that Robert Jones had sent out links for attendees to gain access to Zoom meetings in May 2020.
 - f. Not ask the Claimant about the cause of her illness which related to the sick note for the period 9 July – 9 August 2020? This allegation was denied.
 - g. Carry out a risk assessment about the Claimant's return to work without taking into account her personal circumstances? This allegation was denied.
 - h. Fail to respond appropriately to the Claimant's complaint made in July 2020? This was denied.
2. In these actions,
- a. had the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
 - b. did it have reasonable and proper cause for doing so?
3. Was the breach a fundamental one? Was it so serious that the Claimant was entitled to treat the contract as being at an end?
4. Did the Claimant resign in response to the breach? Was the breach of contract the reason for the Claimant's resignation?
5. Did the Claimant affirm the contract before resigning? Did her words or actions show that she chose to keep the contract alive even after the breach?

The evidence

13. I was satisfied that all witnesses gave their evidence honestly and to the best of their knowledge and belief.
14. I found the Respondent's witnesses to be consistent and compelling. Bishop John in particular was frank in his admission that, with hindsight, he wished he had sent the Claimant flowers upon the death of her father and that he felt wretched when he learnt the Claimant had interpreted, what he had thought was him giving the Claimant space to grieve, as being an act of neglect.
15. In contrast, the Claimant's evidence was less reliable. This is no criticism of the Claimant; I really think she doesn't realise this bias in her account. The Claimant has had a very difficult few years and this has had an impact on her view of Bishop John and the Respondent. She is not able to view and describe his actions or the Respondent's actions objectively; she is only able to view and describe things from her perspective, through a prism of hurt and grief, as sadly Bishop John had inadvertently offended the Claimant in his response to her father's death.

Findings of Fact

16. On the 1st of October 2007 the Claimant commenced employment with the Respondent as a personal secretary. In 2018 she became Bishop John's personal assistant ("PA").
17. Since 2009 Bishop John has been the Bishop of Brecon, and the Claimant's line manager. They had a good relationship up until the start of 2019 when the Claimant was upset at Bishop John's response to the death of her father. The Claimant's father passed away in November 2018. The Claimant did not take sick leave immediately following his death, which meant she continued to work closely with the bishop during a distressing period of her life. The bishop thought he was supporting the Claimant by occasionally asking how she was when they were working in the office together. The bishop had also made enquiries of the Claimant's husband but did not want to intrude and wanted to give the Claimant space to grieve. With hindsight he admitted that he wished he had sent the Claimant flowers or had personally sent a bereavement card.
18. In early 2019, the Claimant was on sick leave for 3 months, up until start of April 2019. The reason for her sick leave was initially described as being "bereavement" and later described as "work related stress". When the Claimant was described as unwell with work related stress, Bishop John learnt that the Claimant was upset by the bishop's response to her bereavement. A meeting was arranged between Bishop John and the Claimant in a Costa coffee shop where everything was discussed. The meeting went well and ended with a hug. In oral evidence the Claimant said that after this meeting there was no remaining ill feeling between them. The Claimant praised the support she had received from the Respondent's human resources officers and the counselling that was provided upon her return to work.

19. As a result of the COVID 19 pandemic, on 19th March 2020, the Claimant started to work from home. The Claimant's mother was living with her and was a vulnerable person, so the Claimant was "shielding" with her mother.
20. Bishop John and the Respondent supported the Claimant in her request to work exclusively from home, even though this meant Bishop John was having to undertake many of the tasks that the Claimant would usually have undertaken. There were many tasks that it was not possible, or practical, for the Claimant to do from home. For instance,
- a. the office phone could not be diverted, so Bishop John was having to answer all the calls on the office phone;
 - b. when there were deliveries or members of the congregation called at the office there was no one to act as receptionist in the office, so Bishop John was having to greet everyone;
 - c. when British Telecom attended to undertake work, Bishop John had to keep letting the workmen in;
 - d. Bishop John was also having to try to sort correspondence as it arrived and then send this to the Claimant so she could process it.
21. **The master diary:** Prior to the pandemic, Bishop John had raised the possibility of sharing an electronic diary / calendar to manage his appointments. The Claimant was not comfortable with this way of working – she preferred a traditional paper diary, so the Claimant and Bishop John had a practice whereby the Claimant kept the master diary on her desk and Bishop John had a second personal diary. When Bishop John was away, the Claimant would receive telephone calls in the office and would leave numerous post it notes on his desk with requests for appointments. She would pencil these appointments into the master diary. When Bishop John returned, they would have a discussion and then the Claimant would write the appointment into the master diary in ink and confirm this with the person that would be meeting the bishop.
22. In lockdown, inevitably, there was a dramatic change in Bishop John's way of working. People were no longer phoning the Claimant for appointments (as she wasn't based in the office to answer the phone). Instead, they were phoning the bishop directly on his mobile phone or he was answering the phone in the office. As there were no meetings in person, Bishop John was attending numerous Zoom meetings and further meetings were being arranged during Zoom meetings. This meant that the Claimant managing the master diary, whilst working from home was not practical; it added an extra layer of complexity to every task for Bishop John, at a time when he was working under immense pressure. So, Bishop John took responsibility for managing the master diary (that remained in the office) and the Claimant managed a secondary diary. I accept this was a temporary arrangement and that this would have been likely to have changed when the Claimant returned to work in the office – I note that in the bishop's email notifying the Claimant of this change he says "*in the meantime I had better hold onto the diary*" indicating this was not a permanent change.

23. There was a telephone call on 1st April 2020 during which Bishop John asked the Claimant if it would be possible for her to collect some paperwork from the office and process it at home. The Claimant said she couldn't because she was living with her mother. The Claimant has criticised Bishop John for being short in his reply. I accept Bishop John may have been brief in his response, but he respected the Claimant's wishes and scanned documents to her for her to process at home, as she requested.
24. **Zoom meetings:** I accept that during the first week in May 2020, Robert Jones did email links to people to enable them to join Zoom meetings. There was nothing inappropriate in this – the Respondent was only just starting to use Zoom as a means of holding meetings. The Claimant didn't yet have a licence to be able to create a Zoom meeting and invite people to join it; only Mr Jones had a licence at that point in time. Mr Jones was sending the links that the participants had to use to access the Zoom meeting, but the arrangements for the meeting had already been made by Bishop Andy.
25. **Translation:** In May 2020, Bishop John asked Mr Jones to translate a document. Again, I accept there was nothing untoward in this. Historically, the Claimant has undertaken translation work for Bishop John, but she did not like translating urgent documents. Prior to the pandemic, Bishop John had a practice of asking the Claimant to translate or arrange translation if it was earlier in the week and there was plenty of time for the work to be turned around; but if it was later in the week and a matter of urgency he would ask other people, such as Mr Jones, to translate. Bishop John was again considering the Claimant's preferences here.
26. **Access to email accounts:** Prior to May 2020 the Claimant had sight of emails received on both of Bishop John's email accounts: the "bishopandyjohn" and the "bishop.brecon" mailbox accounts. Emails to both of these addresses would automatically be forwarded to her email account. In Spring 2020, the Church in Wales suggested that bishops should ensure one of their email accounts could be used for private emails, for more sensitive discussions, such as supporting individual members of staff to return to work and changes that were having to be made because of the pandemic. In May 2020 Bishop Andy removed the Claimant's access to his email account "bishopandyjohn" to be able to use this for sensitive or confidential discussions. The Claimant continued to have access to the "bishop.brecon" email account. The Claimant felt aggrieved that she had used the "bishopandyjohn" mailbox to add entries to the master diary. Having made the "bishopandyjohn" mailbox private, Bishop John had a practice of forwarding emails from this mailbox to the Claimant if there was anything that she needed to know from an email, such as a new appointment, so she could still add these items to the master diary. I accept there was nothing untoward in this change of practice; the Claimant continued to receive emails through the bishop's "bishop.brecon" email account and was being copied in on the bishops responses on the other email address as and when needed. It was necessary and reasonable for the bishop to have a private email address for more sensitive discussions.

27. **Risk assessment:** In June 2020, whilst she continued to work from home, the Claimant received correspondence from Mr Granville relating to the risk assessment and the Claimant's return to work. I accept as a matter of fact that Mr Granville was seeking the Claimant's comments on the risk assessment and was endeavouring to work with the Claimant to introduce measures to ensure she could safely return to work. Whilst a return date of 6th July 2020 had been suggested, this date was not set in stone; rather the Respondent was waiting for medical evidence, that the Claimant had said she would obtain, so this medical evidence could be considered as part of the ongoing risk assessment and the decision as to when the Claimant would return to work.

28. On Friday 3rd July 2020 the Claimant asked to have a conversation with Bishop John.

"Hi Andy, There is a possibility that mum will be going home next week and if she does, I will come in on Friday. I understand that you are taking Friday off but is there a possibility of having a chat on that day please. Thank you."

There was nothing in this email to indicate the Claimant was in anyway upset by the bishop. Bishop John responded the same day and offered to talk whilst he was travelling (on that Friday) or offered to meet the following Monday. The Claimant didn't respond to his offer.

29. On 9th July 2020 the Claimant was signed off work with stress.

30. On 27th July 2020 the Claimant emailed the following complaint to Bishop John

"There are a few things that have happened in work recently that have caused me much concern. In my view a lack of duty of care within the legal sense has been shown to me. In addition, the terms of my work have been changed without me being contacted.

1. *The bishopandyjohn email account was taken from me*
2. *The diary was taken from me*
3. *Not many emails appear in bishop.bangor*
4. *An email to Jenny Lane has been copied to Robert Townsend about translation (if Jenny wanted) for her to confirm this with Robert so that he can arrange the translation. This was something I was doing.*
5. *Robert Jones has been arranging Zoom meetings for you.*

Unfortunately, after I sent Kathryn Harries, HR a copy of my sick note by email on 10th July I haven't heard back. I understand that when stress at work has been noted on the doctor's note someone has to contact me to find out what caused the illness in the first place.

Alex Glanville informed me that a risk assessment had been carried out at Ty'r Esgob so that I could return to work following the movement restrictions. It is clear that my personal circumstances were not taken into account before this was done, which indicates a lack of communication."

31. Bishop John replied by email that same day, advising the Claimant that he had spoken to the Representative Body and Canon Simon Lloyd, Chief Executive, was very happy to talk to the Claimant about her complaint “if this is ok with you” and commented “I hope you are feeling better.”
32. Cannon Lloyd contacted the Claimant and on 30th July 2020 they had a conversation during which he listened to the Claimant’s complaint. By the end of that conversation, it was agreed that the Claimant would take time to recuperate from her ill-health and when she was feeling better there could be a facilitated discussion with Bishop John, just as there had been in Costa coffee shop in 2019.
33. On 5th August 2020 the Claimant emailed her letter of resignation to the Respondent’s HR officer. This included the following,
- “I am writing to inform you that I am resigning from my position...with effect from 4th September 2020. Please accept this as my formal letter of resignation. For my notice period I will however be taking the leave that is owed to me rather than returning to work.*
- I feel that I am being forced to resign my post in view of the recent breach of contract by my line manager unilaterally changing my conditions of work and also his neglect of care. I will be pursuing an action for constructive dismissal.*
- I would like to point out that I am really sad to have to resign as I felt I had a few years of work in me yet but I feel that this is the only thing I can do as a result of the action by my line manager and the unwillingness of the church to recognise the serious issues of bullying and recklessness with respect to duty of care as an employer.”*
34. The Respondent invited the Claimant to discuss her concerns and invited the Claimant to attend an exit interview. The Claimant chose not to do so.

Relevant law

35. As the Claimant resigned her employment and relies upon a constructive dismissal, she must establish that she terminated the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent employer’s conduct (section 95(1)(c) Employment Rights Act 1996).
36. The relevant principles are found in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221. The test of a constructive dismissal is a three-stage one: (1) was there a fundamental breach of the employment contract by the employer? (2) did the employer’s breach cause the employee to resign? and (3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?

37. As Lord Denning explained in *Western Excavating*, I must ask myself whether *“the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows the employer no longer intends to be bound by one or more of the essential terms of the contract”*.
38. As the Court of Appeal explained in *Lewis v Motorworld Garages Ltd* 1986 ICR 157 a series of individual actions by the employer can have the cumulative effect of breaching the implied term of trust and confidence, fundamentally breaching the employment contract.
39. In *Omilaju v Waltham Forest London Borough Council* 2005 ICR 481, Lord Justice Dyson explained that the last straw does not need to be of the same character as earlier acts in the series of acts, but it must contribute something to the breach of trust and confidence. His summary of the law of constructive dismissal explains:

“(1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761.

(2) It is an implied term of any contract of employment 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: see, for example, Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as 'the implied term of trust and confidence'.

(3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract - see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).

(4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer' (emphasis added).

(5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such

incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the “last straw” which causes the employee to terminate a deteriorating relationship.”

40. Mr Winrow, on behalf of the Claimant has referred me to *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316. I accept his submission that the implied term of trust and confidence can be broken by a supervisor’s actions, as happened in the *Hilton* case, where a supervisor had severely reprimanded an employee in front of other colleagues.
41. Mr Winrow has also referred me to *Wadham Stringer Commercials (London) Limited & Wadham Stringer Vehicles Limited v Brown* [1983] 1 WLUK 221, EAT and has reminded me that an employer cannot argue the circumstances (eg the Covid pandemic) justified the breach; I am required to look objectively at what occurred and ask as a matter of contract “has there been a fundamental breach?”; the surrounding circumstances are not relevant.
42. The Claimant’s counsel also referred me to *Coleman v Baldwin* [1977] IRLR 342; the facts of that case were that an acting manager of a greengrocers, had his duties as a buyer removed from his role permanently. The EAT found that after 36 years’ employment the Respondent had unilaterally changed the whole nature of the Claimant’s job and had left him with residual duties. Mr Winrow submitted that the Claimant had been employed for 13 years and the actions of the Bishop had removed much of her role from her.
43. I accept counsel’s submission that I have to consider to the whole period of time from 2019 onwards (and not just the point of resignation) and ask myself whether collectively there is a breach of the implied term.
44. I have also had regard to *Buckland v Bournemouth University* [2010] IRLR 445 and note it is not possible to remedy an existing fundamental breach after the event.

Conclusion

45. Returning to the List of Issues, my findings were as follows:
 1. The Respondent did the following things:
 - a. In May 2020 the automatic email forwarding to the Claimant, from the bishop’s email account “bishopandyjohn”, was removed by the Respondent. This left the Claimant with automatic access to emails received in the “bishop.bangor” email address. She also continued to receive emails from the “bishopandyjohn” email account when Bishop John believed the Claimant needed to see them and forwarded them to her to make arrangements for forthcoming meetings.
 - b. In April / May 2020 Bishop John became responsible for the master diary. This was a temporary arrangement whilst the Claimant was not attending the office (when the Respondent was supporting the

Claimant in her request to be allowed to shield at home rather than work in a public facing role). Bishop John continued to notify the Claimant of appointments as and when she needed to be aware of them.

- c. The Respondent had sent an email to Jenny Lane copied to Robert Jones about a translation on 27 May 2020.
- d. The Respondent had asked Robert Jones to send out links for attendees to gain access to Zoom meetings in May 2020.
- e. When the Claimant was signed off sick with work related stress on 9th July 2020, there was no contact from the Respondent until her complaint of 27th July 2020. However, the context to this was that the Bishop had offered to meet the Claimant or have a chat with her on 3rd July 2020 and the Claimant had chosen not to respond to this offer. The same day as receiving the Claimant's message of 27th July 2020 the Bishop reached out to the Claimant in a supportive manner and on 30th July 2020 Cannon Lloyd had a compassionate conversation with the Claimant.
- f. I did not accept the assertion that the Respondent had carried out a risk assessment about the Claimant's return to work without taking into account her personal circumstances. Far from it, the Respondent had entered into correspondence with the Claimant and was waiting for medical evidence from the Claimant to inform the risk assessment.
- g. I did not accept the assertion that the Respondent had failed to respond appropriately to the Claimant's complaint made in July 2020? I found the Respondent's response to this complaint to be wholly supportive and compassionate.

2. In these actions, had the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent?

46. I must look at the Respondent and Bishop's conduct as a whole, since 2019 and ask myself whether, viewed objectively, this conduct was repudiatory. It is not a subjective test of whether the Claimant has lost confidence in the Respondent. Instead, I must answer the questions posed in *Malik* "*was this conduct likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer*".

47. When I looked at it objectively, I could not say that this was conduct that was calculated or likely to seriously damage an employee's trust and confidence. It was quite apparent to the Claimant and everyone that these were temporary arrangements that flowed from the Claimant's request to shield and work from home. The Bishop was continuing to copy the Claimant into messages relating to diary appointments and had scanned documents to the Claimant as

requested to enable her to work from home. The Respondent was also trying to support the Claimant to return to work in the office, when she would have been able to take on more duties again. This was nothing like the situation in *Coleman v Baldwin* where an employee was having a substantial part of his role removed permanently. Viewed objectively, I did not find there had been any breach of contract on the part of the Respondent, let alone conduct that could seriously damage an employee's degree of trust and confidence. Far from it, the Bishop and Respondent's actions were those of a compassionate and supportive employer.

48. Having determined there was no *Malik* behaviour on the part of the Respondent, I did not need to consider whether there was reasonable and proper cause for this behaviour.
49. Having found there was no breach of contract, I did not need to consider whether the breach was a fundamental one, whether the Claimant had resigned in response to the breach or whether the Claimant had affirmed the contract before resigning.

Employment Judge Howden-Evans

Date 14th May 2022

REASONS SENT TO THE PARTIES ON 16 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche