EMPLOYMENT TRIBUNALS

Claimant: Miss W Horrocks

Respondent: Stateside Foods Limited

HELD AT: Manchester Employment Tribunal **ON:** 10 October 2022

BEFORE: Employment Judge Cookson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr P Warnes (Solicitor)

JUDGMENT having been given orally to the parties on 10 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 on 14 October 2022, the following reasons are provided:

REASONS

Introduction

1. The claimant in this case, Miss Horrocks, was employed by the respondent as a Quality Auditor between April 2018 and December 2020. In her original ET1 presented on 2 March 2021 she sought to bring a claim for unpaid arrears of wages and compensation for constructive unfair dismissal. Both claims were resisted and her claim for unpaid wages was later struck out by Judge Miller-Vary.

2. Following an initial preliminary hearing on 15 October 2021 there was a further open preliminary hearing on 22 February 2022 which considered both an application to strike out the claims and an application from the respondent for a deposit order in relation to the unfair dismissal claim. Following that hearing Judge Miller-Varey made a deposit order in relation to the constructive unfair dismissal complaint.

3. Judge Miller-Varey provided a detailed judgment which explained why she had decided not to strike out the complaint of constructive unfair dismissal because it had no reasonable prospect of success, but her judgment went to some length to explain the law in this area and the hurdles which the claimant would have to overcome if she were to succeed in her claim.

Grounds for making the deposit order

4. In terms of the despot order specifically, Judge Millar-Vary found that two of matters raised by the claimant could amount to breaches (although without being in position to consider any evidence from the respondent so she did not find that they were), but identified that the claimant faced both evidential and legal burdens with the last straw event and noted that it seemed that the claimant's prospects for proving that the respondent's conduct in that regard was not "entirely innocuous", were slim.

5. She also identified that the claimant faced an evidential burden in demonstrating the extent to which, objectively, extending the claimant's notice period contributed to the breach of implied trust which she warned the claimant would not be straightforward. She also identified that, in essence, there may be evidential issues with the claimant showing that the reasons for the claimant's resignation were what she now claims when they are not referenced in her letter of resignation and her resignation and acceptance of new employment were so near if not coincidental in time.

Documents considered in reaching my Judgment

6. In reaching my judgment I considered the following:

(a) A short bundle of documents which included some additional documents produced late by the respondent, and which ran to some 92 pages.

(b) Witness statements for the respondent, from:

(i) Ryan Battersby (Deputy Health and Safety Manager); and

(ii) Robert Coar (HR Officer),

together with their oral evidence.

(c) A witness statement from the claimant comprised of seven short paragraphs set out in an email dated 7 October 2022 and in her oral evidence.

(d) Oral submissions made by the parties.

The law: constructive unfair dismissal

7. Section 95(1)(c) of the ERA provides an employee is dismissed 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."*

8. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach. I must ask the following questions: -

a. What are the relevant terms of the contract said to have been breached?

b. Are any of the alleged breaches made out (the burden of proof being on the employee)?

c. If so, are those breaches fundamental?

d. Did the claimant resign, at least in part, in response to the breaches not for some other unconnected reason and do so before affirming the contract.

e. If the answers to questions (b), (c) and d) are affirmative, there is a dismissal.

9. If there is a dismissal it is then for the respondent to show the reason for dismissal.

Establishing fundamental breach of contract

10. Contractual terms may be express or implied. Whether a breach of any of those terms, including the implied term of trust and confidence, is fundamental is essentially a question of fact and degree. In terms of the implied duty of trust and confidence, an employer must not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. It is not necessary for the employee to show the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer.

11. The employer's motive is irrelevant. The test of fundamental breach is purely contractual, and the surrounding circumstances are not relevant, at this stage, although they may be relevant to the reason for the dismissal.

12. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period when taken together may cumulatively. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets it as hurtful and destructive of their trust and confidence in the employer.

Employee's response to the breach

13. Resignation is the employee accepting that the breach has ended the contract. Conversely, they may expressly or impliedly affirm the contract and thereby lose the right to resign in response to an antecedent breach. Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct, reawakening the right to resign, the employee cannot resign in response to the earlier breach.

14. Even if there has been a fundamental breach which has not been affirmed, if it is not at least in part an effective cause of the employee's resignation, there is no dismissal.

15. If the claimant shows that he has been dismissed, I then turn to consider the reason for dismissal.

Reason for dismissal if the employee has shown they were dismissed

16. It is for the employer to show that it had a potentially fair reason for dismissal in any case where a dismissed employer has more than 2 years continuous service. Even a constructive dismissal may be fair if the respondent shows a potentially fair reason for its breach and that it acted reasonably. However in this case the respondent did not seek to show that it had a fair reason, it simply denied the dismissal.

Findings of Fact

17. I have made my findings of fact on the basis of the materials before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I took into account in my assessment the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings of fact in relation to every matter which was contested in evidence before me, simply those which were material to the determination of the legal issues in this case. I gave brief oral reasons on the day. These are my full reasons in detail and in the event of any conflict between these reasons and those real reasons, these take precedent.

18. I have noted above the very brief nature of the claimant's witness statement. I was concerned by the brevity of the witness statement that she had produced, which was surprising particularly in light of the issues raised by Employment Judge Miller-Varey in her Judgment which had made clear that the claimant's prospects of succeeding in her claim were slim and that she had evidential hurdles to overcome. Unfortunately, the claimant appears to have paid no regard to that because there is little or no attempt in the witness statement to address the issues raised by Judge Millar-Vary I did however give her the opportunity to give me further evidence in chief in support of her claim, and where appropriate I have incorporated findings based on that additional evidence in chief in what I have set out below.

19. The claimant started work as a Quality Auditor in April 2018. She was confirmed in post after three months' probation. On the basis of what she had been told at her interview the claimant understood that her pay would go up at the end of that period. The claimant had an expectation that at the end of the probationary period

her pay would go up to the same as others employed in the same work as her, but I was presented with no evidence to enable me to conclude on the balance of probabilities that there was any particular agreement in place between the claimant and the respondent about that. The claimant's pay did increase at the end of her probationary period but unbeknownst to her it appears her pay was not increased to the same level as her colleagues. In July 2019 the claimant received a further increase, but she found out that she had received less than her colleagues and she was being paid less than them. Initially HR declined to review her pay but after the claimant raised it with the factory manager this was rectified, and the claimant's pay was put up so that she was paid the same as others in the same role as her.

20. On 16 July 2020 the claimant contacted Mr Battersby and another manager, Mr Sonmez, to ask for a referral to Occupational Health because she had pain in her foot which she attributed to the safety shoes she had been issued with. It was common ground between the parties that because of the health and safety requirements applying to a food business, employees were required to wear workplace issued safety shoes. The claimant described the shoes she had been issued with as breaking down and she regarded them as inadequate. In light of that she had purchased some alternative safety shoes herself which she wanted to be allowed to wear.

21. The Health and Safety Coordinator replied to that email to tell the claimant that she could arrange an appointment with Occupational Health who would make an assessment for any specialist shoe requirements. In his evidence to the Tribunal Mr Battersby explained that because of hygiene requirements only particular styles of shoe are acceptable within the factory so staff could not simply provide their own safety shoes.

22. The claimant was assessed by Healthwork, an Occupational Health provider, on 23 July 2020 in a telephone consultation. That records that the claimant had been experiencing periodic pain in her foot for some time and that she believed her work shoes were contributing to her pain and discomfort. The consultation notes that the claimant had purchased her own shoes, but that she was not allowed to wear those as they had to be approved by Health and Safety. The consultation also records that the claimant had not felt the need to consult her GP, but that she had spoken to someone who was a podiatrist who had recommended insoles. However, these had not helped.

23. The Occupational Health advisor suggested that Health and Safety assess the claimant’s own shoes with a view to her being able to wear those and a recommendation was made to allowing microbreaks for her to rest her foot during any periods of flare-up. The Occupational Health adviser concluded by assessing that the claimant as fit for work and without recommending any particular review in the future.

24. In August 2020 the claimant contacted Mr Battersby again to inform him that she had made a doctor’s appointment because she had developed a lump on the side of her foot, and she was now in some pain and having to take painkillers. The email attached a photograph, although that was not included in the bundle of documents before me. Mr Battersby told me he could not record seeing that although it would appear from the respondent’s documents that it had been sent.

25. The respondent did have an alternative solution in terms of footwear. Unfortunately, however, the claimant has small feet and takes a size 3.5. The alternative shoes which the respondent routinely offered to employees experiencing difficulties do not come in half sizes. Mr Battersby contacted the claimant after initially trying to order the shoes in the correct size, and on 2 September he emailed the claimant to explain and asking her if she was happy to try a size 4, which the claimant says she was happy to do.

26. The claimant heard nothing and on 14 September she chased Mr Battersby to find out if there was any news. Unfortunately, it appears there had been a mix up with the supplier, but Mr Battersby informed her that the shoes had been reordered on 16 September 2020. The shoes arrived in late September and the claimant tried them on. Unfortunately, the shoes provided were much too big. The claimant emailed again and requested that a size 3 was tried.

27. It appears that this email was overlooked. There also appears to have been a certain amount of confusion because when the claimant queried matters she was offered the same shoes to try again.

28. Mr Battersby accepted that there had been something of an oversight in this regard. He explained that this was a difficult time at the respondent. These events were happening in October 2020 during the first autumn after the COVID pandemic. The respondent was continuing its operations but there were significant workplace restrictions in place and I accept that at that time the Health and Safety Department will have had a number of competing demands and requirements.

29. By later October 2020 the claimant was feeling very frustrated. However, although the claimant had emailed about the replacement shoes she did not inform Mr Battersby that she was suffering any particular harm, notwithstanding the reference she had made to seeing her doctor, and I find that in the circumstances Mr Battersby will have been aware that there was an issue in relation to the claimant's shoes which needed addressing, but he had no reason to understand that to have any particular urgency.

30. The claimant spoke to her manager, Mr Jan Sonmez, about this, and he told her to wear the ones that she had already purchased. In evidence the claimant said that she decided not to wear those shoes because she was concerned about getting into trouble, but it appears she made no further attempts to contact Mr Battersby about the issue or raise any other concerns with the respondent. Mr Battersby told me that Mr Somnez should not have given that advice but that if he had known he would not have taken any action against the claimant if she was acting with manager’s approval. There is no evidence from the claimant raised any further issues either with Mr Somnez or anyone else, for example HR, about the issue with her shoes.

31. It appears that the claimant does now have significant problems with her foot but the evidence she referred to about that is the situation now. I was not shown evidence that those issues were foreseeable either by the claimant or the respondent at the relevant time.

32. In November 2020 the claimant was issued with a new contract of employment. Unfortunately, there was an error in that document. Mr Coar explained that the respondent had gone through a process of issuing new terms and conditions to staff. When the claimant had begun her employment in April 2018 she had been issued with a statement of particulars summarising her main terms and conditions of employment. That document, which she signed on 30 April 2018, referred to her having a notice period of three months. She was also provided with a more detailed statement of employment particulars and that document refers to the claimant being required to give, and entitled to receive, one month's notice of termination. It appears that this discrepancy had never been identified by either the parties of the time. When HR came to reissue the contracts of employment in 2020 Mr Coar had seen the short summary of terms and conditions and understood from that that the claimant was required to give and entitled to receive three months' notice, and he prepared a new contract of employment for her on that basis.

33. The claimant discovered that she was being required to give longer notice than other employees and was disgruntled about that. She said that she asked Mr Somnez and did not know why that was case. However, the claimant did not query matters with HR nor does she suggest she was put under pressure to sign the new terms and given any sort of ultimatum.

34. Despite this the claimant says that regarded this as the final straw. She says that she asked her manager why her notice period had changed but she was not given any reply. The claimant gave her one month's notice to terminate her contract of employment on 23 November 2020. That letter gives no reason for resignation. That was accepted by the respondent with no suggestion that she should give longer notice.

35. In February 2021 the claimant wrote to the respondent. That letter is headed without prejudice save as to costs and subject to contract. The respondent argued however that the document does not fall within the scope of the without prejudice rule. It contains no meaningful offer of settlement. The claimant told me that she obtained the letter from an advisor but that she had not suggested any settlement terms because she didn't know what to suggest. It appears in essence she hoped this would prompt the respondent to negotiate with her. She did not object to the respondent's submissions and did not object to the letter being considered in evidence.

36. I accepted the letter into evidence. It expresses that the claimant is unhappy and is willing to settle her claim, but it does not contain an offer that the respondent could accept. It is really a statement of grievance. Accordingly I do not find that it was a without prejudice offer of settlement at all.

37. That letter refers to a number of matters which the claimant is unhappy about. She refers to the salary discrepancy at the start of her employment and the issue with the notice period in her contract but there is no mention of the problem with the work shoes. This strongly suggests that when the claimant resigned in and even some three months later, the provision of the safety shoes were not the reason for her resignation.

Submissions

38. I heard very brief submissions in this case. I do not seek to set those in detail in here. In summary Mr Warnes invited me to find that, on the fact there had simply been no breach of contract. In large part as the discussion below explains, I agreed with him. The claimant was a litigant in person and she did not make any legal submissions but reiterated that she felt she had been treated very badly.

Discussion and Conclusion

39. Turning first to the first breach of contract which the claimant alleges in this case, that related to the fact that she had been paid less than her colleagues at the start of her employment and then had received less than them by way of a pay rise in July 2019. Turning to the terms of the claimant's contract of employment, there is nothing in the written terms of the contract which refers to the claimant as being entitled to any particular rate of pay by reference to a particular job description or scale. There is simply reference to a particular salary. The claimant does not suggest that she was not paid the salary referred to in that written contract.

40. It is perhaps understandable that the claimant had an expectation that she would receive the same pay as her colleagues, but there is no evidence before me that there was an agreement between the parties that this would be the case. I do not accept that it is part of the implied term of trust and confidence that an employee is entitled to the same pay as colleagues if they are undertaking the same work. If that were the case there would be no need for the equal pay provisions within the Equality Act 2010 and the earlier legislation putting in place mechanisms for women to claim equal pay with male colleagues. If the law operated the way the claimant appears to suggest that it does, such individuals would simply be able to bring a claim in breach of contract pointing to the fact that other colleagues were being more for the same work.

41. I find that the claimant had no contractual entitlement to a higher rate of pay or the same rate as her colleagues and she had no right to a payment of any particular arears. That was not a breach of contract.

42. Even if I am wrong about that, after the claimant raised the matter after the rise in July 2019 it was resolved and she seemed content with that. If there was a breach of contract, the claimant subsequently affirmed the breach by working without objection and accepting the payment she received at the time.

43. In relation to the work shoes, it was clearly unfortunate that the shoes given to the claimant were defective or did not fit her well. The respondent did seek to find a solution for her problems by ordering the alternative shoes, albeit there appears to be have been a series of mistakes and errors in connection with how this was handled. I can see that that process could have been undertaken more quickly and it is clear that there was something of a breakdown in communications during what was undoubtedly a difficult time, but I do not find the failures by the respondent were such that there was a significant or fundamental breach of the claimant's contract of employment.

44. Significantly, when the claimant lost patience with waiting for the new shoes and she spoke to her manager he told her that she could wear the ones that she had brought in, even though that would not usually be in line with the company’s health

and safety policy. The claimant said that she did not do that because she thought that she would get into trouble, but I did not find that explanation to be credible. There is no suggestion that she told Mr Sonmez that she was not satisfied with this outcome. Her manager had offered a solution to the problem she had with the shoes and she would be entitled to rely on her manager's advice. If she had genuinely been concerned about the risk of getting into trouble with other managers, she could have asked him to confirm it in writing. No employer acting reasonably could criticise an employee for doing something which had been authorised by their line manager, and indeed that was confirmed by Mr Battersby in his evidence. It is clear he did not approve of the steps which Mr Sonmez took in this regard, but he accepted he could not have criticised the claimant in the circumstances.

45. In her evidence before me the claimant made much of the fact that she says she now has serious problems with her feet. I have no reason to doubt that what she says about that is true, but it is significant that the claimant did not present medical evidence at the time of the difficulties that she was having. She was not reporting sick, and she did not produce any evidence from her doctor to the company. Whilst it is clearly unfortunate that the claimant has experienced pain, I have no evidence before me to suggest that the company was aware of that at the time and disregarded this. It seems likely to me that the claimant is judging what happened in terms of the pain she is experiencing now, rather than what the situation she was in at the time. Part of my reason for reaching that conclusion is her failure to mention the issue of her shoes or any issues with pain and harm in either her letter of resignation or in the February 2021 letter. To be clear I accept that a failure to provide the correct shoes could have been a breach of the implied duty of trust and confidence and how this was handled does not reflect on well on the company's health and safety department. However, I do not accept that the claimant has shown there was serious or significant breach of contract by the employer or indeed that it was the reason why she dismissed.

46. Finally, in relation to the contract which was issued to the claimant, I accept the claimant's case that as far as she was concerned she was required to give and entitled to receive one month's notice on the commencement of her employment, and that was what was agreed, despite the other document which refers to three months' notice. I also accept however that the position in the documents in the personnel file was ambiguous and suggested something else and that Mr Coar made a genuine mistake when he issued the wrong contractual term to the claimant. What is more significant to the term of trust and confidence, is that the respondent did no more than send the claimant a new contract to sign. She does not suggest that at any time she was subject to any pressure at all to sign that new contract, she was threatened with dismissal if she didn't sign it. I accept the evidence of Mr Coar that if she had raised the issue she would simply have been issued with a new contract of employment showing one month's notice of termination. This was an entirely innocuous and the claimant had no reasonably basis to believe that it went to the heart of the employment relationship. There was no breach of contract in this regard nor any actionable "last straw".

47. In relation to the reason for dismissal the claimant now refers to all three matters as being the reason for her resignation. As already noted, the evidence of the claimant in relation to the significance of the shoes was somewhat contradictory. She says it was part of the reason why she resigned, but she also said that "it wasn't because of this". I have concluded on the evidence before me that it was a not fundamental

breach which went to the heart of the employment relationship, but in any event I am also satisfied that the issue of the shoes was not a material reason for the claimant's resignation.

48. What prompted the claimant to resign was an innocuous act by the respondent. A last straw need not be a breach of contract in itself but it must contribute something to the breach of trust and confidence. The offer of new contract with the wrong termination provision did not objectively contribute anything to the breakdown of trust and confidence. I find that the conduct of the respondent in this case in relation to the individual matters and cumulatively falls some way short of conduct which would be sufficient to breach the employment relationship and justify the claimant resigning and claiming constructive dismissal. In the circumstances I concluded that the claimant had not been constructively dismissed.

Payment of the deposit to the respondent

49. The respondent made an application on the basis of my oral findings for the payment of the deposit ordered by Employment Judge Miller-Varey to the claimant.

50. Rule 39(5)

> "If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
>
> otherwise the deposit shall be refunded".

51. I am satisfied that the reasons why I did not uphold the claimant's claim are substantially the same as Employment Miller-Varey's reasons for making the deposit order. She identified that claimant faced both evidential and legal burdens with the last straw event and noted that it seemed that the claimant's prospects for proving that the respondent's conduct was not "entirely innocuous" were slim.

52. Despite that warning the claimant offered no additional evidence to seek to overcome those evidential burdens and I have indeed found that the respondent's conduct was innocuous. The claimant also failed to address the evidential burdens identified in relation to the daily since the first alleged breach nor seek to show what the reason for her resignation was.

53. In the circumstances I find that the claimant acted unreasonably in pursuing her claim for constructive unfair dismissal and in those circumstances the deposit should be paid to the respondent in this case.

Employment Judge Cookson

Date: 2 December 2022

REASONS SENT TO THE PARTIES ON

6 December 2022

FOR THE TRIBUNAL OFFICE

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