EMPLOYMENT TRIBUNALS

Claimant: Mrs A Waring

Respondent: Tudor Contract Cleaners Limited

Heard at: Manchester **On:** 20 September 2022

Before: Employment Judge Feeney
Mrs C Bowman
Mr M Stemp

REPRESENTATION:

Claimant: Mr A Effiong , Consultant
Respondent: Mr B Hedley, Consultant

JUDGMENT ON RECONSIDERATION

The unanimous judgment of the Tribunal is that the claimant's application for a reconsideration of her judgment and a variation of the judgment promulgated on 22 November 2021 in respect of constructive unfair dismissal fails.

REASONS FOR RESERVED JUDGMENT ON RECONSIDERATION

1. Following a judgment promulgated on 22 November 2021 the claimant applied for a reconsideration of that judgment. By a letter dated 7 March 2022 the claimant applied for a reconsideration of three aspects of her constructive unfair dismissal judgment. These were as follows:

    (i) Regarding the issue raised on 18 September where the claimant had given a colleague to work and discovered that he had got a life threatening blood born virus, she had previously administered first aid to this colleague without PPE during an accident and she was not made aware of the dangers of the potential exposure. The respondent

had made enquiries in relation to any dangers which may arise to other members of staff from this employee's condition and the information they received were that no specific steps were necessary. In light of this and the need to protect and balance the confidentiality of the individual the company decided that this employee's condition would not be publicised. In addition the claimant should use PPE during first aid. We find there was no breach of the implied term to protect employees health and safety here as the respondent had acted responsibly and balancing the individual and the collective risks.

Claimants response

The claimant's submission was that she holds a superior first aid qualification to Ms Teresa McArdle, the respondent's Human Resources Health and Safety Officer and that when she had treated the casualty at the time of the incident no PPE was available and at no point after the incident was she asked whether she had been exposed to blood or bodily fluids. She believed that the respondent did have a responsibility to inform all employees of possible hazards in the workplace and a risk assessment should have been produced for all first aiders which would have maintained confidentiality. The claimant submitted that first aiders have a legal duty to perform first aid and not refuse treatment if no PPE is available. She asserted that during cross examination Ms McArdle failed to grasp the seriousness of the claimant's original complaint. The evidence was that Ms McArdle had sought advice from Croners HR and she had then been advised that on balance the matter did not need to be reported in order to preserve the individual's confidentiality. The claimant submitted it was a fundamental breach of the implied term of trust and confidence.

(2) On 15 October operatives were informed they must report to David Ogden on the return to the Unit, this was previously a key responsibility of the claimant, the change was not discussed with the claimant, this was a step in the change manage situation and we can understand that if there is a key responsibility of the claimant she would be upset by not having this change discussed with her before it was implemented. This would be a breach of the implied term of trust and confidence, however we do not consider it was a fundamental breach. The claimant had complained about it and if the respondent had completely ignored her then that may have escalated this into a fundamental breach but not at this stage.

The claimant's response

During cross-examination Mr Caqueret was unclear of the back office functions but did not challenge the information produced on the various paper schedules, calendars and reference to the invoicing was not contested. The key information I received from returning operatives was that the main function and the different elements of my role from invoicing equipment, repairs, PPE orders, holidays, absenteeism and job completion. Without this information the claimant would not be able to fulfil her role as Regional Co-Ordinator.

(3) The claimant refers to David Ogden having to arrange when a job would be completed however this was not mentioned in the claimant's witness statement, nor in the list of issues therefore we cannot consider it is not a fundamental breach of contract in that situation.

Claimant's response

This was referred to in paragraph 36 of the witness statement and the list of issues (j) and during cross-examination.

The Law on Reconsideration

2. Rule 70 of the Tribunal rules 2013 provides that an Employment Tribunal can reconsider any judgment where it is necessary in the interests of justice to do so. This power can be exercised on the Tribunal's own initiative or on the application of a party. This is a very wide power in contrast to the previous power which was more limited.

3. Under Rule 72(1) if the Employment Judge considers there is no reasonable prospect of the original decision being varied or revoked the application would be refused and the Tribunal will inform the parties accordingly. If it is not refused then the Tribunal will send notice setting a time limit for any response to the application from other parties and attempting to establish whether the application can be determined without a hearing. In this case it was deemed fairer to have a hearing in person with the full panel who made the original decision.

4. On reconsideration the Tribunal can confirm, vary or revoke the original decision and if revoked the decision could be taken again.

Respondent's Submissions

5. In relation to point 1 the respondent submitted there was no mention of a risk assessment in the original pleadings or witness statements and accordingly the claimant is now putting a gloss on her original claim. The respondent also submitted that the claimant left it too late to resign and she did not resign until 15 October.

6. In relation to ground 2, again the respondent relies on the fact that the claimant waited too long before resigning.

7. In relation to ground 3, the respondent was not convinced that the matter the claimant has now elevated into a claim was the matter in issue in the List of Issues. They had understood the issue to be that the accounts staff were not providing the claimant with any information she needed and the reference to the job was to the chemical delivery issue.

8. In general, the respondent submitted that the claimant had already made a decision to resign before the 15 October incident **The claimant's reply**

9. The claimant replied that she puts all three issues together and says they were sufficient to be a fundamental breach of contract. She also reiterated a point from her original case that DO had previously resigned and this had

been rescinded whereas the respondent did not rescind her resignation rather they immediately advertised her job on a higher pay, they definitely decided not to let her back and FC never asked her whether or not she wanted to come back.

Conclusions

10. (i) <u>18 September 2019</u>

The claimant's witness statement says "on 18 September 2019 during our journey to work I was having a conversation with a colleague about our day and he informed he had a clinic appointment then informed he had a life threatening blood born virus. I have previously administered first aid to this colleague without PPE at the point of an accident, at no point was I made aware of the potential exposure to the ailment by the employer." It is correct that the claimant did not say in her witness statement that there was no PPE available therefore we believe that the claimant has embellished her claim in the reconsideration and put points to us which she did not originally rely on in relation to PPE not being available. We reiterate we were satisfied with the steps the respondent had taken and indeed they had taken steps by consulting Croner their human resource employment law advisors and reached a balanced position between confidentiality and risk. Accordingly, we reiterate our view that this was not a fundamental breach of contract.

(ii) We did accept that there was failure to communicate the situation with the claimant but we also accepted that it was part of the change management the respondents were implementing. The claimant's submission was that taking her off this responsibility meant she would be unable to do her job. However, as this was never raised with the respondents at the time there could be no exploration at the time of the reasons for this change. We still think this would be a necessary step to escalate this breach into a fundamental breach. We have revisited the cross examination of Mr Carqueret and his explanation was that it was a rapidly changing situation and Mr Ogden was leading on the big change as he was the big change champion. His cross examination was mainly about what happened after the claimant's resignation. The other major point was that he had put the claimant under an inordinate amount of pressure in relation to a job he had asked her to complete at the time of these events and on balance it is likely the claimant's feelings were heightened by this. We cannot see how the points raised by the claimant change our view of this issue.

(iii) The third issue. This was Richard Flanagan asking David Ogden " when can we fit it in" . In respect of this it is correct that at item (j) the claimant says "Andrew Flanagan came the claimant's aid in an attempt to extract information about invoice ready work from Nicky Marsh and Richard Phelps. The claimant had previously questioned this information as it was holding up her and the accounts department. The claimant will say she had been fobbed off by both Nicky Marsh and Richard Phelps. The claimant will say that when Andrew Flanagan attempted to extract the information he was fobbed off and ignored

several times in the conversation by the above which caused Andrew to throw his pen onto his desk in frustration and the claimant to walk away from the conversation. The claimant will say that whilst her initial question has now been answered which enabled her to do her job, Richard Phelps clarified with Andrew Flanagan that he needed to arrange with David Ogden when the job would be completed, this confirmed to the claimant that she had been stripped of her duty to arrange this." It is also correct that this paragraph appeared in the claimant's witness statement. We accept therefore that this issue was raised however it was not clear at all that it was the one sentence regarding the completion of jobs that was the issue, we understood the issue was that people would not give her the information that she required and not the short reference to when the job would be completed.

The claimant does describe this as the final straw and she says that it made her realise that all her job was being taken off her in her witness statement. We note it is not referred to in her original claim form or her further and better particulars. It is raised in her witness statement and was clearly misunderstood at the hearing given how the claimant frames this claim i.e. that her job was being taken off her. Our conclusions are :

Firstly the claimant does not actually know to what 'Richard' was referring, the respondent understood it to be the chemical delivery which the claimant had previous complained about having to deal with. In that context it was reasonable and not in breach of contract to ask Mr Ogden. In addition if the context is the claimant believed her job was being taken off her this was an overreaction without any further exploration at the time of what was being discussed, it was also a gloss on the claimant's original constructive dismissal claim which did not mention this as the final straw elsewhere she describes the failure to contact her about why she had walked out as the last straw.. Accordingly we find that it was implausible it was the final straw as it would have been mentioned earlier. Further that there was no intention to remove the claimant's role as this was contradicted by the fact that the claimant's job was advertised quite quickly after this incident, a matter she was upset about including the fact it was advertised on a higher salary, this must militate against the claimant's proposition that this meant that her job was being removed from her. In our view the claimant did not stay long enough to explore what was happening before walking out and did not explain why she thought this was the last straw. At the hearing we understood it was because the accounts staff would not give her the information. We find that the claimant acted prematurely – at that point the respondent could not be said to be acting in a way calculated and likely to destroy confidence and trust as it was not clear what was being referred to and what the implications were.

12. **Overall view**

Taking these incidents overall we still find that the claimant has elevated incidents in a busy office to be personal slights and part of a campaign to get rid of her role. We do not accept this and therefore find that the conduct of the respondent does not meet the test outlined above for constructive dismissal.

Employment Judge Feeney
14 October 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 October 2022

FOR THE TRIBUNAL OFFICE