EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Brewster**

Respondent: **Woodlands School Ltd**

Heard at: **East London Hearing Centre**

On: **26th February 2021**

Before: **Employment Judge Peter Wilkinson**

Representation

Claimant: **Represented by her husband David Brewster**

Respondent: **Ms Kate Annand of Counsel, instructed by Birketts LLP**

JUDGMENT having been sent to the parties on 2 March 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. This is my judgment in the matter of Jane Brewster v Woodlands Schools Ltd. Mrs Brewster was represented by her husband David Brewster. Woodlands Schools were represented by Counsel, Ms Annand, instructed by Birketts LLP. I heard evidence over 2 days; from the claimant and from 3 witnesses for the respondent, Mr Bruton, Ms Bones and Ms Page. I was provided with a bundle containing 155 pages of documents and I was taken to relevant pages in the bundle

2. The claimant was employed by the respondent as an administration assistant in the head office team, dealing with the school's fee accounts. She commenced work in 2003 and resigned in 2020, her last day of work being agreed to be 08/04/2020.

3. The Claimant claims unfair constructive dismissal by the Respondent. The respondent does not accept that there has been a dismissal, In particular, the

Respondent says that the Claimant has identified no breach of contract, alternatively that any breach identified was not repudiatory, still further in the alternative, that any repudiatory breach has been waived and the contract has been affirmed by the claimant, so that she cannot be said to have accepted any repudiation of her contract.

UNFAIR DISMISAL CONTRARY TO SECTION 94 OF THE EMPLOYMENT RIGHTS ACT 1996

The legal framework – unfair dismissal

4. Section 94 of the Employment Rights Act 1996 (hereafter 'the ERA 1996') sets out the right of an employee not to be unfairly dismissed by his or her employer.

5. For the Claimant to be able to establish his claim of unfair dismissal he must show that he has been dismissed. Dismissal for these purposes is defined in Section 95 ERA 1006 and includes in Sub-section 95(1)(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'.*

6. ***Western Excavating (ECC) Ltd and Sharpe*** **1978 IRLR 27** established that in order for the circumstances to entitle the employee to terminate the contract without notice, there must be a breach of contract by the employer, secondly that that breach must be sufficiently important to justify the employee resigning; the employee must leave in response to the breach not some unconnected reason; and that the employee must not delay such as to affirm the contract. The breach relied upon can be a breach of an express or implied term.

7. In ***Mahmood v BCCI*** **1997 ICR 607** it was confirmed that every contract of employment contains an implied term 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 the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd*** **2002 IRLR 9**.

8. Where the breach alleged arises from a number of incidents culminating in a final event, the tribunal may, indeed must, look at the entire conduct of the employer and the final act relied on need not itself be repudiatory or it even unreasonable, but must contribute something even if relatively insignificant to the breach of contract see ***Lewis and Motor World Garages Ltd*** **1985 IRLR 465** and ***Omilaju v Waltham Forest London Borough Council*** **2005 IRLR 35**. In ***Omilaju*** it was said:

> *'19. … 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 precise or 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 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.

20. 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. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. 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. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.'

9. The test to be applied in assessing the gravity of any conduct is an objective one and neither depends upon the subjective reaction of the particular employee nor the opinion of the employer as to whether its conduct is reasonable or not see ***Omilaju v Waltham Forest London Borough Council*** and ***Bournemouth University Higher Education Corpn v Buckland*** **[2011] QB 323**.

10. There is no general implied contractual term that an employer will not breach some other statutory right such as the right not to suffer discrimination ***Doherty v British Midland Airways*** **[2006] IRLR 90, EAT**. However, the same facts that might support a finding of unlawful discrimination or any disregard of such a statutory right may, depending on the facts, suffice to establish a breach of the implied term of mutual trust and confidence see ***Green v Barnsley MBC*** **[2006] IRLR 98** and ***Amnesty International v Ahmed***

11. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - ***Bournemouth University Higher Education Corpn v Buckland***.

12. The breach of contract need not be the only reason for the resignation providing the reason for the resignation is at least in part because of the breach ***Nottinghamshire County Council and Meikle*** **[2004] IRLR 703**.The employee need not spell out or otherwise communicate her reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were ***Weatherfield v Sargent*** **1999 IRLR 94**.

12.1. The proper approach, in the main distilled from the cases set out above has been set out by the Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** **[2018] EWCA Civ 978** per Underhill LJ at paragraph 55.

'it is sufficient for a tribunal to ask itself the following questions:

(1) 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?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

13. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for 'some other substantial reason'. If it cannot do so then the dismissal will be unfair.

14. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'*(4) Where the employer has fulfilled the requirements of subsection (1), 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.'

15. It is for the claimant to demonstrate that the respondent behaved in such a way as to repudiate her contract of employment, entitling her to treat the contract as having been terminated by the respondent's repudiatory breach.

15.1. She must demonstrate that there was in fact a breach (or breaches) of her contract, that such breach amounted to a repudiation of her contract and that she accepted that repudiation by treating the contract as terminated, or to put it in another way, that her resignation was in direct response to the breach. A delay may not be fatal to a claim for constructive dismissal but positive affirmation of the contract or the injured party treating the contract as continuing will result in a finding that the claimant has not resigned in response to the breach.

16. I must therefore consider whether the claimant has demonstrated a repudiatory breach of her contract and whether she has demonstrated that she resigned in response to that breach.

17. It is not my intention to go through all of the evidence I have heard, but I have taken into account all the evidence put before the Tribunal which was relevant to my determination, whether I mention it or not.

18. It is agreed by both parties that I should approach these questions by reference to the 4 matters identified as breaches of the claimant's contract in the claim form and in the accompanying document headed Grounds for Claim. Those are:

18.1. The claimant's contractual role and responsibilities changed without discussion, appraisal or notice.

18.2. The claimant was not provided with adequate and meaningful support in performing her role, leading to unreasonable levels of stress.

18.3. That on being diagnosed with stress, the Claimant was shown no management support, making her return hostile.

18.4. That return-to-work options which were discussed with HR were dismissed.

19. I take those 4 assertions in the order in which they are pleaded:

<u>Change of contractual role without discussion, appraisal or notice</u>

20. As was apparent from the Claimant's evidence and the submissions made on her behalf, this relates to a change in the Claimant's role and hours of work that took place in March 2016, when her then line manager Jackie Lines left her employment with Woodlands.

21. It appears to be agreed that the Claimant and her colleague, Clare Barker were effectively left to pick up the work of Jackie Lines, or at least the majority of

it, at least until such time as a new Bursar was appointed in September 2016. By then, as acknowledged by Mr Bruton, the respondent considered that the expanded role of the Claimant and Ms Barker was effectively a settled position.

22. It does seem to me to be agreed that the claimant's role and responsibilities changed in March 2016. I accept the evidence of the Claimant that this was not discussed with her, that she had no notice of the change and that there was at least no formal appraisal of the effect of the change on her workload or her potential stress levels.

23. This was however in 2016. Much has happened since then. Of particular relevance is the fact that on 26th April 2017, the Claimant signed an addendum to her main terms and conditions of employment, to reflect her changed role and substantially increased remuneration.

24. It is also noted that the claimant herself says that she sought recognition of her increased responsibilities from management and received a bonus. There is also evidence, grudgingly admitted by the Claimant that she received higher salary increases than other members of the non-teaching staff, expressly to reflect her increased responsibility and to compensate her for her hard work and outstanding contribution over the relevant period.

25. By March of 2017, one year after Jackie Lines had left, the Claimant's salary had increased from £12,709 per annum to £17,499.

26. I do consider that it is at least arguable that the imposition of a new role on the Claimant without consultation is capable of being seen as a breach of her contract. I do not consider that it was repudiatory in nature. Employment contracts are said to be living documents. There is no evidence that the Claimant considered that her contract was at an end or that she had been dismissed.

27. The claimant took on the new role, asked for and received recognition for it and sought and received a substantial pay rise as a result. This appears to me to be a clear instance of affirmation of her new contractual position.

28. In any event she did not resign in response to this change and I do not consider it can be considered to form the basis of a claim for constructive dismissal.

<u>Failure to provide adequate and meaningful support in performing her role, leading to unreasonable levels of stress</u>

29. It appears to me that there has been a significant degree of confusion in the claimant's assessment of what amounts to adequate and meaningful support.

30. The Claimant talks of formal appraisals, one to one meetings with employees, controls systems and so forth, as if these are requirements placed on management in all companies.

31. It may well be that such systems are considered necessary in large corporate environments, but I do not see that they necessarily have an application in the setting of a small office where the employees and line managers effectively share a small space and have the opportunity to discuss any concerns directly with their line manager on a more or less daily basis. The Claimant could simply have walked into Ian Bruton's office and asked for support or assistance at any time.

32. I accept the evidence of Pauline Bones that the Claimant was offered help which she declined on a regular basis. It seems to me that the Claimant was very good at her job, that she did it well and that largely, she did not need management intervention to enable her to perform her daily role.

33. It is suggested for the Claimant that she repeatedly sought help as a result of being overwhelmed by work and that the failure of the respondent to formally react to her pleas for help amount to a repudiatory breach of her contract, at least taken with the other pleaded matters.

34. I do not accept that this is correct. The only written complaint the Claimant made about her work prior to 2020 was an email in May 2018, which begins with her making it clear she is contacting Ian Bruton and Pauline Bones about "events on Friday". She makes it clear that she is concerned about the potential exclusion of two children as a result of non-payment of fees. She asks for Pauline Bones to update her on one family whose case PB has evidently taken on and in respect of another, she complains of an abusive phone call from the father.

35. The email sets out how the exclusions have been playing on her mind and suggests that exclusions should not be left solely to her to deal with.

36. She then goes on to set out what she says is a wider issue: An imbalance in workloads, "with some colleagues managing their time effectively, being conscious of the fact that we all have a job to do". She complains that whilst she gets her head down and gets on with it, she and others feel undervalued and overshadowed". This is a reference to the Claimant's view that Debbie Cook, an employee in admissions, was not pulling her weight and that she received favourable treatment from the directors.

37. The Claimant says that she has real confidence in her ability to do her job. She suggests that the events of Friday (regarding the exclusions and abusive parents) left her overwhelmed. She asks for the opportunity to discuss her role and responsibilities going forward.

38. It appears that the respondent took this to be a discrete complaint about the issues of exclusions, abusive parents on the phone and the oft exhibited resentment of the claimant about the behaviour of Debbie Cook.

39. I accept the evidence of Ian Bruton that he offered support in putting his name on the letters threatening exclusion and that he offered to take phone calls from parents where necessary. I also note that the claimant herself accepted in her evidence that dealing with the parents on the phone was a key part of her job. People threatened with financial penalties and exclusion of their children will not always be nice about it and there is a limit to how far the respondent could be expected to go to insulate the claimant from that whilst allowing her to get on with her job.

40. I do not read the email of May 2028 as a plea from the Claimant that she could not cope with her workload or her responsibility. She is complaining about discrete issues and makes it very clear that she has confidence in her ability to do her job.

41. I do not see how that email could give rise to a duty on the part of the respondent to intervene to prevent the Claimant becoming overwhelmed by her

role. What she was overwhelmed by was the behaviour of the parents on a single Friday.

42. I do not consider that a failure to have in place systems of formal appraisal or formal one to one feedback meetings could constitute a breach of contract, much less a repudiation of a contract which contains no such provisions. This is a small employer and an even smaller team, who all worked together in a small space and had the opportunity to air issues as they came up.

43. I also do not consider that a failure to manage Debbie Cook in a way that met the approval of the Claimant could be said to be a breach of contract. It was perfectly apparent that the principal impact on the claimant of the behaviour of Debbie Cook was more about resentment of her "swanning about" than any impact on workload.

44. There was also evidence about the effect of a decision of the head teacher, David Bell, effectively reversing a decision of the claimant about penalty fees, communicated in a manner which left her feeling undermined. Unhappily, in any work environment dealing with the public, there will be competing agendas in different parts of the organisation and sometimes that will lead to stresses. I do not consider that it was particularly good management for Mr Bell to have dealt with the issue the way he did and I entirely understand why the Claimant was offended. Had it been left as it was, I am not convinced that I would have considered it to be a breach of contract, much less a repudiation, but as it is, the issue was addressed, promptly, professionally and in an entirely appropriate manner by the directors.

45. The Claimant now suggests that there was a failure to address the impact on her relationship with Mr Bell. Apart from the fact that this has not been raised before, I fail to see how, in the absence of evidence that the relationship was so poisoned as to force the Claimant to leave, there could be an argument that this is a breach of contract. There is no such evidence.

46. I do not accept that the Claimant was left without adequate or meaningful support in her role.

That on being diagnosed with stress, the Claimant was shown no management support, making her return hostile.

47. The Claimant was in receipt of a number of emails from her employers after she went off sick from the office, in response to her panic resulting from her perception that David Bell was going to be at the meeting she was due to have with Ian Bruton on 29th January 2020. Those emails were on the whole supportive and constructive. There was extensive evidence of the support offered to the Claimant.

48. The Claimant was invited to engage with an outside HR consultant, Julie Page, to mediate with the Respondent over her issues and she took up that invitation and had a constructive dialogue with Ms Page.

49. The claimant was offered the opportunity to arrange a return-to-work meeting where her concerns could be addressed further, not to be arranged until she was well.

50. I do not consider that it is arguable that the Claimant received no management support, nor do I see any evidence to support the contention that her return to work would be hostile. She was plainly a valued and talented member of the head office team and was offered entirely appropriate support to facilitate her return to work.

Return to work options were dismissed

51. Ms Page went to the respondent to put the Claimant's issues to them and try to resolve the difficulties. I heard evidence from Ms Page, which I accept, in the following terms:

i. Jane went off sick as a result of the issues over Xmas, David Bell and the parents.

ii. Jane felt she was not financially recognised –it was about being undervalued and lacking support and not being financially valued.

iii. Jane made it clear that she wanted to have Wednesdays off or to work from home on Wednesdays and that she was not prepared to take a pay cut in order to have Wednesdays off.

iv. If the respondent did not agree to the Wednesday provisions, she would resign.

52. I prefer this evidence to the slightly more nuanced evidence of the claimant, suggesting that she would prefer not to take a pay cut. I find that she said she would not take a pay cut and that this was the position relayed to the Respondent by Julie Page.

53. I am clear on the evidence that I have heard that the options take to the Respondent by Julie Page were considered at the mediation meeting.

54. It is clear that the Respondent agreed to set up a system of formal appraisals, which they had never done before and that they did this expressly in response to the request by the Claimant.

55. Although the decision on Wednesdays was to refuse the claimant's proposal, which does appear to be a suggestion to do less for the same money, that decision was tempered by the offer to consider a written request for flexible working. In any event, this does not seem to me to be a repudiatory breach of the existing contract, it might be said to be quite the opposite, an insistence on the terms of the contract being maintained.

56. Insofar as it is said this is an unreasonable refusal to make adjustments for the Claimant's illness, I revert to the evidence of Julie Page, to the effect that a phased return to work could have been possible but that as she said "we had not got to that stage". The reason the Respondent did not get to that stage was not an unwillingness to do so. They offered to set up a meeting to explore options. The claimant refused to engage further and followed through on her threat to resign if she did not get her way on Wednesdays.

57. Julie Page considers that what drove the Claimant to go off sick was her feeling of being undervalued and under-rewarded. It has been clear from the

Claimant's evidence and the way her case was pursued that she was resentful over the perceived favouritism toward Debbie Cook, she was still upset over the David Bell incident and she felt that she should have been allowed to have her contract changed to get her out of the basement she had worked in for 15 years.

58. I Do not find that realistic return to work options were dismissed. On the contrary, as appears above, I find that the Respondent made it clear that options were being considered and that they were open to discussions on flexible working.

Conclusions

59. For all the reasons given above, I do not find that the claimant was constructively dismissed.

Employment Judge Peter Wilkinson
Date: 22 November 2021