EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MRS J MASKELL		**FUTURE PUBLISHING LIMITED**

Heard at: London Central

On: 31 May to 1 June, 2023

Before: Employment Judge: O Segal KC
Members: Mr S Williams; Mr S Godecharle

Representations
For the Claimant: Miss Meade, solicitor
For the Respondent: Mr T Goodwin, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of discrimination, unfair dismissal and for a redundancy payment fail and are dismissed.

REASONS

1. The Claimant (C) worked for the Respondent (R) (and its predecessor companies) for over 44 years, most recently as Senior Sales Ledger Clerk. She resigned on notice with effect from 21 July 2022.

2. Shortly after that time, R made several of its employees redundant, following a decision to relocate certain finance functions from its London office to its Bath office. C would have been one of those made redundant had she remained in employment with R for a further two to three months or so, becoming entitled in such circumstances to a substantial contractual redundancy payment.

3. At a PH on 8 February 2022, C's claims against R were identified as follows:-

Section 13 Equality Act 2010 (EqA): Direct discrimination because of age

3.1. Did the Respondent treat the Claimant less favourably than a) Mr Clark or b) a hypothetical comparator in not materially different circumstances to her own under section 23(1) EqA, by taking a decision to delay the start of the redundancy exercise until after she had left employment?

3.2. If so, was that treatment because of age?

3.3. On what legitimate aim, if any, does the Respondent rely? If the Respondent is found to have treated the Claimant less favourably, because of age, than an appropriate comparator, was that less favourable treatment justified under section 13(2) EqA, i.e. did the Respondent use proportionate means of achieving any legitimate aim?

Constructive unfair dismissal

3.4. Did the Claimant resign in response to conduct by the Respondent that was calculated or likely to destroy or seriously damage the employment relationship without proper cause, i.e. with effect from January 2022 did the Claimant's workload become unmanageable and if so, did that amount to a breach of contract entitling the Claimant to resign with or without notice (section 95(1)(c) Employment Rights Act 1996 (ERA))?

3.5. Did the Claimant resign sufficiently promptly in response to the breach or did she waive the breach and affirm the contract?

3.6. If the Claimant has shown that she was constructively dismissed, has the Respondent shown that there was a potentially fair reason for dismissing the Claimant?

Redundancy payment

3.7. Did the termination of the Claimant's employment howsoever arising meet the statutory definition of redundancy under section 139(1) ERA?

3.8. If so, is the Claimant entitled to a) a statutory and/or b) an enhanced contractual redundancy payment?

Evidence

4. We had an agreed bundle of documents.

5. On the application of C, we ordered the disclosure by R of further documents ('R1-R7') containing (redacted) information about employees and costings in anticipation of the redundancies referred to above.

6. We had witness statements and heard live oral evidence from:

6.1. the Claimant (C);

6.2. for C, Mrs Maria Figueira (MF).

For the Respondent:

6.3. Mr Robert Tompkins (RT), Group Finance Director;

6.4. Ms Jen Williams (JW), Senior People Business Partner.

7. C also presented a short written statement of Mr Derek Craven, who did not attend, but whose evidence on the one matter dealt with in his statement (the date on which he was informed of his redundancy by R: 29 July 2022) was agreed.

8. The tribunal says immediately that it considered that all four witnesses were giving honest evidence and attempting to assist the tribunal.

Facts

9. C had planned to retire at around age 66 (her 66th birthday was 10 August 2022).

10. C was good at her job, which both parties described at a 'critical' role and which, even before the events of 2022, was demanding and sometimes required her to work beyond her contractual 37.5 hours per week. C had at one time been contractually entitled to be paid overtime, but her more recent contracts were silent on that point and C told us that her understanding was that any right to overtime had ceased to exist or at least to be applied in the years prior to her leaving R.

11. By October 2021, there were aspects of C's job – in particular, inefficient management and systems – which made it less pleasant for her and in one informal 'chat' she wrote in answer to a colleague saying *"I hate this fucking place", "Same, we are never told anything and then if we are it's wrong".* In that context, she wrote in the same 'chat' *"I'm like [a former colleague, who apparently spoke for years about retiring] now counting the days till I retire, never like that before. ... I do feel for all of you at least I can see an end".*

12. On 1 December 2021, C wrote in a 'chat' about a pay rise which had been announced, *"Yes really good about time there was a good pay rise although* ***I'm going so only see a few months of it****"* (emphasis added).

13. In a friendly exchange with a colleague based in Bath in the morning of 27 January 2022, C was asked *"I also heard you're leaving in the summer??!!"* C *"Yes time to retire not exactly sure when* ***July or early August****."* (emphasis added) Her colleague asked *"Are you excited?"* and C replied *"Yes I think so just the lockdown and restrictions made me apprehensive, hopefully by the summer things will back to before."*

14. From that same day, 27 January 2022, an already challenging workload became much greater, following the acquisition earlier that month by R of a company ('Dennis'),

the relevant cashiers and billings workload being taken on almost entirely by C and her colleague MF from late January.

15. From about that time until she left, both C and MF regularly worked very long hours. C, if she was in the office, would start work around 7am and leave work any time typically between 6pm and 9 pm. If C was working from home, she would start work around 6.30am and again might finish as late as about 9pm. MF was doing similar hours, but would leave the office earlier and continue working at home.

16. On 2 February, C expressed to her manager, Sarah Donohoe (SD) her concern that she and MF would not be able to absorb the additional Dennis work given how hard they were already working. Initially, SD said she would share the additional workload with C and MF, but in the event that did not happen.

17. When this became clear, on 4 February 2022, C expressed herself in what she described to us as an entirely uncharacteristic 'outburst' and was seen crying by MF. The next working day, SD told C, regarding the additional workload, *"It isn't fair but that's how it is"*. SD did attempt to organise assistance from an intern working in another team, but that proved ineffective and was not continued.

18. SD proposed in March 2022 that a colleague, Samad, was *"ready to take on some more work"*, but in fact that colleague did not take on any of C's work (though did assist SD with some of her work).

19. Matters got worse in mid-April when an experienced colleague in Accounts Payable was replaced, causing additional work for C with bank reconciliations.

20. At the end of May 2022, C describes herself as *"struggling to keep up ... very stressed and exhausted working extremely long hours and occasionally some weekend time"*.

21. C did not raise her concerns with management or HR in writing, whether by email, grievance or otherwise.

22. When RT joined R in March 2022, he inquired about future vacancies and was told by SD's manager, Catherine Metcalf, that C was intending to retire in about June 2022. Because C's role was critical and because it might take three months to find a

suitable permanent replacement, RT began completing a Vacancy Approval Form in April 2022 to seek authority to recruit a replacement. That authority could only be confirmed once there was a known leaving date for C (which there was not until 7 June). In one part of the form, there is the question *"If replacement, please enter name of leaver …"*, and RT filled in the words *"Jann Maskell retiring. We will relocate role to Bath"*. RT told us, and we accept, that the decision to relocate C's role (or at least the greater proportion of it) to R's offices in Bath when she retired was independent of the later decision to relocate all of R's London finance team to Bath.

23. C had emailed R's HR team (known as People and Culture) in April to clarify her holiday entitlement, saying she was *"thinking of retiring this year"* and giving an *"example"* that *"I calculate that at the end of June I would be entitle to 15 days holiday"*. HR understood that to be a 'provisional leave date', but C replied *"I don't know my leaving date yet"*.

24. On at least two occasions, SD asked C whether she had decided on a date for her retirement.

25. C experienced the communication in April from HR and SD's inquiries as 'harassing' her. That seems to the tribunal an unfair characterisation, objectively, of those communications.

26. Having informed SD informally the previous day, on 7 June 2022, C wrote to SD and HR, *"Dear Sarah, P&C, I would like to inform you that I will be retiring after 44 years and 10 months service on 21st July 2022. I have accrued 9 days holiday to be taken before 21st July making my last working day Friday 8th July. … Kind regards Jann"*.

27. C's case is that, although she did plan to retire around that time in any event, the actual decision to give notice of resignation on 7 June was because of the effect on her well-being of the excessive workload and there being no likelihood of it remitting. For the reasons we give in more detail below, we find that the decision to resign and the timing of that decision were not materially affected by the stress C's workload was causing her; though, doubtless, that issue cast an unfortunate shadow over what would otherwise have been a happier and more positive decision.

28. Unaware yet of C having formally given notice of resignation with effect from 21 July, RT wrote to payroll on 8 June, *"Can I check with you (or should it be Jen) - I think Jann Maslin [sic – for 'Maskell'] is due to retire either this month or next. Is my understanding correct and do you know how the process should work?"*

29. RT had a plan to relocate all of the finance team to Bath in due course, mainly for efficiency purposes (to have all of the team in one location, where he himself was based), but secondarily to save costs. However, he was concerned that recruitment of suitably qualified employees in Bath had been and continued to be difficult, exacerbated by companies moving their functions out of London as an indirect effect of the pandemic.

30. He told the tribunal, and we accept, that until late June, his intention was that any such general relocation of the finance team (probably to Bath, but perhaps to Cardiff where R also had offices) would take place in the new financial year (from October 2022). That is supported by the various documents, including those referred to above as R1-R7, which show the first collation of names and figures for potential redundancies being on 23 June 2022.

31. That latter document was triggered by RT learning on 22 June of a similar company in Bath (IVC) notifying its staff of redundancies, giving him hope that the necessary 5-6 suitable recruits could be procured from that pool.

32. On 24 June, RT emailed JW on potential payments/exit arrangements for staff who could not relocate. Under the heading *'July/August'*, he included *"(Sarah [SD]/Maria [MF]) - Need to align with you when Maria would retire and plan for conversation before Sept if possible."*

33. In the first half of July RT interviewed potential candidates who were leaving IVC. On 26 July 2022, five days after C's last day of employment, RT was told that formal approval had been given to proceed with the relocation and consequent redundancies.

34. Given the findings we have set out above, we note in passing that it is not necessary to address the circumstances of another employee in the finance department, Dan Clarke, who originally gave notice of resignation on 27 July, retracted it, and in the

event left in October pursuant to a settlement agreement which included provision of a redundancy payment.

35. On 16 August 2022, C emailed R saying, *"My decision to retire in July was made due to the heavy workload having to work extra hours daily which became very stressful for me. Additional work was given with acquisitions extending my workload further. When I said I couldn't manage the additional workload and asked if there would be any changes to ease the pressure I was told no nothing is changing. I then made my decision to retire on 21st July 2022. … The legal advice given was to approach you myself in the first instance to reconsider my position and include/offer me a redundancy package as part of the Cashiers/Billings department redundancy plan the same as my colleagues."* This was the first time C had linked her resignation to workload issues in any document.

The Law

Constructive dismissal

36. As regards her constructive unfair dismissal claim, C relies (only) on an alleged breach of the implied duty of trust and confidence, which would require a finding that R *"without reasonable and proper cause, conduct[ed] itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"*.

37. Where there are mixed reasons for resignation, the question is whether the breach was an effective cause of the resignation, not the sole cause (Abbycars (West Horndon) Ltd v Ford [2008] All ER (D) 331, EAT).

38. The law on waiver and affirmation is well-established. Mr Goodwin submitted in the context of affirmation, that *"… giving notice in excess of that which is contractually required may amount to waiver / affirmation. By doing so, the employee is 'offering additional performance of the contract to that which is required by it', which may (depending on the facts) 'be consistent only with affirmation of the contract' (**Cockram v Air Products plc** [2014] IRLR 672)"*. That judgment, he accepted, was fairly extreme on its facts and emphasised that each case where longer than minimum

notice was given by the employee must be considered as a question of 'fact and degree' in the material circumstances.

The discrimination claim

39. S. 13 EqA 2010 (the Act) provides that

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

40. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

41. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

42. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

Discussion

70. Mr Goodwin provided written submissions in opening and both he and Miss Meade made helpful oral closing submissions. We do not set out those submissions in detail here, but will refer to them as necessary.

The complaint of unfair dismissal

71. The conduct of R relied on by C is somewhat more nuanced than set out in the List of Issues (see above), being a period of continual, substantial excessive workload, brought to the attention of her manager, SD, who did nothing to alleviate the issue, indeed made statements as to help that would be provided which turned out not to materialise.

72. Whether that conduct, in so far as we have accepted it occurred as set out in our findings of fact above, constituted R *"without reasonable and proper cause, conduct[ing] itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"*, was a matter which the tribunal considered not to be clearcut. On the one hand, we found that there was a workload in effect imposed (C's work was always time-critical and could not be deferred or delegated) substantially in excess of her contracted hours over a period of months; and we have found that SD was made aware, if not of the precise hours C was working, at least of the problem in broad terms; and that she did little or nothing to address it. On the other hand, by her not pursuing the issue in writing, or otherwise escalating it, C likely allowed SD and management more generally to believe that the issue of C's workload was not as bad as subjectively experienced by C and that there was no very pressing need to address it in order to protect C's health and well-being.

73. On this issue, the tribunal was divided, with the majority concluding that R's conduct did not 'cross the line' so as to be a (fundamental) breach of its duty of trust and confidence, and the minority concluding that it did. For the reasons set out below, the tribunal's lack of unanimity on this issue was not material.

74. We were not persuaded by R's arguments on waiver or affirmation. The breach (if there was one) was continuing until C's resignation on 8 June and therefore had not been waived. Nor did we consider that by C giving 6 rather than 4 weeks' notice of her resignation, in order to be helpful to R, constituted an affirmation of the contract in so far as she was in a position to accept its repudiation by R.

75. However, as set out above, we have found as a fact that C's decision to resign and the timing of that decision were not materially affected by the stress C's workload

was causing her; any breach of the duty of trust and confidence was not an effective cause of her resignation.

76. We so find in light of:-

76.1. The documents cited above from October and December 2021 and January 2022 (written before the workload issue became oppressive), which make it clear that C was planning to retire in about July 2022 and that this was well-known amongst her colleagues.

76.2. The fact that, having decided to resign in about July, C did not bring that forward as she might have done, once it was clear to her from at the latest March or April 2022 that the workload pressures were long-standing and unlikely to be relieved.

76.3. The fact that C did not link her resignation to the workload pressures until after she had left and had become suspicious that she had been unfairly deprived of a substantial contractual redundancy payment.

77. We are therefore unanimous in deciding not to uphold the claim of unfair dismissal.

The age discrimination claim

78. We deal with this shortly, because Miss Meade rightly accepted that the claim could not succeed if the tribunal accepted RT's evidence on the key factual matters – which we did.

79. The disclosure of R1-R7 at the end of day one of the hearing confirmed that C's suspicion that R had planned the redundancies at a time before 8 June, but then delayed then until after C left on 21 July, was ill-founded.

43. In short, we find that the only reason C did not get a contractual redundancy payment was because she happened to leave R on 21 July 2022, as opposed to a date 2-3 months later; which, of course, has nothing to do with her age. For completeness, we record that we did not find facts from which *"a reasonable tribunal could properly conclude"* that discrimination occurred.

The claim for a redundancy payment

80. This claim is not sustainable. It requires a finding that C was dismissed for redundancy – a proposition for which neither party contended.

81. We understood (as did R) this claim to be, in effect, part of what C sought by way of remedy if her claim of unfair dismissal and/or discrimination were to succeed.

Oliver Segal KC

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Employment Judge

2 June, 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/06/2023