



EMPLOYMENT TRIBUNALS

Claimant: Sylwia Andrysiak-Szymenderski

Respondents: XPO Logistics UK Limited

Heard at: Watford **On:** 20 & 21 March 2023

Before: Employment Judge Oldroyd (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Taylor (Solicitor)

JUDGMENT

1. The claim for constructive unfair dismissal is dismissed.

REASONS

Introduction

1. By way of ET1 dated 8 August 2021, the Claimant pursues a claim for constructive dismissal.
2. In particular, the Claimant maintains that, having returned from maternity leave on 11 January 2021, the Respondent acted in fundamental breach of contract and caused her to resign on 29 March 2021.
3. More particularly, the Claimant says that the Respondent:
 - 3.1 Pressured her into signing a new contract on less favourable terms.
 - 3.2 Subjected her to a three sarcastic and derogatory comments that individually or else collectively amounted to a breach of the relationship

of trust and confidence that ordinarily exists between an employee and their employer.

- 3.3 Failed to promptly consider a flexible working request or else unreasonably and without good reason failed to accede to that request.
4. The Respondent denies the claim. The Respondent disputes that it acted in breach of contract (at least in a fundamental way) or else asserts that any breach was either affirmed or else not the cause of the Claimant's resignation.

Representation

5. The Claimant acted in person. Being a Polish native speaker, the Claimant was assisted by an interpreter as and when required during the hearing and she was able to participate effectively.
6. The Respondent was represented by a Solicitor, Mr Taylor.

The Evidence

7. The parties produced a bundle of documents extending to 178 pages.
8. The Claimant relied upon her own Witness Statement and also gave oral evidence. Mr Shaun Littlewood, a former co-worker of the Claimant, also produced a Witness Statement on behalf of the Claimant and he also gave oral evidence.
9. The Respondent relied upon the Witness Statement of Alun Eggleton, the Claimant's former line manager (who oversaw the Claimant's flexible working request and was also the alleged author of the derogatory comments that the Claimant relies upon). Mr Eggleton also gave oral evidence.

Fact findings

10. The Claimant commenced her employment with the Respondent on 8 April 2019.
11. The Respondent operates a large freezer warehouse where frozen foods are sorted and packed for onward distribution.
12. The Claimant was one of three shift managers. As such, the Claimant was responsible for overseeing the workers on any given shift. The other two shift managers were Matthew Lindsay and Shaun Littlewood.
13. At the commencement of her employment, the Claimant routinely worked one of three shifts being either:
 - 13.1 The morning shift, from 06.00 to 14.00; or
 - 13.2 The day shift, from 10.00 to 18:00; or
 - 13.3 The evening shift, from 14.00 to 22.00.

14. Although the warehouse was in operation overnight, none of the shift managers were required to oversee that night shift (between 22.00 and 06.00), albeit the Claimant's contract did not preclude that possibility.
15. On 1 June 2020, the Claimant commenced a period of maternity leave that continued until approximately 11 January 2021. The Claimant confirmed, at the outset of the hearing, that she does rely any act or omission on the part of the Respondent that pre-dates her maternity leave (although certain acts or omissions are set out in ET1).
16. Prior to the commencement of her maternity leave, the Claimant submitted a flexible working request in accordance with her statutory entitlement to do so. This request was approved on 12 May 2020 by the Claimant's line manager, Alun Eggleton. Mr Eggleton confirmed that, upon returning from maternity leave in January 2021, the Claimant would work reduced hours in January, February and March.
17. On 4 January 2021, the Claimant submitted a further flexible working request. Specifically, the Claimant requested that, for the first three months following her return to work, she be allowed to work only on weekdays between the hours of 06.00 to 12.00 (and so part of the morning shift). The Claimant suggested that this arrangement was required because she would be breastfeeding her baby. The Claimant requested that she be permitted to leave her place of work once or twice a day to feed her baby (which was reasonably practical given that she lived in very close proximity to the warehouse) or else be able to express milk at work and store it in an office fridge.
18. The Claimant discussed this proposal with Mr Eggleton on 11 January 2021, the first day that she returned to work. During the course of that meeting, it is apparent that Mr Eggleton carried out a risk assessment in respect of the Claimant's request. It was then agreed that the Claimant's suggested work pattern would be adopted for a three month period and also that the Claimant would be allowed to express milk and store it in the office fridge. (It was not agreed that the Claimant would be permitted to leave her place of work).
19. It is apparent that Mr Eggleton approached this flexible working request with diligence and care; hence he met with the Claimant promptly and carried out a risk assessment.
20. Unfortunately, though, it is clear that the relationship between the Claimant and Mr Eggleton (and as a result the Respondent) deteriorated after this time causing the Claimant, she says, to resign on 29 March 2021. The deterioration of the relationship was the result of, in the Claimant's eyes, three factors:
 - 20.1 First, Mr Eggleton persuaded the Claimant to sign a new contract that obliged her, at least potentially, to work a night shift.
 - 20.2 Second, Mr Eggleton made three comments that the Claimant found to be sarcastic or else derogatory and which had the effect of seriously damaging her trust and confidence in the Respondent. (The Claimant says

there were other comments but only three comments were explored in evidence).

20.3 Third, the Claimant submitted a further flexible working request that she says Mr Eggleton dealt with at a lamentably slow pace and which, ultimately, was unreasonably refused.

21. I shall deal with each factor in turn.

Factor 1: The new contract

22. During the course of her first week of work, the Claimant says that she was pressured into signing a “new” contract by Mr Eggleton without being provided any explanation as to why this was required. The Claimant described that Mr Eggleton used words along the lines of “*just sign it!*”.

23. The Claimant duly signed this new contract on 4 January 2021, but unwillingly she says.

24. In these proceedings, the Claimant says that this new contract was less favourable than her “old” contract because, unlike her old contract, it obliged to her to work a night shift (as opposed to a morning, day or evening shift).

25. This new contract did not appear in the bundle but it was made available to the Claimant and the Tribunal shortly before the hearing.

26. Comparing the old contract and the new contract, it is now clear that there is in fact no discernable difference between them. In fact, the two contracts are more or less identical (and the Claimant now accepts this). Certainly, the new contract does not alter the shifts that the Claimant was obliged to work.

27. It is clear, therefore, that the only reason why the Claimant was asked to sign the new contract was because the Respondent had not, at the time, been able to locate a signed copy of the old contract (being the contract that the Claimant had initially signed upon the commencement of her employment). This is consistent with the fact that the Claimant, in her own Statement, accepts that Mr Eggleton indicated that he had been unable to locate the old contract.

Factor 2: Sarcastic or derogatory comments

28. In her first or second week at work (the Claimant does not know precisely when), the Claimant says that Mr Eggleton made the first of three sarcastic and derogatory comments that she says led to her resignation.

29. To this end, the Claimant was engaged in an informal discussion with Mr Eggleton for the purpose of agreeing work objectives. Nobody else was present at the meeting.

30. At the meeting, the Claimant explained to the Mr Eggleton that she had passed a logistics management course. The Claimant was proud of her achievement. Indeed, the Claimant, in her evidence, came across as a highly driven employee

who was constantly seeking to improve her skills for her own benefit and also for that of her employer.

31. The Claimant described in her evidence that Mr Eggleton appeared to belittle her achievement swiftly and decisively by saying words in a negative tone to the effect of:

“Because someone’s read the book, it doesn’t mean that you’re a pilot”

32. The Claimant explained that she was left feeling demotivated by the negativity of the comment, her balloon having been resoundingly burst.
33. Even though the Claimant made no formal complaint about this at the time (saying in effect that she did not want to damage her relationship with Mr Eggleton), I accept the Claimant’s evidence that she felt demotivated as a result of this encounter. The Claimant was visibly emotional when addressing the incident.
34. For his part, Mr Eggleton accepts that he made the comment, although he did not accept that it was intended to be anything but constructive and a reminder to the Claimant that, whilst passing the course was an achievement, she now had to actually put her learning into practice. The comment, Mr Eggleton explained, was his way of grounding the Claimant; he might equally have used words to the effect of *“you can’t run before you can walk”*. As it happens, Mr Eggleton says (convincingly) that he alighted upon the pilot analogy that he used because both he and the Claimant had shared their experiences of having previously both worked at Heathrow airport earlier in their conversation.
35. In my Judgment, Mr Eggleton’s comment, and more its tone, was clumsy and demonstrated a certain lack of empathy on his part. Mr Eggleton failed to recognise that, having returned from maternity leave, the Claimant was lacking in confidence and that she was seeking positive support and encouragement. In its manner of delivery, it is not surprising that the comment had a deflating effect.
36. However, I also accept that Mr Eggleton was not actively intending to deflate the Claimant but that he was intending to provide honest and constructive feedback. Indeed, Mr Eggleton’s dealings with the Claimant and the way in which he had dealt with her flexible working requests up until this time were constructive.
37. I also consider the *substance* of the message that Mr Eggleton was seeking to convey was a reasonable one. On this occasion though, the message was imparted clumsily.
38. Viewed in this way and objectively, this was not a comment that likely to seriously impact on the employer - employee relationship.
39. The second sarcastic and derogatory comment about which the Claimant complains was made at a management meeting that took place at some time in February 2021. Again, the Claimant cannot be specific as to the precise date.

40. The meeting in question was attended by Mr Eggleton, the Claimant, Mr Lindsay Mr Littlewood and also by Mr Paul Moss and Mr Michael Cotham (and possibly others). It commenced at some time before 14.00.
41. The Claimant describes that, as the meeting was ongoing and at about 14:00, she packed her things and left the meeting without formally announcing that she was leaving or making apologies for this. The Claimant says that this was because it was already known to all those attending the meeting that she had to leave promptly at 14:00 for childcare reasons.
42. In response to the Claimant's early exit, Mr Eggleton remarked (somewhat sarcastically in her eyes):
- "Thanks for popping in".*
43. The Claimant describes the comment as being "*humiliating*" and a deliberate and unwarranted "*put down*". The Claimant said in her closing submissions that the comment "*broke her*". That she was upset about it was clear from statements given to the Respondent by other attendees of the meeting in the course of a complaints process that was instigated after the Claimant's resignation.
44. Although Mr Eggleton has no recollection of making the comment, I find that he did make it. To this end:
- 44.1 the Claimant says he made it and I found the Claimant to be a truthful witness, whose evidence was consistent with other witnesses.
- 44.2 Mr Littlewood, Mr Lindsay Mr Moss and Mr Cotham all recall Mr Eggleton using words to this effect.
45. I also find as a fact that the comment can only have been intended by Mr Eggleton to be as an ill-judged sarcastic jibe. As such it was a comment that was always likely to damage the Claimant's trust and confidence in the Respondent. I reach that view for four reasons:
- 45.1 To say "*thanks for popping in*" when someone is leaving is ostensibly sarcastic.
- 45.2 In the course of the investigation the complaint to which I have alluded, the Respondent interviewed Mr Moss, Mr Cotham, Mr Littlewood and Mr Lindsay who were present when the comment was made. Mr Cotham, perceived the comment to be "*sarcastic*" as did Mr Lindsay. Mr Littlewood, who gave evidence before the Tribunal, agreed with that sentiment. Mr Moss said of the comment:
- "Maybe [Mr Eggleton] thought it was a joke but it did not come up like that".*
- 45.3 Mr Eggleton well knew (or should have known) why the Claimant was leaving the meeting. By drawing attention to her leaving the meeting, in a sarcastic way, Mr Eggleton was implicitly being critical of the Claimant's need to arrange childcare.

45.4 The outcome of the Respondent's own complaints process was that it was concluded that Mr Eggleton made the comment and that it was inappropriate (which I infer to mean that it was sarcastic). The Respondent accepted that the comment was out of keeping with the Respondent's own values such that Mr Eggleton should be the subject of disciplinary action.

46. The third and final inappropriate comment that the Claimant relies upon was made on 28 April 2021 when the Claimant says that, in the course of a management meeting, Mr Eggleton said:

"Where's my tea".

47. It appears to me that because this comment postdated the Claimant's resignation by a month, I do not need to make any factual findings in respect of it. This is for the simple reason that this comment, even if made, cannot have caused the Claimant to resign. It therefore is not relevant to the issues that I need to consider.

Factor 3: The Flexible Working Request

48. The third factor that the Claimant says caused her to resign arises out of a flexible working request that the Claimant submitted on 19 January 2021. The Claimant actually makes two complaints about this request.

48.1 Firstly, the Claimant says that the request was dealt with at a snail's pace, the outcome of her request only being made known to her after nine weeks on 25 March 2021.

48.2 Secondly, the Claimant says that the request itself was unreasonably refused.

49. The flexible working request that the Claimant first submitted on 19 January 2021 evolved slightly over time but it ultimately envisaged that, for a period of nine months, the Claimant should be allowed to work either the morning shift or the evening shift but not the day shift.

50. The rationale for the request, from the Claimant's perspective, was that it would allow her to more conveniently to co-ordinate childcare arrangements with her husband (made more difficult by the ongoing Covid pandemic).

51. The request was dealt with, on behalf of the Respondent by Mr Eggleton (albeit he liaised with the Respondent's HR department).

52. Viewed at least from the outside, the Claimant's request was not dealt with in rapid fashion, particularly given that it was to be expected that the Claimant would wish for matters to be resolved promptly so that she could make appropriate childcare arrangements. To this end, having first submitted a request on 19 January 2021, the outcome was not conveyed to the Claimant until nine weeks later.

53. Mr Eggleton explained in evidence that, whilst the pace at which the request was dealt appeared to be dilatory, it was not a straightforward request and that in his view it was dealt with as promptly as was reasonably possible.
54. Mr Eggleton explained that the request required him to consult widely within the Respondent and consider a number of factors that were relevant to the decision that had to be made. I accept Mr Eggleton's evidence in this regard. Indeed, it is clear from a note dated 25 March 2021 (that recorded the outcome of the flexible working request) that Mr Eggleton did consult widely within the business (including with Mr Lindsay and Mr Littlewood) and that he also considered a number of factors, such as customer demand and future possible structural changes that might be implemented. For this reason, I do not consider that the decision making process can be described as having been unreasonably slow even though that it was the Claimant's perception and even though, without doubt, the process might have been conducted a greater pace.
55. As to the outcome of the flexible working request, this was, as I have said, conveyed to the Claimant by Mr Eggleton at the meeting that took place on 25 March 2021 (in the presence of Mr Wallis, the Respondent's HR representative). It was explained to the Claimant she would be offered a permanent morning shift for the period of 5 April 2021 to 1 May 2021 only, albeit that the position would then be reviewed on 23 April 2021 with view to it being extended on a rolling monthly basis subject to further monthly reviews.
56. Effectively therefore, the Claimant's request was refused as she had been seeking a commitment to permanent morning (or evening) shifts for a period of 9 months and she was offered a one month rolling commitment only. (It does seem that the Claimant did not fully appreciate, until after she resigned, that she was being offered to permanent morning shifts on a rolling monthly basis, which is unfortunate. However, as the Claimant accepted in her closing submissions that this would not have been acceptable to her in any event, nothing turns on this).
57. As to why the Claimant's request was refused, the note of the meeting of 25 March 2021 sets out six reasons for the refusal of a nine month variation to her contract. The reasons were set out in some detail but they can be summarised as the variation having a potential adverse impact on:
 - 57.1 the ability to meet customer demands;
 - 57.2 quality;
 - 57.3 performance;
 - 57.4 other shift managers (albeit their support was noted);
 - 57.5 recruitment costs;
 - 57.6 future structural changes to introduce a night shift.

58. Mr Eggleton was questioned about these reasons extensively by the Claimant in cross examination. The Claimant noted that, following the end of her employment, the Respondent did not immediately recruit to replace her. The Claimant drew the inference that if it was possible to operate with two shift managers after her resignation then it would have been quite possible to operate with three shift managers, one of whom was working flexibly. The Claimant also pointed to the extra resource that the Respondent had available to “plug” any gaps that were caused by her flexible working proposal, as it had done during her maternity leave.
59. The Claimant went so far as to suggest that her flexible working request was refused for no other reason that it would cause her to “*hit the wall*” and resign. To this end, the Claimant explained that it was clear that the Respondent wished for her and the other shift managers to work a night shift going forward and that, as a mother of young children, she would be unable to accommodate this. In the Claimant’s opinion, this meant that the Respondent no longer wished to employ her.
60. In response, Mr Eggleton summarised his position (on behalf of the Respondent) by saying that whilst he would have wished to accommodate the Claimant’s request if possible, he was unable to do so as the Claimant’s proposal was too rigid. Mr Eggleton explained that he required his three shift managers to have flexible working patterns to react to uncertainties that existed in relation to future customer demand and the consequential impact on resourcing. Those uncertainties were heightened by the ongoing Covid pandemic. Mr Eggleton also accepted that having one of three shift managers working a morning shift only, might impact on the introduction of a future night shift manager. Ultimately, Mr Eggleton explained that committing to an inflexible working pattern for a period of 9 months (as opposed to 1 month, subject to review) was not in the wider interests of the Respondent.
61. In my judgment, I have not seen any evidence that Mr Eggleton denied the flexible working request as a matter of course with a view to causing the Claimant’s resignation because he knew that she would not commit to a night shift. Indeed, as a matter of fact, the Claimant did not introduce a night shift manager in the 18 months so after the Claimant’s resignation. Further, the evidence suggests that Mr Eggleton considered the Claimant’s flexible working request carefully. This is apparent from the fact that Mr Eggleton consulted widely and gave 6 cogent reasons to explain why the request was refused.
62. As to why the request was refused, I also accept that there were legitimate business or operational reasons that led to the request being refused. Having found that the decision process was not a sham, as the Claimant contends, it is not the role of the Tribunal to go behind the legitimacy of the decision that was made.
63. In terms of subsequent events, the Claimant was plainly dissatisfied with the outcome of her final flexible working request. In fact, the Claimant accepted in cross examination that the fact that she was unable to work only a morning or evening shift meant it would be difficult for her to arrange her childcare in such a way that would allow her to remain in employment with the Respondent. I am

satisfied therefore that it was the refusal of this flexible working request that immediately led to the Claimant resigning by letter dated 29 March 2021.

64. However, it is also clear to me that the Claimant's relationship with the Mr Eggleton, and the impact of his treatment of her (to the extent that I have found that this treatment to be inappropriate) had a material impact on her decision to resign. I reach this view because of the contents of the Claimant's letter to the Respondent, written very shortly after her resignation on 1 May 2021, in which she expressly cites Mr Eggleton's comment relating to "*popping in*" as being an influential factor in her decision to leave.
65. There are three other points to note about the Claimant's resignation letter.
 - 65.1 First, the letter states that the Claimant's was seeking "*move on to a new challenge*". I do not see this as being inconsistent with my finding that the immediate cause of the resignation was the flexible working request and the conduct of Mr Eggleton.
 - 65.2 Second, the letter makes no complaint about the way in which the Claimant now says she was treated poorly by the Mr Eggleton. I do not find this surprising given the letter was based upon a Google precedent and also addressed to Mr Eggleton (against whom, the Claimant's complaint lies). I can understand why the Claimant did not wish to raise any complaint she had directly with Mr Eggleton at this time.
 - 65.3 Thirdly, the Claimant was contractually obliged to give four weeks' notice but she offered a six week notice period. The Claimant explained in evidence that this was because she had no immediate new role to go to and also because, by working a six week notice period, she would not be obliged to repay the Respondent in respect of holiday that she had taken but which had not yet accrued.
66. It was whilst working her notice period that the Claimant raised a formal grievance as against Mr Eggleton (by way of the letter dated 1 May 2021 to which I have referred). That grievance raised many of the complaints that form the subject of these proceedings.
67. The grievance was duly investigated by the Respondent. In a nutshell, it was held that flexible working request was dealt with appropriately but that Mr Eggleton made one inappropriate to the comment to the Claimant (as set out above).
68. An appeal was also lodged but not upheld by the Respondent.

The Relevant Law

50. Constructive unfair dismissal arises under section 95(1)(c) of the Employment Rights Act 1996 which deems a dismissal to have arisen in circumstances where:

“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”.

51. In *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA*, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

“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.”

52. The component parts of a constructive dismissal which need to be considered are therefore as follows. The Claimant must establish:

52.1. a repudiatory or fundamental breach of the contract of employment by the employer; and

52.2. there must be a termination of the contract by the employee because of that breach.

53. In terms of the alleged breach of contract, it may be breach an express term or an implied term.

54. In this instance, two implied terms are of relevance.

55. The Claimant firstly says that the Respondent’s failure to deal with her flexible working request was a breach of the Respondent’s implied obligation to deal with a flexible working request in accordance with its statutory obligations as set out in the Employment Rights Act 1996. In this regard:

55.1 Pursuant to Section 80F of the Employment Rights Act 1996 , an employee has a statutory right to request for what is commonly called a flexible working arrangement. Section 80G requires the employer to then deal with that request in a reasonable manner and notify the employee of the outcome within 3 months.

55.2 An employer is not obliged to accede to flexible working request; it may be refused on any of the following grounds:

55.2.1 the burden of additional costs

55.2.2 detrimental effect on ability to meet customer demand

55.2.3 inability to re-organise work among existing staff

55.2.4 inability to recruit additional staff

55.2.5 detrimental impact on quality

55.2.6 detrimental impact on performance

55.2.7 insufficiency of work during the periods the employee proposes to work

55.2.8 planned structural changes

56. The second implied term in play arises out of *Malik and Mahmud v BCCI [1997] ICR 606* in which was held that an employer is under a duty to maintain the relationship of trust and confidence that should exist between employer and employee and 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.”

57. In this case, it is suggested that the imposition of a new contract and the making of derogatory or sarcastic comments amounted to a breach of the implied term of trust and confidence.

58. A breach of such the implied term of trust and confidence is repudiatory in nature *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A*.

59. It is accepted that a breach of trust and confidence might arise not because of any single event but because of a series of events. In such a case a claimant can rely on a “last straw” which does not itself have to be a repudiation of the contract see *Waltham Forest v Omilaju [2005] IRLR 35*, and *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*. In *Kaur* it was also confirmed that an employee can rely upon earlier conduct by the employer even if they affirmed the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns.

60. Whether breach of an express or implied term, the fundamental breach of contract by the employer need only be a single reason for the resignation of the claimant. It does not matter if there are other reasons: *Wright v North Ayrshire Council [2014] IRLR 4*.

61. Even if there is a fundamental breach, the contract may be affirmed if, after the breach, an employee behaves in a way which shows that they intend the contract to continue notably by reason of delay, but delay of itself is not sufficient. It all depends on the circumstances. It must be accepted that the paradigm case of the worker downing tools and walking out immediately rarely happens in modern life, particularly in professional or managerial occupations. It may take some time for an employee to consider whether to accept the breach and resign or not.

62. In *Cockram -v- Air Products UKEAT/0038/14/LA* the EAT noted that an employee who resigns on the basis of a constructive dismissal but who works more than the contractually agreed notice period may affirm a contract; but it is not a hard and fast rule that affirmation is automatic. Mr Justice Silber stated:

“Where an employee resigns on notice and despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.”

63. If it is established that there has been a dismissal, the next stage is for the Tribunal if the dismissal was fair, the burden being upon the Respondent to establish fairness.

The Issues

64. The issues that I must now determine are these.

65. Did Respondent fundamentally breach the terms of the Claimant’s contract of because (viewed either individually or as a collective series of events) by

65.1. Persuading the Claimant to sign a new contract which was less favourable to her.

65.2. Subjecting her to sarcastic or derogatory comments.

65.3. Failing to promptly deal with the flexible working request or else unreasonably refusing the flexible working request

66. Did the Claimant resign because of any breach or breaches of contract?

67. Did the Claimant affirm the contract before resigning?

68. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Employment Rights Act 1996?

Conclusions

Did the Respondent fundamentally breach the Claimant’s contract?

69. The first issue to resolve is whether the Respondent acted in breach of contract in a fundamental way, in which respect, the Claimant makes four complaints. This is the Claimant’s burden to discharge.

70. The Claimant’s first complaint is that she was pressurised into signing a new contract that was less favourable to her.

71. I do not consider this to have been a fundamental breach of contract for two reasons.

- 71.1. I have found, as a matter of fact that the Claimant was not being asked to sign a new contract. Instead, she was being asked to sign a replacement contract, her old contract having been mislaid.
- 71.2. As the Claimant now accepts, there is no discernible difference between the so called old and new contracts and the Claimant was not materially disadvantaged in anyway.
72. The second complaint that the Claimant makes is that Mr Eggleton made sarcastic or disparaging remarks that amounted to a fundamental breach of the implied term of trust and confidence. In this context, it certainly seems to me that if a line manager makes a sarcastic or derogatory comment, it has the *potential* to be a breach of the implied term ..
73. In this regard, I have found that Mr Eggleton made one sarcastic remark to the effect of "*thanks for popping in*". This remark that was unwarranted in its sarcasm. There is no doubt that, by making this comment, Mr Eggleton damaged the relationship between the Claimant and the Respondent.
74. However, establishing some damage to the employment relationship does not of its own justify resignation. Something more is required. The real question is whether, by making this remark, Mr Eggleton was likely to *seriously* damage the Claimant's trust in the Respondent to the extent that she was (absent other considerations) not to be expected to continue in her employment.
75. In my judgment, Mr Eggleton's remark, even when made in isolation, was likely to seriously damage the relationship; and did so. In reaching this conclusion I bear in mind that the comment was made in public in front of the Claimant's peers (who were generally in no doubt that it was a disparaging comment) and also the significant impact of the comment upon the Claimant herself.
76. Consequently, this particular remark amounted to a repudiatory breach of contract. On the face of things, the Claimant would ordinarily have been permitted to resign in response to the comment. The Claimant chose not to immediately do so at that time and I will consider the implications of this below.
77. I must next consider whether the Respondent's alleged failure to promptly deal with the Claimant's flexible working request was a fundamental breach of contract.
78. In my judgment though, the request was dealt with reasonably promptly and there was no breach of contract for two reasons:
- 78.1. First, and most significantly, the relevant statute itself provides for a flexible working request should be dealt with within 3 months. This timescale was met.
- 78.2. Secondly, whilst undoubtedly, the request could have been dealt with more speedily (which is true in almost all cases I suspect), I have found that it was not a straightforward request. It required Mr Eggleton to consult widely and

consider a number of issues which he did. In short, Mr Eggleton acted reasonably even disregarding the statutory time limit.

79. Even had I found that the request was dealt with slowly, I would not have regarded any delay to be so significant so as to be a fundamental breach of contract.
80. Finally, I must consider whether the request itself was unreasonably refused in a manner that amounts to a fundamental breach of contract.
81. In my judgment the Respondent was perfectly entitled to reject the Claimant's request. This flows from my factual findings that:
 - 81.1. Mr Eggleton did not simply reject the Claimant's application with the intention that she should then resign, as the Claimant suspects. There is no evidence to support that suspicion. The evidence instead suggests that the request was carefully considered.
 - 81.2. In fact, the Respondent rejected the application for legitimate operational reasons that were set out to the Claimant in the meeting that took place on 25 March 2021. The reasons for rejecting the request are all ones that justify rejection of a flexible working request within the meaning of Section 80G Employment Rights Act 1996.

Did the Claimant resign because of any breach or breaches of contract?

82. I have found that the Respondent acted in breach of contract in one sense only; namely I have found that Mr Eggleton's comment relating to the Claimant "*popping in*" was a repudiatory breach of contract.
83. As I have set out, the Claimant's principal reason for resigning was the rejection of her flexible working request, but the Claimant's resignation was also materially influenced by Mr Eggleton's derogatory comment referencing "*popping in*". I refer again to the Claimant's contemporaneous letter of 1 May 2021 in which she drew a direct link between her resignation and Mr Eggleton's comment.
84. In light of this, I am satisfied that the breach of contract did cause, in a legal sense, the Claimant's resignation because the resignation was, in part, a response to what I have found to be a fundamental breach of contract and the damage that it caused to the Claimant's relationship with the Respondent.

Did the Claimant affirm the contract before resigning?

85. Although I have found that the Respondent was in fundamental breach of contract and that this caused the Claimant's resignation, I must still consider whether the contract was affirmed before that resignation.
86. On these facts, I am satisfied that there was an affirmation of the contract for two reasons.

87. Firstly and most importantly, the inappropriate comment was made in February 2021 at least one whole month before the Claimant resigned. Between the making the comment and her resignation the Claimant continued to work. More to the point, the Claimant actively engaged with her flexible working request (and so sought to vary her contract) by meeting with Mr Eggleton on at least two occasions to discuss the issue. At no point in this period did the Claimant raise concerns over Mr Eggleton's conduct. This conduct suggests that the Claimant was not at all, either subjectively or objectively, treating her relationship as having come to an end. Certainly, to the outside world a continuing relationship remained in place.
88. Secondly, the Claimant expressly agreed to continue to work beyond her notice period by period of two weeks albeit for financial reasons which are understandable. However, working for an extended notice period (and extending it by 50%) again strikes me as affirming the contractual relationship.
89. Taken individually but even more so together, I find that these steps are inconsistent with the Claimant having treated the contract as having come to an end.

Decision

90. Because I have found that there was a single repudiatory breach of contract which caused the Claimant to resign but which was affirmed, the claim for constructive dismissal must fail and is dismissed.

Employment Judge Oldroyd

Date: 31 March 2023

JUDGMENT SENT TO THE PARTIES ON

30.4.2023

GDJ
FOR THE TRIBUNAL OFFICE