EMPLOYMENT TRIBUNALS

Claimant	Mrs K Lister
Respondent	Done Brothers LTD
Heard at	Leeds Employment Tribunal by CVP **On**: 11 April 2022.
Before	Employment Judge Othen (sitting alone)

Representation

Claimant	In person
Respondent	Mr Cater (Consultant)

JUDGMENT ON LIABILITY

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The Claimant, was employed from 22 November 2016, latterly as an Area Operations Assistant, until she resigned with immediate effect on 10 November 2021.

2. The Claimant claims that she was (constructively) dismissed in accordance with Section 95(1)(c) of the Employment Rights Act 1996.

3. The Respondent contests the claim. It says that the Claimant resigned.

4. The Claimant represented herself at the hearing and gave sworn evidence. The Respondent was represented by Mr Cater, a consultant, who called sworn evidence from Craig Sykes ("CS") and Laurence Farley ("LF") (both Regional Managers). I considered the documents from an agreed, 79-page Bundle of Documents which the parties introduced in evidence.

Issues for the Tribunal to decide

5. At the outset of the case, I took some time to discuss the issues with the parties and to understand the Claimant's case. She explained that she had taken some preliminary advice from ACAS and was aware of the general principles of a case of constructive unfair dismissal.

6. After some discussion, the Claimant confirmed that the alleged breaches of her contract of employment, in response to which she resigned on 10 November 2021, were as follows:

6.1 A change in her work location on or around 27th September 2021;

6.2 A failure to fairly or reasonably consult with her about the change in her work location; and/or

6.3 A delay in dealing with the written grievance that she submitted on 19 October 2021.

6.4 The Claimant was unable to explain why she resigned on 10 November 2021 in particular, saying that no action taken by the Respondent on that day had triggered it but rather, the stress of the above alleged breaches, all taken as a whole.

Findings of Fact

7. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

8. The Respondent is a bookmaker which owns and runs shops in the United Kingdom, trading under the name of Betfred. The Claimant, who lives in Pontefract, was employed from 22nd of November 2016. She first worked in shop management, then as a Group Sales Manager, before becoming Area Operations Assistant (AOA) in January 2020.

9. The Claimant's general duties included doing audits and conducting disciplinary and grievance hearings, within the Respondent's various shops.

10. Neither the Claimant nor Respondent was able to produce a contract of employment for the Claimant and the Respondent explained that although this was likely to exist, it had been unable to locate one for the purposes of this hearing.

11. A letter dated the 13th of January 2020, which was signed by the Claimant, defined her appointment as AOA. With effect from 27th of January 2020. it stated that her place of work:

11.1 "*will be any of the company's sites*" (78)

12. When questioned by me about her place of work, the Claimant replied that she had no specific work location but travelled around approximately fifty-three shops within a geographical area.

13. Lawrence Farley gave unchallenged evidence that the above work location reflected the normal terms and conditions for AOAs in the Respondent's organisation.

14. With effect from 5th of July 2021, the Claimant worked in a temporary position as Area Supervisor which was confirmed in an email to her dated the 15th of July 2021. This temporary role was then extended on the 3rd of August 2021, purportedly until the 26th of September 2021. The email dated 15th July 2021 (38) also defined her place of work as:

14.1 "..a*ny of the company's sites*".

15. The area in which the Claimant worked at that time was defined as N7 in the North Region which, very roughly, covered a geographical area from Cutsyke to Accrington. She would therefore travel from her home to any of those shops on daily basis, which would represent average journey times of up to one hour and 20 minutes (approximately).

16. With effect from August 2021, the Respondent intended to reorganise the management of its shops to redefine its regions and areas. On the 3rd of August 2021, a conversation took place between the Claimant and CS In which he confirmed that her area of N7 was to become part of the East Region. As manager of this region, CS explained that it was to be split into six new areas, E1 to E6. He informed the Claimant that, as a result of the reorganisation, her role may be placed at risk of redundancy. He further explained:

16.1 *"In the first instance I need you to look at the boundaries which were distributed to you and confirm to me which areas within the East Region would be acceptable for you. If I could please request the information before close of business on Thursday the 5th of August 2021 that would be much appreciated*."

17. This conversation was record in a note dated 3rd of August 2021 (41).

18. The Claimant confirmed to me that there was no dispute about the content of this meeting and that she did not take issue with any part of it.

19. In the days that followed, the Claimant emailed CS to inform him that she wished to take over E6 area. Another colleague (referred to as Ashley) who, before that point had also been AOA of a nearby area in the North Region, also requested E6. Both employees wanted this area because it included a significant number of the same shops which had previously been in their respective northern areas.

20. Between the 2nd and 9th of August 2021, CS telephoned both the Claimant and Ashley, on two separate occasions. The purpose and content of these telephone conversations were the same according to the unchallenged evidence of CS. He wished to explain to them that there were currently six AOAs working in his region and six areas. As such, if each AOA was allocated

to a different area, there would be no risk of redundancy. Currently, both Ashley and the Claimant had expressed a desire to work in E6 but geographically the E5 area made little difference to their travel, the shops covering a similar radius in relation to their homes. Working within E5 would not therefore represent further significant travel distance/time for either employee. As a result, he wanted to explore whether either of them would be willing to take on the E5 area rather than E6.

21. The Claimant complained that she felt bullied during these conversations and that she was backed into a corner in choosing E5 rather than E6. On balance, I do not believe that CS bullied the Claimant during these telephone conversations. It was entirely reasonable for him to explore, with both the Claimant and Ashley, whether either of them would be willing to voluntarily move to E5; indeed, it may have been unreasonable not to do so. This could have resulted in an agreeable outcome for all parties and may avoid job losses. I can understand and accept that the conversations may have been difficult and unpleasant for the Claimant and I sympathise with her, but they did need to take place. I believe that the conversation that CS had was the same with both employees and that he did not treat the Claimant unfairly or less favourably.

22. As neither employee was willing to consider the E5 area, the Claimant was then invited to a consultation meeting by way of a letter dated the 9th of August 2021 (42). She was again informed that the area restructure meant that her role was at risk of redundancy.

23. The consultation meeting took place on the 13th of August 2021. The notes from the meeting record that the Claimant felt "*backed into a corner*" in the preceding telephone conversations. CS is noted as saying "*I am sorry you felt that way…. it is completely your right to discuss options at this meeting…. I hope I can make you feel more comfortable going forward*".

24. The Claimant is further noted as saying:

24.1 "*there is no real difference in the two areas regarding size or time but I have worked hard to build up the trust with my staff. I know where to go to get the job done. I am clear that I would want to stay in E6. I would be considered for E5 but I must be clear my preferred option is E6. I could potentially [move] to E5 as a trial*".

25. Following this consultation meeting, CS considered the position further and analysed the work areas of each AOA. His unchallenged evidence was that it was the priority of the company to avoid redundancies and to try and keep management teams together wherever possible. He reviewed travel distances again. A third employee, known as Chris, who was currently AOA for the previous E5 area, lived further south in that region.

26. After his review, CS took the decision to move Chris from E5 to E4, to allocate the Claimant to E5 and Ashley to E6. He therefore decided that there was no further need to consult with employees as there was no risk of redundancy.

27. On 17th of August 2021, CS telephoned the Claimant to inform her of his decision. A final note of this conversation records it as follows

27.1 "*I recently held an individual consultation meeting with yourself as you were potentially affected by the changes. During this process I have listened to your concerns, considered individual travel required from your home address, and considered that there are 6 AOAs within the Eastern Region and six areas. My main priority within this process has been to ensure that we can keep colleagues employed and avoid redundancies where possible. I believe that given some reasonable adjustments and reasonable travelling time, this is possible due to the available positions within the East Region*"(50).

28. A letter was sent to the Claimant on the same day to confirm this conversation and its outcome. The Claimant was therefore informed that her new position:

28.1 "..*will be AOA in E5 under the management of Damian Glossop from Monday 27th of September*" (57).

29. When challenged in cross examination about the reasons for stopping consultation and imposing this decision on the Claimant, CS explain that he didn't think there was anything in the evidence that he had regarding Ashley or the Claimant which meant that either of them could not be moved to E5. Both employees wanted E6. He considered their experience, the impact on both employees and the reasons that they gave for their choice, which, in both cases was familiarity with the relevant shops. There were two reasons why he decided to allocate Ashley to E6:

29.1 that area was managed by David Milnes, who was her current Area Manager, thereby keeping that management team together, and

29.2 that the Claimant had marginally more E5 shops that were closer to her home than did Ashley.

30. As such, CS did not feel there was any further need for redundancy consultation once the decision was taken. He explained that he considered the decision was reasonable based on all the evidence before him.

31. The Claimant didn't want to accept this decision. When questioned by me about her reasons for this, she explained that she had worked in the area now represented by E6 for the past five years; that she knew the shops, knew the staff and had done a good job. Working in E5 would mean starting over again with new staff and shops which she did not want to do.

32. She also felt aggrieved that the decision to give Ashley the E6 area had been predetermined and that consultation had not continued and had not been fair.

33. Once the decision had been made to move her, she talked to her old regional manager, Chris Anderson, who advised her to put in a grievance. She did not put in a grievance at that time. Between 17th of August and 27th of September 2021, the Claimant looked for other roles both within the Respondent's organisation and externally.

34. Her move to E5 took effect on the 27th September 2021 but the Claimant was on holiday until the 8th of October 2021. On her return, she worked as AOA in E5 for approximately 10 days. She then took some advice from ACAS.

35. On 19th of October 2021 the Claimant submitted a written grievance to the Respondent (58) and went off sick. When questioned in cross examination about the delay in submitting her grievance, she explained that she intended to try and give the area of E5 a trial and that she also didn't know how to submit a grievance.

36. On 26th of October 2021, LF wrote to the Claimant inviting her to a grievance hearing. This letter summarised her grounds of grievance as being that she was bullied into moving area to E5, and that the decision to move her there was procedurally and substantively unfair (60).

37. The Claimant was on holiday for seven days at the end of October 2021. Therefore she contacted LF to inform him that she was unable to attend a hearing on the 3rd of November 2021.

38. The hearing was rescheduled for the 10th of November 2021 and took place on this day.

39. The minutes record a comprehensive discussion about why the Claimant wanted to be allocated to E6 area, that being "*your area*". The area comprised 61 shops and 45 of those had previously been in the Claimants N7 area.

40. When asked how the Claimant felt as if she had been treated unfairly, she replied:

40.1 "*because both Debbie and Lucinda were offered* [the] *same job and both got a pay-out*".

41. When questioned about this in cross examination, the Claimant agreed that this was one reason why she thought she had been treated unfairly. CS, under questioning from me explained that the two employees referred to above were in different roles to the Claimant and had received payments pursuant to genuine redundancy situations and/or under the terms of settlement agreements. Their cases were therefore not comparable.

42. After a discussion during the grievance meeting, which lasted for approximately 50 minutes, there was a short break. The meeting then reconvened and at this point, the notes record the Claimant as saying:

42.1 "*I think it's best to hand in notice with immediate effect. ACAS have said I have a case for constructive dismissal. I was forced into a position I didn't want* [to] *run other area*".

43. LF tried to persuade the Claimant to resolve the situation via the grievance process but the Claimant refused.

44. Her resignation was confirmed by way of a short note at the conclusion of the grievance meeting which states as follows:

44.1 "*I Katie Lister would like to resign with immediate effect due to the way I have been treated. I feel I have no option but to resign. I will be contacting my solicitor and ACAS*".

45. During cross examination, the Claimant explained that she resigned at that point because she had gathered her thoughts and was unable to cope with the stress of the situation any further. She accepted that she did not know at that stage what conclusion LF would come to regarding her grievance. She was unable to explain anything that LF had done or said which prompted her to resign there and then.

Relevant law

Contractual Terms

46. Terms of an employment contract comprise those which are written but also implied by custom and practice[1] and/or law.

Contractual Flexibility Clauses

47. A contractual term regarding an employee's workplace may be subject to a specific or general flexibility clause, giving the employer a right to change this place of work without the consent of the employee.

48. Such clauses can be relied upon although certain case-law principles have developed to restrict the manner in which they are applied by employers. The leading case of United Bank v Akhtar [1989] confirmed that an employer should act reasonably in the way it seeks to rely on flexibility clauses by, for example, explaining to employees the reasons for the change in workplace and giving them reasonable notice of when the change will take effect.

Constructive and Unfair Dismissal

49. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

50. Section 95(1)(c) ERA states that an employee is dismissed if (s)he: "*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*".

51. The above statutory test has, over the decades, been clarified and refined by cases such as Western Excavating (ECC) Ltd v Sharp [1978] from which this well-known judgment extract is taken:

51.1 "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further*

[1] Bond v CAV Ltd [1983] IRLR 360

performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

52. The relevant contractual breach can relate to express or written terms, such as a place of work or those which are implied into every contract of employment, such as the mutual term of trust and confidence.

53. The House of Lords in Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation) [1998] explained the effect of the breach of trust and confidence as follows:

53.1 "*The employer must not, without reasonable and proper cause, conduct itself in a manner calculated* [or][2] *likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*".

54. In accordance with the above legal principles, my role in this case is therefore to determine:

54.1 the terms of the employment contract between the Claimant and Respondent;

54.2 whether any of those terms were breached by the Respondent;

54.3 if so, whether any such breaches were so significant that they went to the root of the contract; and

54.4 whether the Claimant resigned in response to any such breach (so include any relevant consideration of delay).

Conclusions

55. Having considered the above principles I apply them to the facts in this case and come to my conclusions as follows:

56. The alleged contractual breaches on which the Claimant relied were, as set out above:

56.1 A change in her work location on or around 27th September 2021;

56.2 A failure to fairly or reasonably consult with her about the change in her work location; and/or

56.3 A delay in dealing with the written grievance that she submitted on 19 October 2021.

Change in work Location

57. It was agreed between the parties that the Claimant did not have a specific work-place but was required to travel between the Respondent's shops in a certain geographical area to perform her role.

[2] Varma v North Cheshire Hospitals NHS Trust UKEAT/0178/07

58. Until 27th September 2021, this had been defined as area N7. After that date, N7 no longer existed but the shops included within it fell mostly under the re-defined E6 area, with some included in E5.

59. I do not consider that the allocation of the Claimant as an AOA to E5 amounted to a breach of her contractual terms regarding work location for the following reasons:

59.1 The Claimant had no defined, contractual workplace but was expected, subject to the other implied terms of her contract, to travel to the Respondent's shops to perform her role;

59.2 The letter and email to the Claimant dated 27th January 2020 and 15th July 2021 confirmed her workplace to be: "*any of the company's sites".* According to the unchallenged evidence of LF, this reflected standard contractual terms for AOAs;

59.3 As a matter of custom and practice, the Claimant was required to travel to shops which were within a reasonable travel distance/time from her home, that being up to approximately one hour and 20 minutes for each journey;

59.4 There was no financial, physical or other material detriment to the Claimant in changing to E5. In fact, it made little, if any practical difference to her;

59.5 She agreed in her evidence, on multiple occasions that the change would result in no or very little additional travel time/distance and that her complaint was about the process used to implement the change;

59.6 When asked by me whether, if the change had been implemented by way of a consultation process which she deemed to be fair, she would have accepted it, she agreed that she would.

<u>Lack of reasonable/fair consultation</u>

60. I do not consider that the allocation of the Claimant to the E5 area was implemented in a manner which amounted to a breach of any of the Claimant's implied contractual terms, particularly that of trust and confidence. I conclude this for the following reasons:

60.1 The change in geographical areas was explained clearly to the Claimant, approximately eight weeks before her allocation took effect;

60.2 It was discussed with her both in person and by telephone on four occasions over that period and the notes from the in-person consultation meeting reflect a full and comprehensive discussion during which she was able to put forward her questions and opinions;

60.3 She was given an opportunity to state her views and these were given reasonable consideration by CS;

60.4 CS reasonably analysed the effect of the change upon the Claimant and other affected employees and reasonably took these into account in making his decision;

60.5 It was reasonable for CS to consider the wider business objectives of retaining existing employees and working teams into account also.

61. In my view therefore, none of the above conduct amounted to conduct "*calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee*" (Malik).

Delay in dealing with grievance

62. I do not consider that there was any unreasonable delay in dealing with the Claimant's grievance and/or that this amounted to any breach of implied contractual terms of the Claimant's contract, because:

62.1 Her grievance was acknowledged seven days after submission and she was invited to a grievance meeting to take place eight days thereafter;

62.2 She could not attend this as she was on holiday but instead attended a week later;

62.3 She resigned before the grievance process was completed.

63. I find, therefore, that the Claimant was not dismissed by the Respondent as defined by section 95 of the Employment Rights Act 1996 and her claim fails and is dismissed.

Employment Judge Othen
30 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 May 2022