



EMPLOYMENT TRIBUNALS

Claimant: Mrs E J Blair

Respondent: Duncan Boxwell & Company Limited

Heard at: By CVP

On: 27 and 28 February 2023

Before: Employment Judge Othen

Appearances

For the Claimant: Mrs A Tyson (Solicitor)

For the Respondent: Mr Wood, (Counsel).

RESERVED JUDGMENT ON LIABILITY

The Claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The Claimant was employed from 14 January 1992, latterly as a Practice Manager, until she resigned with immediate effect on 23 November 2021.
2. The Claimant claims that she was (constructively) dismissed in accordance with Section 95(1)(c) of the Employment Rights Act 1996.
3. The Respondent contests the claim. It says that the Claimant resigned.
4. The parties were represented at the hearing. The Claimant gave sworn evidence and called sworn evidence from Christine Archer. The Respondent called sworn evidence from Duncan Boxwell ("DB") and Renee Shepherd ("RS"). I considered the documents from an agreed, 128 page Bundle of

Documents which the parties introduced in evidence. I received written submissions and further comments from the parties' representatives on 4 May 2023.

Issues for the Tribunal to decide

5. At the outset of the case, I took some time to discuss the issues with the parties and to understand the Claimant's case.
6. After some discussion, the Claimant confirmed the alleged breaches of her contract of employment in response to which she resigned and the list of issues to be determined in the case was therefore confirmed as follows:
 - 6.1 Whether the Respondent committed an anticipatory breach of a fundamental express term of the Claimant's contract of employment regarding pay on 19 November 2021; and/or
 - 6.2 Whether the Respondent, without reasonable and proper cause, acted in such a way as to destroy or seriously damage the implied term of trust and confidence in:
 - 6.2.1 Removing the Claimant as director on 4 October 2021;
 - 6.2.2 Removing her duties of approving overtime pay and holiday on 18 October 2021;
 - 6.2.3 Sending an email on 19 November 2021, which:
 - (a) Attached fabricated, inaccurate minutes;
 - (b) Changed further practice management duties which the Claimant either did not do or did rarely.
 - 6.3 Whether the Claimant affirmed the breach of contract;
 - 6.4 Whether the Claimant resigned in response to the breach of contract;
 - 6.5 Whether, if the Claimant was unfairly dismissed, either the basic award or compensatory award should be reduced, in particular because of the Claimant's conduct.

Findings of Fact

7. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.
8. The Respondent is a firm of accountants in Pulford, Chester jointly owned by DB and RS who are Chartered Accountants, Directors and shareholders. At the time of the Claimant's resignation, the Respondent employed approximately four members of staff.

9. The Claimant commenced employment in 1992. She had no written contract of employment. Her job title evolved over time from a typist and receptionist, through various other administrative and management positions to Practice Manager from approximately 2021. She was also a director in the latter part of her employment and held a nominal shareholding.
10. The Claimant hours of work were from 9 am to 5:15 pm, Monday to Friday with an hour for lunch.
11. The Claimant had no written job description. Her duties, by her own admission, have "*always historically changed over a period of time*" (paragraph 6 Claimant's witness statement). At page 90 of the bundle was a long list of duties which was prepared by the Claimant for a discussion with DB in February 2017. This list states that it is not complete and appears to have been amended, at least to some extent, since that point to include clients' tax issues. The list includes the managing and assisting of payroll for the Respondent and some general HR tasks such as the approval of holiday requests.
12. A copy of the Respondent's handbook is in the bundle from page 50. This is dated 2019. The Claimant and Christine Archer assert that they were not aware of this handbook. The Respondent asserts that there was a copy in the kitchen area. There was no evidence in the bundle of this having been sent to the Claimant or to Christine Archer and as the evidence of both those witnesses is consistent, I accept that they were not aware of it.
13. The handbook states at page 58 of the bundle that: "*We do not permit holidays to be carried forward and no payment in lieu will be made in respect of untaken holidays other than in the event of termination of your employment*".
14. The handbook contains no provisions with regard to working overtime or payment thereof. The witness evidence regarding overtime working and payments is confused and confusing.
15. The Respondent's case is that the Claimant was responsible for administering payroll but did not have authority to approve overtime payments. Authority to make overtime payments should have been sought and given in advance by DB (or RS) and was given by DB in certain circumstances for certain employees. DB asserts that he had approved overtime pay in the past for Christine Archer but never for other employees ("Rachel and Fay"). The Respondent accepts that overtime was worked but not on an excessive basis. Furthermore, it asserts that the Claimant encouraged or even "pestered" other employees to submit claims for overtime payments (page 116) .
16. The Claimant's case is that historically, she would discuss issues generally with DB on a regular basis, "*sometimes daily*" (paragraph 72 Claimant's witness statement) but that changed in the years before her resignation as he was "*no longer interested*". She says that there was no official procedure in place for approval of overtime pay, that it had occasionally been paid in the past and that she could not remember whether she had approval to pay it from DB

beforehand or not (paragraph 83 Claimant's witness statement). She agreed that no overtime had been paid since RS was appointed.

17. RS was appointed as co-owner and director from September 2018. Going into the COVID pandemic, the Respondent were required to work on a flexible basis with some overtime.
18. The Claimant's evidence is that there were a lot of changes which were implemented on a regular basis after RS took up her post and that the Claimant was not happy about this. Her witness statement makes various complaints about alleged poor management and administration although there is no documentary evidence that she made any complaints about this at the time.
19. From October 2020 until September 2021, the Claimant approved various payments of overtime for Christine Archer and two other employees (Rachel and Fay) which amounted to £1437.98. She says that she had been given general authority to make these payments by DB, they were relatively small amounts, she used her initiative and she wanted to make sure that Respondent's National minimum wage requirements were met. The Respondent says that these payments should not have been made without prior approval from DB (or RS). On balance, I find that the Claimant should have specifically discussed these payments with DB or RS before they were made and had she done so, they may have objected to the payments or have asked to discuss them in further detail. I have found this because of the lack of specific or clear evidence from the Claimant about when, how and what authority had been given to her by DB, the evidence from CA that she hadn't wanted or needed to receive such payments and the consistent witness evidence from DB and RS.
20. From 2019, the Respondent was looking to relocate its office which was then in Neston. In late August 2021, it received a time-sensitive lease offer from a landlord for its current premises in Pulford. The landlord required all of the Respondent's statutory directors to give personal guarantees for the proposed annual rent and they were required to act swiftly to secure the tenancy. As such, RS contacted the Claimant by WhatsApp on 4 October 2021 to ask her whether she would be willing to give such a personal guarantee. The WhatsApp (page 97) explains the circumstances and says: "*it might be a tall ask for you. Are you okay to sign?*" The Claimant immediately replied saying "*No, I don't do PGs... As Duncan knows from past experience*". RS responded to say "*OK. Let me speak to our lawyer and see what we can do. We have to go ahead with the lease*".
21. RS asserted that at the time, they were under pressure and needed to act quickly. She therefore spoke to the Claimant and asked her if she would be willing to resign as a director, meaning that the landlord would not require a personal guarantee from her. She said that the Claimant agreed and the Claimant confirmed that she asked Christine Archer to file her resignation at Companies House on the same day, 4 October 2021. A copy of this document is at page 98 in the bundle. There is no evidence that the Claimant was unhappy with this at the time or raised any complaint about it. The witness evidence of Christine Archer was consistent with this.

22. The Respondent planned to move to its new office with effect from 1 November 2021. In the lead up to this, there had been informal discussions about possible hybrid working for staff (from both home and office) on a trial basis.
23. The Claimant was unhappy about the relocation as it meant increased travel for her from her home location. She verbally raised the possibility of a change to her working hours towards the end of September 2021 and submitted a written flexible working request by way of email on 5 October 2021 (page 102).
24. The changes that she requested in her email were to work from home one day per week (working from the office on five days every fourth week) and a change to her working hours from 7 am to 3 pm with 45 minutes lunch break.. The email concluded by explaining the stress that the additional commute to work will cause her and states that *"I think the request I have made is more than reasonable and if for any reason you think my offer is unacceptable, I will have no choice other than to regrettably tender my formal resignation"*.
25. RS responded by email on the same day to suggest a meeting on 18 October 2021 (after the Claimant's booked holiday) to discuss the request.
26. The meeting took place as planned.
27. The Claimant's version of that meeting is that she explained the reason for her request, that being her desire to car share with her husband to his work location and therefore, to coordinate with his working hours. She says that her request was agreed, with her varied hours to commence from 1 November 2021, at the new office, on a permanent basis. She also reported that RS raised a concern about the carryover of holiday entitlement and unauthorised overtime payments and that due to this, she would take over the approval of holidays and overtime from that point. She says that no one took any notes at the meeting.
28. A summary of the Respondent's version of the meeting is as follows:
 - 28.1 DB took notes at the meeting;
 - 28.2 RS says that she asked the Claimant if a compromise was possible with regard to the working hours that she requested so that they could be pushed back an hour later but the Claimant said this was not possible;
 - 28.3 RS raised her concerns about possible payroll cover from clients between 3 and 5 PM and the Claimant's ability to perform her practice management duties fully before 3 PM each day;
 - 28.4 RS raised a concern about unauthorised overtime payments and carry forward of holiday entitlement;
 - 28.5 RS said that as a result, RS would take over those duties and other practice management duties from that point;
 - 28.6 The Claimant's request was agreed on a trial basis for 3 to 6 months.

29. On the balance of probabilities, I find that the Respondent did take brief notes of the meeting. Both DB and RS confirm this, it would have been likely to do so in the circumstances and I think it more likely that the Claimant didn't notice this happening rather than DB and RS had both lied about this. Both DB and RS explained that these notes were subsequently destroyed in accordance with their paperless practice policy and I find this explanation to be credible.
30. The office relocation took place on 1 November 2021 and as a result, there was a delay in written confirmation of this meeting until 19 November 2021. The Claimant worked during this period at the new office on her newly agreed hours without any problems or concerns.
31. C didn't raise any complaints or concerns about the removal of her duties of approving holidays or overtime on 18 October 2021 or thereafter.
32. On Friday 19 November 2021, RS sent an email to the Claimant to agree to her flexible working request on a temporary trial basis, for three months, subject to review. It attached some typed notes of the meeting on 18 October 2021. The email further states that: "*Given your 3pm finish, I agreed that I would take over your practice management duties temporarily during the trial period*". It contains a list of those practice management duties and confirms a list of other duties which the Claimant was required to continue to focus on. It further states that: "*Please note that if your proposed working hours prove a success during the trial period and we agree that they are to be your permanent hours, then we will also look at potentially reducing your remuneration to reflect your diminished duties and responsibilities as listed above*".
33. The Claimant says that on the receipt of this email, "*straightaway I knew that I could not go back*" (paragraph 66 Claimant's witness statement). Her decision to resign her employment was made at that point. She says that any discussion to change her duties and remuneration should have taken place at the meeting on 18 October 2021 but did not. Many of the practice management duties which were included in the 'removed list' of RS were not her duties in any event and the list was simply fabricated in order to justify an intended, later reduction in remuneration.
34. That evening, the Claimant telephoned DB, upset regarding the email that she had received. She explained her view of her poor treatment (as did her husband in a subsequent telephone call) and made various allegations about RS. A note of that telephone call made by DB (page 113) (unchallenged by the claimant) states that DB suggested that she should come to a meeting where all her concerns could be addressed but the Claimant's husband confirmed that "*There was no point in Elaine attending a meeting. The outcome had already been decided*".
35. On Saturday, 20 October 2021, the Claimant contacted her current employer to advise him of her intention to leave the Respondent's employment due to its relocation and asked him about any available vacancies (page 114).
36. The Claimant resigned her employment by way of a letter dated 23 November 2021 sent to DB and RS (page 123). The letter was sent undercover of an

email of the same date which also attached a copy of the Respondent's typed minutes of the meeting dated 18 October 2021, annotated with the Claimant's comments.

37. The Claimant's resignation letter is six pages in length and contains detailed complaints. It objects to the trial period, saying that this was never mentioned on 18 October 2021. It disputes that any minutes were taken at the meeting and that the typed minutes that she was sent were inaccurate. On removal of the duties of holiday and overtime approval, it states:
 - 37.1 *"You said, you would be taking over the holiday and overtime approval.... At no point did you ever say or infer that you were taking over these duties because I was varying my contract. I have become accustomed to you making unilateral changes without consultation or consideration"*
38. With regard to the list of other duties which were included in the letter of RS (see paragraph 32 above), it says that these are either:
 - 38.1 Not her duties in any event;
 - 38.2 Haven't been done by her for a while;
 - 38.3 Were currently being done by her at the request of RS/DB.
39. The letter concludes by saying: *"My flexible working request involves me spending most of my time in the office and there is no basis for any suggestion that this variation would impact my duties going forward. There was certainly no discussion about this at any time....So there is no justification remit for removing any of my duties at all....The suggestion of the proposed reduction in my remuneration is grossly unfair and makes my position totally untenable. You have demonstrated by your egregious conduct that you have no intention of honouring and being bound by the contract of employment. As such I am accepting your repudiation of this contract and am resigning in response to this breach with immediate effect"*.
40. The Claimant subsequently submitted a written grievance on 2 December 2021, of seven pages in length, containing various complaints dating back to 2018.
41. On 9 December 2021, RS sent a lengthy email to the Claimant, responding to her grievance and recent resignation. In summary, it stated that:
 - 41.1 much of her assertions about the meeting of 18 October 2021 are disputed;
 - 41.2 she had jumped the gun by resigning and that she should have raised her complaints by way of a grievance to resolve matters amicably;
 - 41.3 that her remuneration would not have been reduced without her agreement;
 - 41.4 that as she was no longer an employee, her grievance would not be investigated.

42. On balance, I find that the typed minutes sent by the respondent were based on brief written notes of the meeting of 18 October 2021 and that they were largely accurate. In particular, I find that the Respondent's agreement to the variation of the Claimant's working hours was agreed on a trial basis and that RS did refer to taking over some of the Claimant's duties. I find as such because:
- 42.1 Both the evidence of DB and RS is clear and consistent on these issues;
- 42.2 The minutes are clearly accurate on a number of issues that the Claimant agrees were discussed;
- 42.3 They contain things purportedly said by the Claimant which they did not need to contain and which I feel it is unlikely for the Respondent to have made up: for example, the fact that the Claimant asked why a trial was needed;
- 42.4 On the balance of probabilities, I do not believe it likely that both DB and RS would have written untruthful minutes to retrospectively fabricate events that weren't discussed and things that weren't said;
- 42.5 There is no contemporaneous or other evidence of the meeting, the Claimant, RS and DB having been the only witnesses to it and the Claimant not having made any notes herself;
- 42.6 I think it more likely that the Claimant may have misremembered things that were said at the meeting rather than that DB and RS have both lied about them.
43. I also find that the minutes are unlikely to be completely inaccurate, word for word; this is admitted by the Respondent.
44. As far as the content of RS's letter of 19 November 2021 is concerned, I do not believe that the list of practice management duties in it was fabricated by RS as inaccurate as a "*cynical ploy*" (Claimant's submissions) to justify a later pay reduction. I accept RS's evidence in cross examination that she wrote this list of duties when preparing this letter in a genuine belief that they were or had been performed by the Claimant. That belief may not have been entirely accurate and the Claimant may have had legitimate reason to correct it (especially when related to a potential pay reduction) but I do not find it likely that this was the aim of the list. As for the potential future reduction in pay, the Respondent's case is that this would not have been undertaken without the Claimant's agreement but when pressed about this by me, RS responded that this would had to have been discussed with the Claimant who may have had valid arguments about the value of her work notwithstanding any recent changes in duties. I find this to be a credible argument and have no reason to disbelieve it.

Relevant law

Contractual Terms

45. Terms of an employment contract comprise those which are written but also implied by custom and practice¹ and/or law.

Constructive and Unfair Dismissal

46. Section 94 of the Employment Rights Act 1996 (ERA) confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.
47. Section 95(1)(c) ERA states that an employee is dismissed if (s)he: "*terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct*".
48. The above statutory test has, over the decades, been clarified and refined by cases such as Western Excavating (ECC) Ltd v Sharp [1978] from which this well-known judgment extract is taken:
- 48.1 "*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.*"
49. The relevant contractual breach can relate to express or written terms, such as a place of work or those which are implied into every contract of employment, such as the mutual term of trust and confidence.

Anticipatory Breach

50. The breach of contract in question may be an anticipatory, as opposed to an actual, breach. It is enough for the employer to demonstrate an intention not to be bound by the contract in the future (Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668). The breach, however, must be clear and specific:
- 50.1 "*Vague or conditional proposals of a change in terms, conditions or working practices will not amount to an anticipatory breach and will not justify an employee resigning and claiming constructive dismissal.*"²

Trust and Confidence

51. The House of Lords in Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation) [1998] explained the effect of the breach of trust and confidence as follows:

¹ Bond v CAV Ltd [1983] IRLR 360

² IDS Employment Law Handbooks, Volume 13 - Unfair Dismissal

- 51.1 "The employer must not, without reasonable and proper cause, conduct itself in a manner calculated [or]³ likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".
52. The application of this test should be on an objective basis, that is to say, the question to ask is whether the employer's actions, considered objectively, were likely to destroy or seriously damage the relationship of trust and confidence; its intention is irrelevant.

Last Straw

53. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out a test of five questions that an employment tribunal should ask in order to determine whether an employee has been constructively dismissed:
- 53.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?
- 53.2 Has the employee affirmed the contract since that act?
- 53.3 If not, was that act (or omission) by itself a repudiatory breach of contract?
- 53.4 If not, was it nevertheless a part (applying an approach explained in Waltham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- 53.5 Did the employee resign in response (or partly in response) to that breach?
54. Where the most recent act or omission is innocuous, a constructive dismissal claim can still succeed if there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it. In other words, if the answer to the above question 53.4 is "no", it is relevant to ask whether any earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign (Williams v. Governing Body of Alderman Davies Church in Wales Primary School EAT/0108/19).

Causation

55. The breach does not have to be the only cause of the employee's resignation; the repudiatory breach must have "played a part" and be "one of the factors relied upon" in the employee's resignation (Wright v North Ayrshire Council UKEAT/0017/13).

Removal of Duties

³ Varma v North Cheshire Hospitals NHS Trust UKEAT/0178/07

56. Removal of duties can amount to a repudiatory breach.
57. The case of Hilton v Shiner Ltd [2001] IRLR 727 considered this issue. Mr Hilton worked in a builder's yard and his principal job was serving customers. He was the only one looking after the till. He had been given a final written warning and offered an alternative form of work after his employer suspected his honesty. Mr Hilton refused the offer of alternative work, which did not involve any responsibility for financial transactions, and had made a complaint of constructive dismissal. The judgment of Mr Recorder Langstaff QC includes helpful guidance which is applicable to this case:
- 57.1 *"The Appellant was engaged over 20 years before his dismissal. His job description had never formally have been reduced to writing. In such circumstances, the only material available to identify what it was that he was obliged to do for his employer, and to identify the obligations of the employer, was the way in which the contract had been performed. Yet the fact that a person works for another by carrying out tasks of a particular nature, in a particular way, over a long period of time does not necessarily mean that he is obliged as a matter of contract to perform each and every one of those tasks, nor does it mean that he is necessarily obliged to continue to perform those tasks in exactly the same way as he has been doing, nor does it necessarily imply that he may not, within his contract, be asked to perform duties which hitherto he has not been required to do. In Carmichael v National Power Plc [1999] ICR 1226, Lord Hoffmann, with whom Lords Goff and Jauncey expressly agreed, thought that in such circumstances it would be open to an Employment Tribunal to find as a fact what were the terms of the contract. He concluded that the parties' might intend that the terms of a contract could evolve by conduct as time went on, and noted that this "would not be untypical of agreements through which people are engaged to do work, whether as employees or otherwise."*
58. It also reiterates the following established principles which should be applied in such cases:
- 58.1 In order to determine whether a change in duties amounts to a breach of the implied term of trust and confidence, two matters have to be determined: *"The first is whether, ignoring their cause, there have been acts which are likely on the face of them seriously to damage or destroy the relationship of trust and confidence between employer and employee. The second is, whether that act has no reasonable and proper cause"*. In other words, an employment tribunal must ask whether the change or removal of duties was *"sufficiently material a breach to justify the [employee] in accepting it as discharging him from the obligation to continue in service"*;
- 58.2 It is relevant to consider where the removed duties result in an inevitable loss of status.
59. In the case of Hilton itself: *"requiring Mr Hilton to cease doing what has been his principal job, and to require him to take up a new role, in circumstances in which there had been no allegation of dishonesty against the employee would in our view amount to a variation of the employee's contract. We do not think*

that such a variation could be imposed upon the employee without his consent. To attempt to do so would, we think, almost always be capable of being a repudiatory breach. Whether it reached the materiality sufficient for the breach to be repudiatory has to be judged objectively"

60. In this case, the EAT allowed Mr Hilton's appeal, concluding that:
- 60.1 *"We are conscious that it might have been open to the Employment Tribunal to find that the Appellant was employed to perform a wide range of duties, of which he could be directed to do some only. In such a case he could have been employed as a yard operative, and asked (as part of the duties which he could be invited to perform) to handle the purchases of customers. It would not then be necessarily be a breach of contract for him, after April 1999, to be invited to concentrate on other aspects which had always been part of his job (the loading and unloading of vehicles, sweeping the yard etc). However, the Employment Tribunal does not make it clear that this was the way in which they approached the matter".*

Conclusions

61. Having considered the above principles I apply them to the facts in this case and come to my conclusions as follows:
62. The alleged contractual breaches on which the Claimant relied were, as set out above:
- 62.1 an anticipatory breach of a fundamental express term of the Claimant's contract of employment regarding pay on 19 November 2021;
- 62.2 a breach of the implied term of trust and confidence in:
- 62.2.1 Removing the Claimant as director on 4 October 2021;
- 62.2.2 Removing duties of approving overtime pay and holiday on 18 October 2021;
- 62.2.3 Sending an email on 19 November 2021, which:
- (a) Attached fabricated, inaccurate minutes;
 - (b) Changed further practice management duties which the Claimant either did not do or did rarely.

Reduction in pay

63. There is no doubt that a unilateral reduction in the Claimant's remuneration would amount to a fundamental breach of her contract. I do not consider that the statement of RS on 19 November 2021 amounted to an anticipatory breach however. It was not sufficiently clear or specific and was conditional on a number of different criteria:

63.1 *"..if your proposed working hours prove a success during the trial period **and** we agree that they are to be your permanent hours, **then** we will also **look at potentially** reducing your remuneration" (my emphasis).*

64. There is no certainty of intention here and the Respondent was not indicating its clear intention to depart from the terms of the Claimant's contract regarding pay.

65. I therefore find that this was not an anticipatory breach of the claimant's contract of employment.

Trust and Confidence

66. As directed, I will adopt the recommended reasoning in Kaur by asking the following questions:

66.1 *What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?*

66.2 This was the Respondent's email, written by RS on 19 November 2021 and its contents therein.

66.3 *Has the employee affirmed the contract since that act?*

67. No: the Claimant resigned immediately on receipt (indicated by her resignation letter dated 23 November 2021).

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

67.2 The Claimant alleges that this email amounted to/evidenced a repudiatory breach for the following reasons:

67.2.1 that it attached fabricated, inaccurate minutes; and/or

67.2.2 that it announced changes to her practice management duties (other than the removal of approving overtime pay and holiday) which the Claimant either did not do or did rarely.

67.3 I have found that the minutes were not fabricated by the Respondent to the extent that they were deliberately intended to mislead or deceive and that they were largely accurate based on brief written notes. To the extent that there were any inaccuracies, I do not consider that these were, in and of themselves material so as to amount to a repudiatory breach of contract.

67.4 In considering the changes to the Claimant's practice management duties which were stated in this email, I have applied the guidance from the case of Hilton as it is of particular relevance here. In so doing, I have concluded that those changes, of themselves, did not amount to a repudiatory breach of contract for the following reasons:

67.4.1 As Practice Manager, she had no written job description or agreed written duties. The scope of the Claimant's duties was wide and flexible.

There appear to have been no core or fundamental duties which typified or defined her role and they comprised a mixture of administrative, managerial and client facing tasks, dependent on the needs of the practice and its owners (DB and RS) at any particular time.

67.4.2 There was considerable change to those duties over the course of her employment and in recent years. The evidence demonstrates that those changes were directed by RS in the immediate years before the Claimant's resignation. Indeed, the Claimant's resignation letter confirms her (reluctant) toleration of such changes by the Respondent when she states that she had "*become accustomed*" to them.

67.4.3 There was no evidence that the Claimant had objected to any change in her duties at any time before her resignation.

67.4.4 She did not object to the removal of the duties of approving overtime pay and holiday at or after the meeting on 18 October 2021 when this change was communicated by RS.

67.4.5 A change of the duties listed amounted to no discernible change of status.

67.4.6 The change was announced as temporary (during the trial period of the Claimant's flexible working request).

67.4.7 By the Claimant's own admission, a number of the duties which were purportedly being removed were not performed by her or were performed so infrequently that they were not significant.

67.4.8 The list contained an error, which RS admitted to in cross examination ("*Answering client queries*"; to which the Claimant objected in her resignation letter and which could have been clarified).

67.4.9 The Claimant had been invited to a meeting by DB on 19 November 2023 to discuss her concerns about the contents of email from RS and the changes stated therein. Had the Claimant attended such meeting, she would have been able to assert and discuss the concerns and anomalies which she raised in her resignation letter and the Respondent would have been able to consider and address them. She could also have raised a formal grievance under its grievance procedure and the Respondent would have been obligated to reasonably investigate this.

67.4.10 RS provided reasoning for the change in these duties, that being the variation of her working hours so that she would finish two hours earlier than her contractual hours and its normal office hours.

67.5 For the reasons stated above, I have concluded that on balance, and viewed objectively, although RS's letter contained some errors and merited further discussion, the change in duties announced in the email of 19 November 2021 was not:

67.5.1 likely to destroy or seriously damage the relationship of trust and confidence between the parties; and/or

67.5.2 made without reasonable and proper cause; and/or

67.5.3 a "*sufficiently material breach of the Claimant's contract of employment to justify the Claimant in accepting them as discharging her from the obligation to continue in service*"⁴.

67.6 *If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?*

67.7 The other acts on which the Claimant relies as part of a course of conduct were the removal of her as a director on 4 October 2021 and the removal of her duties of approving overtime pay and holiday on 18 October 2021.

67.8 I conclude that these acts, viewed cumulatively with those stated at paragraph 67.2 above do not amount to a repudiatory breach. I have based this conclusion on the same factors which are set out in paragraph 67.4 above, as well as the following additional conclusions:

67.8.1 The Claimant instructed Christine Archer to remove her as a director on 4 October 2021. This was done after RS had enquired whether the Claimant would be willing to resign as director given the requirement for a personal guarantee for the value of the new lease. The Claimant did not object and did not indicate to anyone that she was unhappy about this at the time.

67.8.2 The Respondent had genuine financial concerns about the payment of overtime and the carry-forward of staff holidays in recent years and this was the reason why RS wished to take over these duties. There was a lack of evidence about when and whether overtime payments should be made. There was a clear lack of understanding and miscommunication about whether employees were permitted to carry forward staff holidays. Whatever the reason for these issues (and the Respondent bore some responsibility for this) the Respondent clearly wished to take control of them for the future and they were not duties which were arbitrarily removed or, conversely, removed as part of a disciplinary or performance-related sanction. Instead, the removal was discussed in the context of the Claimant's reduced working hours and the possible impact of this on her duties.

67.8.3 Had the Claimant considered these factors to have amounted to a breach of her contract or serious matters with which she was unhappy, or which she viewed as different to the routine changes made by RS to which she had "*become accustomed*", one would have expected her to raise that at the time or sometime in the five weeks that followed after 18 October 2021.

⁴ Hilton

- 67.8.4 The Claimant's resignation letter suggests that it was the proposed reduction in her remuneration which made "*my position totally untenable*". It is that act which she specifically cited as alleged evidence for the Respondent's intention to depart from the terms of her contract of employment.
- 67.9 I therefore conclude that the claimant did not resign in response to a repudiatory breach of her contract of employment.
68. I find, therefore, that the Claimant was not dismissed by the Respondent as defined by section 95 of the Employment Rights Act 1996 and her claim fails and is dismissed.

V·Othen

Employment Judge Othen
17 May 2023

JUDGMENT AND REASONS SENT TO THE PARTIES

ON 22 May 2023

FOR THE TRIBUNAL Mr N Roche