



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Lorna Prado-Marin

**Respondent:** W.E.Roberts (Corrugated) Limited

**By CVP**

**On:** 18 – 19 May 2022

**Before:** Employment Judge Martin

**Representation**

**Claimant:** In Person assisted by Mr Kennedy (a friend)

**Respondent:** Ms Hatch - Counsel

## RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for constructive unfair dismissal succeeds
2. The Claimant's claim for pregnancy/maternity related discrimination succeeds
3. The Claimant's claim of disability discrimination is dismissed

## RESERVED REASONS

1. The Claimant presented a claim to the tribunal on 30 March 2021 claiming constructive unfair dismissal, pregnancy slash maternity related discrimination and disability discrimination. All claims were defended by the respondent.

### **The hearing**

2. The Claimant gave evidence on her own behalf, and for the Respondent the Tribunal heard from Claire Faulkner Member of Executive Team, Ben Wilks – Operations Director and Sarah Maxey – HR Manager.
3. At the start of the hearing Mr Newlyn said he knew Mr Puffette in a

professional capacity and gave details of the extent of his involvement with him. Mr Puffette is the Finance Director and is referred to but did not give evidence. Both the Claimant and the Respondent were happy for him to continue to hear the case.

### **The agreed issues**

#### Constructive dismissal (s.95 and 98 ERA 1996)

4. What was the most recent act (or omission) on the part of the respondent which the claimant says caused, or triggered, his or her resignation?
5. The claimant relies on deductions being made from her wages without consulting with her. She also relies on her discrimination claim below.
6. Did the Claimant affirm the contract after that act? If not, was that act (or omission) by itself a repudiatory breach of contract?
7. If not, was it nevertheless part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? Did the claimant resign in response (or partly in response) to that breach?
8. If the Tribunal finds the claimant was dismissed, has the respondent proved a potentially fair reason for dismissal?
9. The reason(s) relied on by the respondent is [] <sup>1</sup>
10. Did the respondent act reasonably or unreasonably in treating that reason as a reason for dismissal?

#### Pregnancy discrimination (s.13 EQA)

11. Did the respondent treat the claimant unfavourably because she was on compulsory maternity leave?
12. Did the respondent treat the claimant unfavourably because the claimant exercised her right to ordinary or additional maternity leave?
13. The unfavourable treatment was not informing the claimant of the opportunity to apply for the position of Production Scheduler and not considering the claimant for that role.

#### Disability discrimination – failing to make reasonable adjustments

14. Did the respondent apply a PCP to the claimant?
15. The claimant alleges that the requirement for her to repay the overpayment in the sums requested were part of the respondent's normal practice for claiming back overpayments.

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<sup>1</sup> As set out in the case management order

16. Did the above PCP place the claimant at a substantial disadvantage because of her disability, compared to someone without her disability?
17. Did the respondent fail to make adjustments that were reasonable and would have mitigated the disadvantage?

### The facts

18. The following facts are found on the balance of probabilities having heard the evidence and considered the documents and submissions. These findings are limited to those facts that are relevant to the issues and necessary to explain the decision reached.
19. The respondent is a company that has benefited from the COVID-19 pandemic. It specialises in the manufacture of corrugated board and packaging products, and has seen a dramatic increase in demand since the pandemic started.
20. The claimant was employed in February 2017 as an administrator. Her line manager was originally Ms Faulkner, and then changed to Mr Wicks on or about July 2020 she was promoted in 2018 to administration department team leader which had line management responsibility for five members of staff. The claimant went on maternity leave in 2019 and whilst on maternity leave she tendered her resignation on 4 June 2019. Her resignation letter at the time said:

*"Hi Claire,*

*Firstly, I want to thank you for absolutely everything. You've been not only an amazing manager to me, but also quite a dear friend.*

*It's really with a heavy heart that I've made the decision not to return to W.E Roberts's when my SML ends.*

*I feel like the worst person ever telling you this over email, but I needed to get my words out properly & I'm sure I wouldn't have managed it had I been in a meeting with you. For that I'm really sorry!*

*It's been a very difficult decision to make but one that I needed to consider with my current personal circumstances. This is what's best for me right now.*

*I love the work that I do, I adore the people that I work with and I believe in the company as a whole. I will miss it dearly.*

*Thank you for every opportunity that you have given me.*

*I wish W.E. Roberts and all its staff all the success, love and happiness in the world <3*

*I hope that with the notice that I have given, you will be able to fill my position as quickly and effortlessly as possible."*

21. The respondent invited her back to work with them on a flexible ad hoc basis with a view to her hours being increased if she wanted them to be.

22. The Respondent decided that it was important to have staff from other departments trained in scheduling as this was an integral and important part of its business. The Claimant and two others were trained in scheduling and in another department, and worked on a three-week rota, one week in each department. The objective was to ensure that there was adequate cover in these departments, so production was not held up if staff in these departments were absent through illness.
23. The Claimant was a valued and well-liked member of staff. Ms Faulkner described herself as being a fan of the claimant. Likewise, Mr Wicks who later became the claimants line manager also thought very highly of the claimant she was quite clearly an asset to the company. This is evidenced by them being flexible when the Claimant's first period of maternity leave with them ended. They wanted to retain her as a member of staff.
24. There is a dispute between the parties about the Respondent's knowledge of the Claimant's mental health issues. The Tribunal has considered each matter that the Claimant raised as evidence that they were aware.
25. The Respondent has a pre-employment medical questionnaire form which the Claimant was given to complete. She did not declare any illnesses on this form. In April 2020, a second form was given for staff to complete, this time the Claimant put depression/postnatal depression. The question she was answering was "Have you ever suffered from any of the following illnesses?" There was no indication that the Claimant was still suffering from the illnesses identified. (Tribunal's emphasis)
26. The previous year, at the time she resigned, the Claimant was unwell and told Ms Faulkner that she probably had post natal depression and that a friend of hers had sadly died recently. Ms Faulkner took this on board, and this was one of the reasons she offered the Claimant flexible working rather than accepting the Claimant's resignation in 2019. When Ms Faulkner saw what the Claimant had put on the second medical questionnaire she reasonably believed this related to the previous year's post natal depression and grief and did not know it was a continuing issue.
27. On 15 October 2020, the Claimant's partner sent an email to the Respondent explaining that the Claimant was unable to attend work. The email is a bit confusing as parts appear to come from the Claimant and parts from her partner. It is difficult to establish from this whether the reason the Claimant could not attend work was issues to do with her mental health (i.e., she was unfit to work) or because she could not get childcare. It says:

*"Jason, I am so sorry I am unable to come into work today as Lorna is very unwell. She is struggling really bad at the moment with the pregnancy along with her poor mental health, time's are hard and I know she wont mention it to her work colleague's.*

*Her sister was meant to look after the kids this afternoon, but has let us down and left us in this position. I have tried to find cover no luck.*

*I feel like I'm letting you and the team down at the moment having to take days off at this time, but I hope you can understand."*

The Claimant brought forward her maternity leave from December to start in November 2020.

28. During the Covid-19 lockdowns, the Claimant worked from home. She had two children one of whom she was home-schooling. Her partner lost his job in this period and inevitably things were very difficult. The Respondent was aware of these issues and was aware that they would influence the Claimant. It must have been a very stressful time. This is alluded to in the email from her partner set out above. The Claimant did not refer to her mental health in other communications, saying she was well.
29. As the Respondent was expanding, there were changes being made in the organisation. Some of these changes affected the administration department and some other departments. Whilst the Respondent notified the Claimant of changes in the administration department on 15 December 2020, it did not notify her of changes in other departments, including scheduling and the other department the Claimant worked in.
30. On 9 February 2021, the Claimant became aware of an advertisement for a permanent position as a scheduler. She had not been told of this by the Respondent. This was posted by her friend Hazel who also worked for the Respondent. The Respondent had a policy at that time of advertising on LinkedIn and on internal screens. It did not send job vacancies to staff on maternity leave or staff on long term sick leave.
31. The Claimant sent an email to Mr Wicks on 9 February 2021:

*"Hi Ben  
I hope you're well.  
I know there's been a lot of changes at WER recently - I've just seen the job advert for production scheduler. Does this mean the company doesn't need me to learn this anymore? As I was going to come in on my mat leave to do training with Karina.."*

32. Mr Wick replied within an hour:

*Hi Lorna  
How are you?  
You are correct that there are loads of things happening here and happy to have a phone call if you want to discuss anything. With the new machine arriving in next few weeks we will be increasing our output significantly. Scheduling was already beyond reasonable workload pre Christmas so we have had to advertise for full time resource. That is not to say that the company would not want you to be involved in future in this side of the business once things settle down. Hazel and team have relocated to Seacon and there will be a role being advertised there as well shortly. Retail and PS are merging into the main WER company going forwards and there is a huge need for supply chain management in this new divisional structure which is currently being reviewed and I imagine again will be future hiring.  
Etc etc*

*To cut a long story the investment we have made are creating roles quicker*

*than we can fill them as it stands so we have to try and get people in to be trained but I would hope you do not see this as doors closing for yourself as this should make WER a much stronger business for the future than it is today.*

*Let me know if you want to discuss further and hope everything is going Okay for you”*

33. The Claimant responded:

*“I’m well thank you :- ) wish this lockdown would end already!  
No I fully understand. I wanted to make sure if I was actually still needed or not. All of the changes are looking really promising for WER on efficiency level. I hope the merging hasn’t been too stressful!”*

34. The Claimant did not ask to be considered for the scheduling job in these communications or make an application.

35. The same day, the Claimant exchanged WhatsApp messages with Hazel. The messages talk about this post being advertised. Hazel said *“what they want from that job you honestly wouldn’t want for having 3 small kids....*

*I say this as your loving friend not the transport manager”*

.....

The Claimant wrote *“Honestly H, I know I couldn’t do it now”* to which Hazel replied, *“in all honesty,, I very openly told BW that I wouldn’t want you to be in either of these vacancies as they are too much for a mum with small children”.*

36. The Claimant took this last comment as being the view of Mr Wick. Reading the messages together, the Tribunal finds this was the view of Hazel in her capacity as a friend. Mr Wick said he never discussed this with Hazel, and she had no part in recruiting for the scheduling role. She was responsible for recruiting into the other role, but this other role is not part of this claim. The Tribunal accepts Mr Wick’s evidence. It does not find that this was something he thought.

37. The Respondent should only have been paying the Claimant her statutory maternity pay during December 2020 and January 2021. The Claimant noticed in January that the Respondent had also paid her basic salary. This was a mistake by the Respondent, and it was common ground that the money was owing to the Respondent and that the Respondent was able to make a deduction from the Claimant’s wages to get that sum of money back.

38. The Claimant notified Mr Puffette, the Finance Director of the overpayment by email sent on 31 January 2021. On 1 February 2021 Mr Puffette asked the Claimant to reimburse the overpayment (£1,245.60) back to the company and gave her the bank details to do this. He said he would correct her payslip. The Claimant responded: *“No problem :- )  
Rich can I be cheeky and ask to give it back via wages in installments? Like £200 a month (possibly more) Or i set up a transfer to the Roberts account? We claim*

*Universal Credit at the moment as Shane isn't working, this has put us in a bit of a pickle as the overpayment meant I didn't qualify for any help from them this month :- ( sucks to be me!"*

39. The Claimant never disputed the money was owing. Despite the Claimant requesting this on 1 February 2021, Mr Puffette did not reply until 24 February 2021 which was a couple of days before pay day:

*"Sorry, I forgot to reply to this. I've put £500 of it through this month – I may need to put the rest through in March otherwise it may mess your tax up.  
Hope that is ok.  
Ta"*

40. This led the Claimant to contact Ms Maxey, from HR. She emailed her on 26 February explaining that £500 was a lot of money to take in one go and it would leave her with £138 that month and the following month if further deductions were made. She said *"I love working for Roberts and wanted desperately to come back but this happening, amongst a few other things is making my return look highly unlikely."*

41. Ms Maxey immediately contacted Mr Wick and there were ongoing discussions. Ms Maxey at some point had a conversation with the Claimant. The Claimant contacted ACAS to start early conciliation and ACAS contacted the Respondent. Mr Wick communicated with ACAS. ACAS told Ms Maxey when it first called, that the Claimant did not want to have any direct contact with anyone from the Respondent. The ACAS conciliation certificate was issued on 30 March 2021. Given the communications between the Respondent and ACAS during this time were without prejudice the Tribunal does not know what was said. The Tribunal has ignored the parts of the Claimant's particulars of claim which refer to these conversations.

42. On 2 March 2021 there were more WhatsApp exchanges between the Claimant and Hazel. In one message the Claimant said *"Asked him if I could pay back off wages as I stopped getting UC cos of the overpayment, he wanted it all back in one go"* to which Hazel responded *"That's why he left it..so BW and Sarah couldn't stop him"*. There is no suggestion of any basis for this comment. It appears to be supposition only.

43. On 25 March 2021, the Claimant tendered her resignation:

*"Please accept this as my notice of resignation from W.E Roberts effective immediately.*

*I feel that I now can't return after my maternity after how the company has treated me during a number of situations during my leave.*

*One of these situations of course being the repayment of the overpayment - taking more than I can financially afford from SMP without my consent and no implication of any empathy towards how I am personally going to survive the month with 3 children. Which by the way, this month's universal credit has been affected again!! As it's been declared to HMRC that I received 638 net instead of the 138 I actually received.*

*I have also been through maternity discrimination by being pushed out of a job opportunity / training whilst I was on maternity leave. I was in the middle of training for this role and had already agreed prior to my leaving that I would continue the training using my KIT days. The role was even part of my review objectives.*

*By going on my leave I feel I have been completely disadvantaged.*

*I had no communication regarding the opening of the job role in scheduling or any changes that affected me or any opportunities that I could have potentially had. I found out about the role via a Facebook advertisement in which I then messaged Ben, to be told to be happy for the company's progress.*

*All of this has caused me now to seek more medical help as my mental health through this whole process has been obliterated.*

*I will continue to speak with ACAS on the matters and hope a solution can be found,*

*All of this aside - this is absolutely breaking my heart. I was very much a patriot of WE Roberts throughout my employment and did whatever was needed of me... even taking my kids into the office during the COVID-19 pandemic when no one else wanted to go in and do the paperwork.*

*I am very upset with how this has all turned out. However, I wish WE Roberts all the best for the future."*

44. The Respondent accepted the Claimant's resignation, and this time did not go back to her to ask her to reconsider. This was because this was the second time that the Claimant had resigned. It did not contact the Claimant further, even after a significant event happened. This was because the Claimant said she did not want them to contact her.

### **Submissions**

45. Both parties gave submissions. They were in writing and not repeated here.

### **The Tribunal's conclusions**

46. This is a very sad case. The Claimant was a much liked, and respected member of staff who was an asset to the company. The Claimant said how much she loved working for the Respondent. It is a shame that their relationship had to end, and it resulted in this claim being brought.
47. The Tribunal found the evidence of all witnesses to be truthful from the witnesses' perspective. There are matters which are explained below where the Tribunal finds that the Claimant unfortunately misinterpreted matters and relied on the comments made by Hazel which appear to have had an impact on how the Claimant perceived the Respondent when the comments were personal to Hazel and not reflective of what the Respondent was thinking. The Claimant seems to have misinterpreted what Mr Wick said about the new scheduling role. The Respondent's evidence which the Tribunal accepts is that she was being trained so she could cover in that role, not specifically for a permanent position in that department although of course this may have happened in time. The Respondent said that given the rate of growth in the company that more schedulers roles would be required going forward.
48. The Tribunal considers the Respondent overall, to be a company that does respect and value its employees. Its actions of taking the Claimant back when she first resigned and being very flexible are indicative of this and the high regard it had of



the Claimant. The Claimant has obviously been through a very difficult time as can be seen from what she said and the medical information in the bundle. The Claimant presented very well, she answered the questions asked and gave well structured submissions. The Respondent's counsel described the matters giving rise to this case as a tragedy. We agree.

49. These conclusions are found against the factual matrix set out above, and on the balance of probabilities. All evidence was considered even if all of it is not recorded in this judgment.

50. In coming to our conclusions, we considered the following law:

**Constructive unfair dismissal**

51. s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice, by reason of the employer's conduct.

52. **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA**, held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of 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'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or 'repudiatory'.

53. **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347** held that to constitute a breach it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

54. The first question to be answered is whether there was a breach of contract. A breach of contract can be the breach of an express term or of an implied term for example mutual trust and confidence. There is no doubt that that the Respondent had the right conferred by s 13(4) Employment Rights Act 1996

Pregnancy/maternity discrimination

55. S 18 Equality Act 2010

Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to

exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

#### Disability discrimination - Reasonable adjustments –

#### **S 20 Equality Act 2010 Duty to make adjustments**

(1) The Respondent must have knowledge of the Claimant's disability

(2) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(3) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) – (13) . . . .

#### Constructive unfair dismissal

56. To succeed in a claim for constructive unfair dismissal the Claimant must show a breach of contract by the Respondent that 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.'* The Claimant relies on the implied term of trust and confidence and cites the last straw as being the deduction of £500 from her wages.

57. There is no doubt that the Respondent had the statutory right to make such deductions as the overpayment was a mistake. The Respondent's policy states:

*“Overpayments*

*If you are overpaid for any reason, the total amount of the overpayment will normally be deducted from your next payment but if this would cause hardship, arrangements may be made for the overpayment to be recovered over a longer period.”*

58. It is therefore envisaged that there may be circumstances where it is not possible to repay the sums immediately, and that a payment plan could be agreed. The problem for the Claimant was that the overpayment was swallowed up by her overdraft and she therefore did not have the funds to repay it.
59. Given the terms of the policy there was a reasonable expectation that a payment plan could be agreed. The Claimant referred in her email to Mr Puffette to a monthly sum of £200 being deducted. She explains her financial difficulties. Rather than engaging in a dialogue with the Claimant, Mr Puffette does not respond until two days before pay day and makes a deduction of £500 more than twice what the Claimant suggested.
60. The Claimant felt this damaged the trust and confidence she had in her employer, and she tendered her resignation. She immediately sought assistance from Ms Maxey who in turn discussed matters with Mr Wicks. There was no immediate solution offered. The Claimant then engaged with ACAS, and it is presumed there was without prejudice discussions after this. The Claimant resigned on 25 March 2021. The Claimant’s early conciliation certificate was issued on 30 March 2021 and the Claimant promptly presented her claim on the same day.
61. Despite the Tribunal finding that overall, the Respondent was a caring employer, the actions of Mr Puffette did breach the implied term of trust and confidence and the Tribunal finds that this was a significant breach going to the root of the contract of employment. Mr Puffette did not give evidence, so his motivation is unknown.
62. The Tribunal finds that the Claimant acted promptly in resigning. It was reasonable to engage the services of ACAS when she did, and was reasonable to wait to see what if anything happened. The Tribunal finds that the reason the Claimant resigned was because of this breach against the background of the previous issues regarding the advertising of the role in scheduling which is set out above. The Claimant did not affirm the last breach.
63. The Tribunal finds that the Claimant was dismissed by the Respondent and that this dismissal was unfair.
64. The Claimant’s claim of constructive unfair dismissal succeeds.

Pregnancy/maternity discrimination

65. The Respondent had a policy of advertising jobs internally on screens and on LinkedIn. It did not send information about vacancies to any staff who

were absent either by way of maternity leave or long-term sick leave. It was by chance that the Claimant found out about the new position in scheduling.

66. No comparator is needed for this type of discrimination. It is therefore irrelevant that anyone on long term sick leave would also not have received information about the vacancy. The reason the Claimant did not receive the information was because she was on maternity leave. This is discrimination. The Tribunal were pleased to hear that the Respondent has changed its policy now and is now providing staff absent on maternity leave and long-term sick leave with information about vacancies.

67. Of note however, is that despite finding out about the position in scheduling and having communication with Mr Wicks about it, the Claimant did not then express an interest in the role or make a separate application. This may go to remedy.

#### Disability discrimination

68. The Tribunal finds that Mr Puffette did not know about the Claimant being disabled and has found that Mr Wick and Ms Faulkner similarly did not know she was disabled for the reasons set out above. In these circumstances the Claimant's claim of disability discrimination can not succeed and is dismissed.

69. A one-day remedy hearing will be listed and separate directions will be given for the preparation of this hearing. The parties are encouraged to liaise and see if they can settle matters between themselves.

Employment Judge Martin

Date: 25 May 2022