EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mrs Elisabeth Ellis **v** **The Weston Turville Golf Club Ltd**

Heard at: Watford **On**: 7 October 2022

Before: Employment Judge Bedeau

Representation
For the Claimant: Mr B Hill, Friend
For the Respondents Did not attend nor represented

JUDGMENT

1. The constructive unfair dismissal claim is well-founded and the respondent is ordered to pay the claimant the sum of £14,555.
2. The unauthorised deductions from wages claim is well-founded and the respondent is ordered to pay the claimant the sum of shall £3,295.62 net.
3. The claim of accrued unpaid holiday is well-founded and the respondent is ordered to pay the claimant the sum of £722.54 net.
4. The breach of contract or wrongful dismissal claim has been proved and the respondent is ordered to pay the claimant the sum of £2,664.42 net.
5. The total sum to be paid by the respondent to the claimant is £21,237.58.
6. The claimant did not claim any state benefits, therefore, the Recoupment provisions do not apply.

REASONS

1. The claimant, Elisabeth Ellis, presented her claim form on 6 October 2021 in which she claims unfair dismissal; wrongful dismissal; accrued unpaid holiday; unauthorised deductions from wages; and other unspecified payments. She worked for the respondent as an Administrator.

2. The respondent was sent by the tribunal Notice of Claim on 18 November 2021, and was given the statutory period of 28 days within which to present its response, by 16 December 2021. It failed to do so. I was satisfied that the notice was sent to its correct address on New Road, Aylesbury, Buckinghamshire, HP22 5QT.

3. On 20 January 2022, the claimant applied for a judgment in default of a response from the respondent.

4. On April 2022, the Tribunal issued a Notice of Hearing to the claimant and to the respondent, as well is to Weston Turville Golf Club, Cherry Acres Commercial Centre, Piddington, Bicester, OX25 1QN. It listed the case for a final hearing on 7 October 2022 at 10.00am, with a time estimate of one hour. Appropriate case management orders were issued. On the same day, the respondent was sent a letter by the Tribunal and to the Cherry Acres Commercial Centre address. It stated that as the respondent did not present a response,

> "Under 21 of the above rules, because you have not entered the you are entitled to receive notice of any hearing that you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case."

5. There was no response from the respondent to the Tribunal's letter in or around April 2022. On 6 October 2022, an email was sent by Harshal Vyas, Group Operations Director, to Mr Tony Clingan, General Manager, based at the respondent's address in Aylesbury. The email refers to having received from the Tribunal, notification of the hearing been conducted by video and details of the hyperlink. Harshal Vyas expressed ignorance of the Tribunal's proceedings and of the hearing the following day. A request was made that the hearing be postponed. The email continued,

> "Many people will advise us to use their services but we do not need them for this case. We have done everything as per the books. We have given her notice we have tried to offer her different role. We made changes to her job role. The only reason we could lose this case is that we have not responded in time."

6. It would appear from this email that Harshal Vyas was aware that the respondent had failed to present its response in time.

7. Following on from the email, Mr Clingan emailed the Tribunal the following morning, at 0902, stating,

> "I have had a message back from my head office saying that they have not received any documents on this case.
>
> You will see our group operations director's response below and he is requesting this is stop so that we the company can make a proper response.
>
> You will see his note below which I have listed underneath.
>
> We have done everything as per the books. We have given her notice we tried to offer her different job role. We made changes to her job role.
>
> It obviously cannot be in the interest of justice that the judgement of any sort is made until such times as this has happened."

8. The address given in the email by Mr Clingan is the New Road, Aylesbury address with two telephone numbers.

9. I was satisfied that the Tribunal correctly sent correspondence to the Aylesbury address notifying the respondent of the claim; the date it was required to present its response; the rule 21 warning; that if it wished to participate in any hearings, it could only be permitted to do so by the Employment Judge at the hearing. Apart from the email from Mr Clingan sent in the morning of this hearing, there has been no correspondence, nor any communication from the respondent to the Tribunal or to the claimant.

10. I decided to refuse the application for a postponement.

The evidence

11. The claimant gave evidence and produced a small bundle of documents.

Findings of fact

12. After having heard evidence from the claimant, and after having considered the documentary evidence, I made findings of fact.

13. The claimant gave clear, cogent and credible evidence. She was at times very anxious and emotional having to recount events leading up to her resignation after 25 years' service.

14. She commenced employment on 1 January 1996, and was at all material times, employed as full-time Administrator until her resignation, effective on 8 June 2021, on notice.

15. She worked in membership, recruiting members, members' payments, accounts, would take requests for the booking of weddings and parties and pass the information on to the sales team as she was not involved in sales. She had been doing that work for a considerable number of years. She worked at the respondent's Aylesbury premises.

16. In March 2021, she was on furlough working from home, when on the 10 March, during a telephone call with Mr Tony Clingan, General Manager, he said to her,

> "By the way, Dr Chen wants you to train the girls from head office to do your job and move you into another role."

17. She was shocked and unsettled by that statement, even more so when Mr Clingan said that she may be working promoting the Banqueting facilities, an area of work she was unfamiliar with, and she told me, she was not suited for. She had not been forewarned abut any reorganisation of the respondent's business. She requested that Mr Clingan should put what he had said to her in writing. This was not done until 24 March 2021, after repeated requests from her He wrote,

> "Good afternoon Libby

Further to our conversations with yourself and Barry I have put in writing the outline of what Dr Chen would like to achieve.

Can I start by assuring you that there is no intention to remove you from post but that he would like to get you more directly involved in Function sales.

We all greatly appreciate the important role you play with the members and we have no intention of cutting across that.

You are pivotal on the membership relationship side of things and Margaret is not going to directly get involved with that, however he would like to have Margaret dealing with accounts from the office.

There will be sense in Margaret understanding the system and there will be times when it will make sense for you to have some support from Margaret, she will not be directly involved in conversations with members.

She will take some load off me in a number of areas and I believe she will achieve the same for you, much in the way that Janet did when she was here.

I think we also need to understand that Dr Chen has not seen you at the club for some time now, he understands that Rose has passed away and that Millie is not well.

However he would like to see you back in the office and I actually believe that if we can develop a collaboration between yourself and Margaret in the way that you have with Sandra then I feel that everybody wins from that.

We will put in place a budget to help you drive the function sales which you already do on a smaller scale and I have every confidence that you will find this highly fulfilling and will help the business achieve its required long-term growth.

I will develop some training for you and I take on board the need for you to be able to hand over the events to somebody who is both ready to drive them and who shares the passion that I looking for in running events.

I firmly believe that you will come out office with an enhanced role, the market has been brutal in the last year and in the short-term furlough still exists to support you as we start to grow again.

Dr Chen has had a tough time to the last year and we all now need to do our utmost to grow back quickly and to support his continued commitment to the business.

I would like us to conclude a dialogue on this and get you back involved on a weekly basis going forward.

Many thanks

Tony Clingan"

18. On 25 March he emailed Mr Barry Hill, a friend of the claimant and who was acting on her behalf, forwarding an email from the Area Manager, who wrote that the claimant must turn up at the office the following day as she cannot work from home.

19. The claimant was signed off sick from 30 March for two weeks with work-related stress. Within hours of sending in her sick note she was sent work to do from her home. This only aggravated her work-related stress and was contrary to what the respondent was supposed to do, that is to allow her time to recuperate within the two weeks. She was signed off again from 13 April for a further two weeks, and from the 27 April for four weeks due to work-related

stress and arm pain. During this time Mr Clingan continued to send her work to do from her home.

20. On 5 May 2021, she received her salary and was concerned at the amount paid by the respondent to her. She requested her payslip which arrived on 8 May together with more work for her to do. She had been paid sick pay notwithstanding the fact that she was working and on furlough. In fact, while on furlough she was required to carry out her normal work which is contrary to the provisions of the Job Retention Scheme. On 13 May, she queried her pay and sent in a further sick note but, by 8 June, she did not receive a reply from Mr Clingan.

21. On 8 June 2021, she wrote to Mr Clingan, tendering her resignation in which she set out the history of her treatment from 10 March to May 2021, after which she wrote,

> "You have never advised that you were taking me off furlough and therefore I believe I should have continued to have been paid the furlough, let alone at least be paid for work which you know I have done. Is that not the most fundamental obligation of an employer?
>
> Today, I have been signed off for a further four weeks. I have never before been off work with stress and neither have I been so ill for such a protracted period of time. In the interests of my mental health, I feel I have no alternative but to resign my position in Weston Turville Golf Club and therefore offer three months' notice as I believe is required. If that is not correct, please advise me accordingly.
>
> I expect to be paid all holiday pay due to me and I believe that your failure to pay me for the work carried out whilst off sick amounts to an illegal deduction from my wages for which I expect full redress.
>
> Your treatment of me on the last few months is tantamount to bullying, has caused me to be ill, you have continued to exert pressure on me whilst I have been ill, and you have created a situation which aside from my health makes a return to my position at work the most difficult. Twenty-five years of my life has been invested in Weston Turville Golf Club and it saddens me greatly that you have chosen to treat me in this manner. Fundamentally, I believe the summary of what has occurred amounts to a breach of trust and confidence on your part and therefore find that combined with my ill-health my position is untenable."

22. Mr Clingan emailed the claimant on 11 June 2021, acknowledging her resignation which he accepted with "a heavy heart". He stated that he had not made her resignation public and in due course he would respond to the points she raised.

23. There was no response from him to the claimant's resignation email. She wrote to him on 6 October 2021, expressing concern that he had not responded to the points in her resignation as he promised he would. She stated that he had failed to pay statutory sick pay despite numerous requests from her, and had not formalised her termination details. As she had not taken any holidays over the previous twelve months, she was entitled to her holiday pay. Further, as he had not engaged in ACAS conciliation, she decided to issue Employment Tribunal proceedings against the respondent.

The law

24. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

25. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

26. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

27. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

28. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final

> straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

29. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

30. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

31. Mr Justice Cavanagh in the case of Lacey v Wechseln Ltd t/a The Andrew Hill Salon UKEAT/0038/20/VP, held in relation to the last straw doctrine,

> "The very essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself. It need not even amount to a breach of contract, when looked at on its own. It need not even have the same character as the other incidents that preceded it: Omilaju v Waltham Forest London Borough Council, at paragraphs 15-16. Rather, the significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiate a breach of contract.", paragraph 71.

31. In addition, I have considered the contractual position in relation to holiday pay and notice pay.

Conclusion

24. In the absence of evidence from the respondent, I accepted the claimant's evidence of her treatment and do conclude that the respondent had breached the implied term of mutual trust and confidence, in that, it instructed her to give to her other work colleagues, all of her substantive duties as an

Administrator and did not give her an alternative, comparable position. Furthermore, while on sick leave and on furlough, she was still required to carry out work for the respondent, contrary to the provision of the Job Retention Scheme. She resigned on notice which she was entitled to do. There was no ulterior motive for her resignation other than her treatment in relation to her substantive duties. Section 95(1)(c) ERA applies and she was dismissed by the respondent.

25. As the respondent has not given a potentially fair reason for dismissing her, I conclude that her dismissal was unfair.

26. She is entitled to her outstanding wages, notice pay, and holiday pay.

Remedy

Unauthorised deductions from wages

27. She told me and I do find as fact, that she received each week statutory sick pay from 30 March 2021, of £346.46 each month. The total she was paid over three months to end of June 2021, was £1,039.38.

28. As she was working she was entitled to her full monthly pay of £1,445 for three months which is the sum of £4,335, less her sick pay of £1,039.38, is £3,295.62.

29. I conclude that there has been unauthorised deductions from her wages and the respondent is ordered to pay her the sum of **£3,295.62** net.

Accrued unpaid holiday

30. In relation to holiday pay, she told me and I accepted her evidence, that the holiday year runs from 1 January to 31 December, and she was entitled to 28 days a year. One day's holiday pay is £1,445 divided by 28 which is £51.61 net. As she resigned half way through the year, I will award her 14 days multiplied by £51.61. She is, therefore, entitled to holiday pay in the sum of **£722.54** net which is ordered to be paid by the respondent to her.

Constructive unfair dismissal

31. I have considered sections 114 to 124 Employment Rights Act 1996, on compensation for unfair dismissal. The claimant has opted to be compensated. She is entitled to be paid the following sums:

The Basic Award

32. She was born on 6 April 1960 and was 61 years of age at the date of her dismissal. The effective date of which was on 8 September 2021. She was employed by the respondent for 25 years.

33. She told me that her gross weekly pay was £335. For the Basic Award, she is entitled to 30 weeks multiplied by £335 = **£10,050.**

The Compensatory Award

34. The claimant told me that she has a terminally ill sister for whom she provide care twice a week. Her first sister died from cancer on 14 August 2020. Since her dismissal she has only applied for one job which was in September

2021. She said that after 25 years working for the respondent her confidence had been "destroyed". She also said tat she has a very good reference from her previous employer. I have decided to limit her loss of wages to 13 weeks from 9 September 2021, to 9 December 2021, to take into account the shock of having to resign from a job she loved and the time it would have taken her to find another comparable Administrator role. Her loss of wages is, therefore, 13 x £285 = **£3,705.**

Loss of statutory rights

35. As regards loss of statutory rights, I take into account that she was a long-serving employee and would need to be continuously employed for two years before she becomes protected from being unfairly dismissed. I award to sum of **£800.**

Notice pay

36. In her resignation email dated 8 June 2021, she gave the respondent three months' notice to 8 September 2021, but was not paid her full salary while she was working but statutory sick pay of £346.86 for each month over three months, which is £1,040.58. She was entitled to be paid for 13 weeks at £285 each week = £3,705, less £1,040.58 of £3,705 = £2,664.42. The respondent is ordered to pay the sum of **£2,664.42** to the claimant in respect of her notice pay.

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Employment Judge Bedeau
26 October 2022

Sent to the parties on:

3 November 2022

Naren Gotecha

For the Secretary to the Tribunals