



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Jodie Smith

v

Hopkins Homes Limited

Heard at: Bury St Edmunds

On: 12-14 September 2022

Before: Employment Judge Freshwater

Appearances

For the Claimant: Ms Bradbury (counsel)

For the Respondent: Mr Stanway (consultant)

RESERVED JUDGMENT

1. The claimant's claim for unfair (constructive) dismissal against the respondent is not well founded and is dismissed.
2. The claimant's claim for wrongful dismissal against the respondent is not well founded and is dismissed.
3. The provisional remedy hearing booked for 13 January 2023 is cancelled.

RESERVED REASONS

Claims and issues

1. The claimant claimed that she had been unfairly (constructively) dismissed, and wrongfully dismissed, from her employment as a Field Sales Manager by the respondent.
2. The respondent denied that the claimant had been unfairly (constructively) dismissed, or wrongfully dismissed. The respondent said that the claimant had resigned from her employment.

3. The issue in the case was whether there had been a breach of the implied term of trust and confidence of the claimant's contract of employment based on the behavior of the claimant's managers over a period of many months.

Procedure, documents and evidence heard

4. The case was heard in person at Bury St Edmunds Employment Tribunal. It was listed for three days. An agreed electronic bundle was filed electronically. A paper bundle of was provided on the first day of the hearing. I also read the witness statements of the claimant and the three witnesses on behalf of the respondent (see paragraph 5 below for details.)
5. At the beginning of the hearing, it was agreed that the claimant would present her case first. I heard oral evidence from the claimant. The respondent called three witnesses to give evidence: Mr Lee Barnard, Miss Monika Hanlon and Miss Nicola Bullivant.
6. Mr Barnard was expected to give evidence in person, however he was unexpectedly unwell and I agreed that he could give evidence by way of video link if he was well enough to do so.

Findings

7. The claimant commenced her employment with the respondent on 14 September 2019 as a Field Sales Manager. She was employed as part of a team of three Field Sales Managers, with responsibility for a number of sites. When her employment started, her manager was Mr Barnard who was the Sales and Marketing Director for the Respondent.
8. The claimant did not have experience in new home sales, but was known to Mr Barnard through her previous employment. They had a good working relationship and Mr Barnard had confidence in her transferrable skills as well as her ability to learn.
9. The claimant was on probation for a period of three months during which she underwent training for the role. The form of the training had been to work alongside a sales negotiator and then an experienced Field Sales Manager who would soon be retiring. Her probationary review dated 16 April 2019 said that she had settled in extremely well and that training was ongoing.
10. Mr Barnard was subsequently promoted to Group Managing Director in early 2020. Ms Hanlon was appointed in his previous role as Group Sales and Marketing Director and became the claimant's line manager from 2 March 2020. Ms Hanlon introduced new internal procedures and had a different management style from Mr Barnard. She introduced a number of changes in a

short period of time. The claimant was supportive of these changes, and welcomed the more structured environment that Ms Hanlon was creating.

11. As a result of the Covid-19 pandemic, the claimant was furloughed from 02 April 2020 until 15 May 2020. On her return from furlough, one of the claimant's sites was in Thurston and another was Halesworth. She was told by Ms Hanlon that she should be based at Thurston and cover the role of Sales Consultant in addition to being a Field Sales Manager (and manage her team remotely). This is because there was a need to recruit more Sales Consultants for the Respondent's various sites. The claimant said that she did this "without complaint as she was keen to cooperate". I do not find that this is remarkable. It was not unreasonable to expect the claimant to work from the site nor for a manager to cover the role of those beneath them in a management chain in times of need.
12. The sales at Thurston and Halesworth were not at the level expected by the Respondent. There was pressure to increase the sales. Other house builders in the area were selling more houses than the respondent. As a result of this, Ms Hanlon requested the claimant to research the market competition and propose strategies to combat the low sales. The quality of the work was not what was expected by Ms Hanlon. The claimant said that she followed the process previously put in place by the respondent in compiling the research, and so if Ms Hanlon felt her work was poor it was not entirely the claimant's fault. I found the evidence of Ms Hanlon to be credible in that she recognised that what had happened was because of the lack of experience the claimant had in housebuilding sales and that she wanted to support the claimant in increasing the sales performance of the Thurston site. One of the ways in which Ms Hanlon did this was to suggest that a high-performing sales consultant could transfer to Thurston. I find that Ms Hanlon's motivation was to support the claimant and to increase performance at Thurston, not to undermine the claimant.
13. There was a site visit from the Respondent's Chairman – Mr James Hopkins – in July 2020 due to concerns about the sales performance of the site. The claimant was unable to provide the competitor research that had been requested and Mr Hopkins was unimpressed by her. The claimant was not told about the view that Mr Hopkins had formed, which was, at least in part, due to an email exchange he had with Mr Barnard. In that email, Mr Barnard said to Mr Hopkins that the claimant "understands she has failed". I find that the claimant did not say she had "failed" and that Mr Barnard should not have said that she did to Mr Hopkins. The claimant was unaware at the time that this email exchange had taken place.
14. Ms Hanlon recruited new Sales Consultants for the respondent, this included but was not limited to people who would work on the Claimant's sites. The claimant was asked for her views, as were the other Field Site Managers, but

was not directly involved in the recruitment of the new staff. I do not find this was an act intended to undermine the claimant. Ms Hanlon had asked all the Field Sales Managers for their input, and had existing relationships with recruitment consultants. It was perfectly reasonable for Ms Hanlon to interview and recruit people who would be reporting to the claimant.

15. Ms Hanlon recruited a Head of Sales and Marketing. This was Ms Nicola Bullivant who started work on 6 October 2020. Ms Hanlon and Ms Bullivant had worked together for the previous five years for a different house building company. I found their evidence to be credible about the extent of their friendship outside work. I find that they socialised through work, but not personally.
16. Part of Ms Bullivant's role was to manage the Field Sales Managers, which included the claimant. The claimant said she was told by Ms Hanlon that Ms Bullivant would not manage the Field Sales Managers. Ms Hanlon's evidence was that she told the claimant that "ultimately line management would change". Initially, the function was shared with Ms Hanlon whilst Ms Bullivant settled in to her new role. This is consistent with the account given by Ms Hanlon, and I find Ms Hanlon's evidence on this point to be credible.
17. The claimant's evidence was that shortly following the arrival of Ms Bullivant, the claimant found herself "being unfairly and unjustifiably criticized about how [she] was doing [her] job, facing constant negativity, and having [her] authority questioned and undermined at all times predominantly by Nicola Bullivant." I accept the claimant's evidence that this was her perception. However, I find that neither Ms Bullivant nor Ms Hanlon behaved in the way described.
18. On 2 November 2020, a meeting took place between the claimant, Ms Hanlon and Ms Bullivant. This meeting was set up at short notice (on Sunday 1 November). The claimant was told the purpose of the meeting was to establish what the claimant believed her role to be and to set in motion ways of working. At that meeting, the claimant was told that the expectation on her was to work from site during her working hours rather than from home. This was different to how she had worked to date, when she would start work at home at 8.30 am and then go to site before the sales team started at 10.00am. I find the evidence of Ms Hanlon and Ms Bullivant to be credible because I accept that, in their experience, this was a fundamental part of the Field Sales Manager role. I do not find they intended to be critical of the claimant. They did ask lots of questions and may well have been surprised at the answers. They had worked together before, and had similar ideas of the way in which a Field Sales Manager should operate. This does not mean they intended to belittle the claimant.
19. During the meeting on 2 November, the claimant requested a job description which she was told she would receive following the meeting. This did not

materialise until May 2021. Although not ideal for the claimant, I believe the evidence of Ms Hanlon that this was because she had more pressing priorities at time. I do not find that the absence of this job description meant that the claimant's role was in anyway unclear, or lead to any ambiguity as to the performance expected of her.

20. After the 2 November meeting, the claimant said that she tried to gain the approval of Ms Hanlon and Ms Bullivant by working in the way that they wanted even if she did not think an instruction made sense. In her witness statement, the claimant gives an example of this as following the direction to be on site at 8.30 am instead of 10.00 am rather than work from home. I find this to be an example of the claimant simply taking a different view of the way in which a Field Sales Manager should work, rather than an unjustifiable instruction from her managers.
21. Towards the end of November 2020, there was an issue with another of the Field Sales Managers who, due to personal issues, started to take absences from work. Ms Bullivant and Ms Hanlon both took on aspects of that role to cover the absence. This meant they were both under pressure. I find that they did so in order to maintain the performance of the team as a whole, and not to undermine the claimant.
22. In early 2021, a meeting took place between Ms Hanlon, the claimant and a sales consultant at the Thurston site. The meeting was set up by Ms Bullivant and the claimant was not aware that Ms Hanlon would lead the meeting. During the meeting, Ms Hanlon asked many questions of the sales consultant and the claimant. Ms Hanlon was unhappy about the progress of the development. The exchange upset the sales consultant, and the claimant. The claimant accepted that Ms Hanlon was right to have concerns but felt that the way in which the conversation was conducted was not fair or acceptable.
23. The claimant was less experienced than the other Field Sales Managers, and I accept her evidence that Ms Hanlon and Ms Bullivant asked the other Field Sales Managers for their input more often than they did the claimant.
24. The claimant highlighted an email exchange between herself and Ms Bullivant dated 9 April 2021 (pages 123 – 125 in the bundle). In those emails, the claimant says she has been ridiculed. However, I do not find that to be the case. I find that Ms Bullivant was simply providing feedback. Although the claimant said that she had not said that a former employee was no longer with the employment, and that a customer should make of that what they will, the claimant did say in her email that it “was words to that effect, not exactly those words” so there clearly had been a conversation with the customers. I therefore find that Ms Bullivant was entitled to comment on what had occurred and, as she did, set out in straightforward terms how the situation could have been handled differently.

25. There are examples in the bundle of supportive emails from Ms Bullivant to the claimant. One is found at page 126 and one is found at page 136. I do not find that the claimant was undermined at all times by Ms Bullivant.
26. On 21 May 2021, there was a heated telephone conversation between the claimant and Ms Bullivant because they disagreed about the decision the claimant had made to cover a site rather than to use agency staff. I find that they were both frustrated and angry with each other, and that both raised their voice. I find that they were equally responsible for the manner in which the conversation was conducted. However, I do not find it unreasonable for Ms Bullivant to have questioned the issue of cover when the claimant clearly had so much work outstanding. I do not find that this was an example of Ms Bullivant undermining, micromanaging or trying to provoke the claimant.
27. Following the conversation on 21 May, a meeting was arranged between the claimant, Ms Bullivant and Ms Hanlon. The claimant wanted the meeting to be in person because she knew that she intended to resign at the meeting. Ms Hanlon, who was not aware of the claimant's intentions, objected to this as she felt meetings could effectively take place remotely. The claimant was asked to formally set out the reasons for her insistence on a meeting in person, which she objected to. I do not find this was an unreasonable request. Ms Hanlon had not been told why the claimant wanted to meet in person and had a busy diary. In the end, the meeting went ahead remotely on 28 May 2021. The claimant resigned and explained her reasoning which Ms Hanlon and Ms Bullivant did not agree with. I found the evidence of Ms Hanlon to be credible in that she was surprised and wanted to reflect after the meeting. It was for that reason she did not attempt to try and change the claimant's mind.
28. When she handed in her notice on 28 May, the claimant intended to work her period of notice which was three months' notice. However, she was asked to dismiss a member of staff who, it was agreed, was not performing well in the role. The claimant accepted she told Ms Bullivant that the member of staff was not fit for the job. Ms Bullivant told the claimant that there needed to be an immediate dismissal (without notice). The claimant said that she felt this was an unfair request of her given that the claimant was working her notice period and clearly unhappy at work, but she did not challenge Ms Bullivant and followed her instructions. Ms Bullivant was therefore unaware of the feelings of the claimant. I find that this is indicative of the fact that Ms Bullivant simply believed the claimant was happy to carry out her normal responsibilities whilst working her notice.
29. On 11 June 2021, the claimant served notice to terminate her employment with immediate effect.

30. I do not find the emails between Ms Hanlon and Mr Barnard about the resignation of the claimant to be significant. They simply note that she has resigned and that a successor needed to be recruited.

Law

31. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) says that “an employee is dismissed by his employer if...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.” This is commonly known as constructive dismissal.

32. In the case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer’s conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: “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 the employer’s conduct. He is constructively dismissed”.

33. In the case of Malik v BCCI; Mahmud v BCCI 1997 1 IRLR 462, guidance is provided for deciding if there has been a breach of the implied term of trust and confidence. Lord Steyn said that an 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.”

34. In the case of Lewis v Motorworld Garages Ltd [1986] I.C.R. 157, Lord Justice Neil said that “it is now established that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee...”

35. In assessing whether there has been a breach of the implied term of trust and confidence, the test is not whether an employee has subjectively lost confidence in the employer, but whether, objectively, the employer’s conduct was calculated or likely to destroy or seriously damage trust and confidence without reasonable and proper cause: Leeds Dental Team Ltd v Rose [2014] ICR 94, EAT.

Conclusions

36. Ms Hanlon and Ms Bullivant implemented new ways of working, which created a more high-pressured sales environment. They had high expectations of their staff which they conveyed clearly. They had a very different management style than Mr Barnard. I do not find that they worked in concert against the claimant. They simply addressed issues as they found them and were very direct in their approach.
37. I do not find that the claimant was singled out in respect of her working pattern, nor that it was unreasonable for Ms Hanlon and Ms Bullivant to express their expectation that she should work from site during her working hours rather than working from home. They discussed the issue with the claimant and were entitled to make a management decision as to the needs of the business.
38. The claimant was less experienced than the other Field Sales Managers, and part of management is to identify the needs of individual members of staff. It is not surprising that someone with less experience would need more guidance than someone with more experience. I find that although the claimant thought this amounted to micro-management, Ms Bullivant and Ms Hanlon considered this to be coaching. Additionally, I accept that less experienced members of staff may be relied upon for their experience more than less experienced members of staff. The claimant was not side-lined by Ms Hanlon and Ms Bullivant in that regard.
39. Although the claimant did not have a formal job description, she was being managed in such a way that the expectations of her were articulated to her. She had also been trained by working alongside an experienced Field Sales Manager when she started.
40. Ms Bullivant and Ms Hanlon were not being 'passive aggressive' to the claimant. They may well have voiced their surprise as they had different expectations to the claimant as to ways of working, but I do not find they intended to hurt or upset the claimant or thought it likely that she would feel that way.
41. The claimant is someone who takes her work seriously and was used to performing at a high level. I find that she found it hard to accept the change in management style that came with the promotion of Mr Barnard, and the insertion of Ms Hanlon and then Ms Bullivant into her management structure.
42. Subjectively, I accept that the claimant felt that she was being undermined, criticised and unsupported and was generally being treated unfairly. However, the test for me is an objective one. Objectively, the evidence has shown the Respondent did not act in such a way that was calculated to, or likely to, destroy or damage trust and confidence. There was a business need to improve performance at the claimant's sites and those appointed to her management chain put measures in place to do that. They did not single the claimant out, or treat her unfairly. I do not find she was bullied. Instead, her managers used

working examples as a way to coach the claimant. She was not micro-managed and her management discretion was not removed. She was expected to manage her team, but she could not always work in the way she wanted to.

43. Ms Hanlon and Ms Bullivant were robust managers who proactively put steps in place to improve the performance of their team. On occasion, they (and Mr Barnard) could have handled things differently. This is to be expected in a fast-paced working environment. Mistakes happen. However, I do not think that Ms Hanlon or Ms Bullivant acted in a way that was calculated to, or was likely to, destroy or damage the claimant's trust and confidence in the respondent because, ultimately, they wanted to get the best out of the claimant and those that she managed.
44. The claimant has not established that there was a course of conduct that amounted to a breach of the implied term of trust and confidence in her contract of employment. The claimant was not constructively dismissed by the claimant.
45. The claimant's claims for unfair dismissal, and wrongful dismissal, are not well founded and are dismissed.

Employment Judge Freshwater

Date: ...17 November 2022.....

Sent to the parties on: 30 November 22

For the Tribunal Office