EMPLOYMENT TRIBUNALS

BETWEEN

MRS ANGELA WARE

Claimant

AND

STRONGHOLD GLOBAL LIMITED

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON BY VHS **ON** 4 to 6 October 2022

EMPLOYMENT JUDGE H Lumby

Representation

For the Claimant: **In person**
For the Respondent: **Mr. Matthew Sutton of Peninsula**

JUDGMENT

The judgment of the tribunal is that:

1. **the claimant's claim for unfair dismissal by reason of constructive dismissal succeeds and**
2. **the respondent is ordered to pay the claimant a total of £2634.79 comprising:**
    a. **a basic award of £2,293.29 (calculated as one and half weeks' gross pay at £509.62 per week for each of the claimant's three complete years of employment with the respondent) and**
    b. **a compensatory award of £341.50 (calculated as one week's net pay of £401.40 together a 5% pension contribution for that week less a 20% reduction for contributory conduct) and**
3. **the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.**

REASONS PURSUANT TO A REQUEST FROM THE CLAIMANT

1. In this case the claimant Mrs Ware claims that she has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by VHS. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 217 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have also heard from the Sara Rodwell as a witness. I have heard from Mr Sutton on behalf of the respondent and from Lauren Dickson, Lydia Turner and Max Turner from the respondent company as witnesses on its behalf. I am grateful to all participants for their assistance.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

5. The respondent is a family run business employing around 30 people. The claimant joined on 22nd October 2018 and was continuously employed until 28th February 2022, most latterly in business development. It is agreed that she was an employee and had over two years continuous employment.
6. Up until November 2021, she appears to have an unblemished record and was happy at the respondent. She also had a close relationship with members of the Turner family who owned and ran the company.
7. The claimant was provided with a company computer. This had the claimant's WhatsApp account set up on it, apparently placed there in 2018 by Sam Turner, another member of the Turner family. It is clear that WhatsApp was a tool used by the company for internal communications.
8. The company's handbook also had restrictions on the use of work computers for personal use. This would include Whatsapps. However, the necessity to check and deal with work Whatsapps would mean seeing personal Whatsapps. I therefore find that looking at and sending a reasonable level of personal Whatsapps was inherent in day to day working, being comingled with work Whatsapps.
9. In November 2020, the respondent experienced a data breach by a manager at the company, Jonathan Kendrick, who was dismissed on the basis of failing his second probation period. Mr Kendrick was a friend of the claimant.
10. Employees of the respondent were asked by email not to contact Mr Kendrick in relation to their business.
11. The respondent investigated the data breach, including by studying the results of remote monitoring software on employees' computers. This software worked by taking random screenshots of screens, taking pictures of what was open on

them. The software did not allow the company to open matters shown but to view everything open on the screen at the relevant time. This included in the case of Whatsapps a list of recent communications and a few lines of the latest communication in each conversation. In addition, much more could be seen of the conversation highlighted by the user at the relevant time.

12. This was stored on the company database for six months and could be retrieved by the company's IT manager and seen by three members of the Turner family.
13. The use of monitoring software was permitted by the employee handbook, which referred to it having "the right to monitor all e-mail/internet activity by you". It is clear that the claimant was aware of this policy although not how the software worked. It is also clear that the claimant never received any form of GDPR training from the respondent.
14. In carrying out its investigation, the respondent found screenshots of the claimant's screens with her WhatsApp app open. This included shots of her communicating with Mr Kendrick. Four screenshots have been provided to the court and there has been a suggestion that these were the only ones seen by the respondent. I find that on the balance of probabilities many screenshots of the claimant's screen would have been reviewed by the respondent, these four were produced because they were the relevant ones for their complaint against the claimant. There is therefore a reasonable probability these included at least parts of personal Whatsapps.
15. As a result of the discovery of the WhatsApp communications between Mr Kendrick and the claimant, on 22 November 2021 the claimant was required to attend at short notice a meeting with Lydia Turner. This was characterised as an informal investigation meeting and no prior information in relation to it was provided to the claimant. The claimant was asked about the communications and the meeting adjourned for further investigation. Two days later the claimant received a letter stating that no action would be taken but the letter placed on her file as a "reasonable written management instruction". It has emerged that it was not in fact placed on the file but as the claimant did not know this, it is irrelevant to the issues here.
16. Following the letter being received, Lydia Turner rang the claimant accusing her of disloyalty.
17. It is clear that the claimant was very upset by the whole approach here, in particular the accusations of disloyalty in relation to a company for which she had given dedicated service and viewed the Turners as friends.
18. In addition, she was similarly very upset that her personal Whatsapps would have been seen. She was clearly unaware that Whatsapps could be seen and genuinely believed that all that could be seen was emails and open internet pages; that view is entirely consistent with a reading of the employee handbook, with its reference to email and internet activity.
19. Finally, the respondent's approach to the investigation meeting, the wording of the letter and subsequent behaviour were clearly intimidating and unsettling, the lack of clarity to her having a major adverse effect on her mental wellbeing.
20. Taken together I find that these had the effect of undermining her trust and confidence in her employer and amounted to the principal reason for her subsequent resignation.
21. Having sought external advice, the claimant sent a letter setting out her concerns to the respondent on 30th November 2021. Critically, she sets out in there her belief that her position with the company was now untenable and

invited agreement on an exit package. There was no formal response to the concerns and questions raised in that letter.

22. On 1st December 2021 she was signed off with stress and never returned to work. I find this to be directly related to her treatment and resultant poor mental well-being.
23. Given the lack of a response to the concerns and questions her 30th November 2021 letter, she filed a formal grievance on 7th January.
24. She also separately raised a complaint with the ICO and made a request for information held by the company about her. Although this was responded to, the time taken to do so added to her stress and anxiety.
25. Her grievance was reviewed on 13th January by Lisa Baynes of Peninsula Face to Face and a report was issued on 21st January recommending the dismissal of the various grievances. Max Turner of the respondent wrote to her on 27th January confirming the decision not to uphold the grievances. The claimant subsequently appealed on 2nd February with an appeal meeting with John Derwin of Peninsula Face to Face held on 9th February and the report issued on 21st February. The report was issued to both parties and recommended dismissing the appeal. Lydia Turner wrote to the claimant on 23rd February confirming the decision to dismiss the appeal.
26. The claimant resigned on 25 February 2022 with immediate effect, her last date of employment being 28th February 2022. It is agreed that she did indeed resign on 25th February.
27. Prior to her resignation, she had sought alternative employment, being interviewed on 22nd February, offered a role on 1st March and commencing in her new position on 8th March. I do not find that her principal reason for resigning was the new role, nor did this affect the timing of her resignation.

Law

28. Having established the above facts, I now apply the law.
29. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if 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.
30. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
31. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon

PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; Chindove v William Morrison Supermarkets plc EAT 0201/13; Cantor Fitzgerald International v Bird and ors 2002 IRLR 867, QBD; Gordon v J & D Pierce (Contracts) Ltd 2021 IRLR 266, EAT; and Upton-Hansen Architects v Gyftaki UKEAT/0278/18/RN.

32. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
33. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… 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 refuse to perform the contract."
34. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
35. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 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) Limited 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 CA, at 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. 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".

36. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
37. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
38. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee. Kaur also lists five questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed: (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (ii) Has he or she affirmed the contract since that act? (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? (iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? (v) Did the employee resign in response (or partly in response) to that breach?
39. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which

objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

40. As referred to in Sharp and Kaur, an employee must not delay too long or otherwise act to affirm its contract following the matter relied on. The law here is clear that the test is however not simply the mere passage of time. The test, following the case of Chindove v William Morrison Supermarkets plc EAT 0201/13*,* is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. Resigning is a serious matter with serious consequences so time should be allowed to consider this; in cases where the employee is on sick leave, for example, more time should be given.
41. Similarly, it has been held that an employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract, for example in the case of Cantor Fitzgerald International v Bird and ors 2002 IRLR 867, QBD*,* where it was held that employees had not affirmed their contracts by waiting more than two months before resigning with immediate effect. They had indicated their discontent with the employment and given clear signs of their intention to leave. The judge commented that affirmation is essentially the legal embodiment of the everyday concept of "letting bygones be bygones".
42. In addition, in Gordon v J & D Pierce (Contracts) Ltd 2021 IRLR 266, EAT*,* the EAT in Scotland has specifically found that exercise of a right of grievance or appeal should not be regarded as affirmation of an employment contract as a whole. They found it would be unsatisfactory if an employee were unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.
43. As re-emphasised by the EAT in the decision of Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal*.*

Application of Law

44. In this case, the claimant is claiming that the breach is one of the implied term of mutual trust and confidence. Any breach of this will be treated as repudiating the contract of employment. The appropriate test is therefore that set out in Malik - neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
45. This test is to be viewed objectively, as set out in Omilaju.
46. I have already found that the clamant resigned on 25th February 2022 and that the principal cause for resignation was the breach of the implied term of mutual trust and confidence, arising from the combination of the viewing of her personal Whatsapps, the accusations of disloyalty and the treatment of the alleged breach of the instruction in relation to Jonathan Kendrick. I find that these, taken together and viewed objectively, amount to conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties. I also find that there is

no reasonable and proper cause for the same which would prevent this amounting to a fundamental breach of contract

47. I have in addition considered the five questions set out in Kaur in order to decide whether an employee has been constructively dismissed. Taking each of these in turn:
    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? I have found this to be the events up to 30th November 2021
    b. Has he or she affirmed the contract since that act? I will come back to this
    c. If not, was that act (or omission) by itself a repudiatory breach of contract? I find that the acts individually were not a repudiatory breach.
    d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? I have found that the events were cumulatively sufficient.
    e. Did the employee resign in response (or partly in response) to that breach? I have found that to be the case
48. Accordingly, I find that, subject to the question of affirmation, the claimant has been constructively dismissed. The remaining question to be considered is therefore whether the claimant did anything to affirm the contract. The events giving rise to the principal reason for the resignation occurred in late November 2021, the question is whether her delay in resigning until 25 February 2022, whilst conducting the grievance process, amounted to an affirmation of the contract.
49. The test set out in Chindove is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. Resigning is a serious matter with serious consequences so time should be allowed to consider this and more time should be given here to reflect that the claimant was on sick leave. Based on this I find that the claimant had not affirmed the contract. She made it clear at the end of November her position was untenable and was fully entitled to pursue the grievance procedure without affirming the contract. She was on sick leave throughout, as a result of the respondent's breach, and confirmed her resignation within a few days of the final outcome of the grievance process. Throughout, she showed no intention to let bygones be bygones.
50. As a result, I find that the claimant has been constructively dismissed.
51. Finally, it needs to be considered whether that dismissal was fair for the purposes of section 98(4) of the Act. Following the decision in UHA, the respondent has not pleaded or proved a potentially fair reason for the dismissal and I find therefore that the dismissal was unfair for the purposes of section 98(4).

Decision

52. I find therefore that the claimant has been unfairly dismissed by reason of constructive dismissal.

Remedy

53. I have calculated the remedy as follows:
    a. a basic award calculated as one and half weeks' gross pay at £509.62 per week for each of the claimant's three complete years of employment with the respondent giving a total of £2,293.29 and
    b. a compensatory award calculated as one week's net pay of £401.40 together a 5% pension contribution for that week less a 20% reduction for contributory conduct giving a total of £341.50
54. The respondent is therefore ordered to pay the claimant a total of £2634.79 comprising:
    a. a basic award of £2,293.29 and
    b. a compensatory award of £341.50.
55. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
56. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 27 ; a concise identification of the relevant law is at paragraphs 28 to 43; how that law has been applied to those findings in order to decide the issues is at paragraphs 44 to 52; and how the amount of the financial award has been calculated is at paragraphs 53 to 54.

Employment Judge H Lumby
Date: 27 October 2022

Reasons sent to Parties: 04 November 2022

FOR THE TRIBUNAL OFFICE