



EMPLOYMENT TRIBUNALS

Claimant: Ms H Wood

Respondent: Aster Group

Heard at: Bristol (by video-VHS) **On:** 15 and 16 May 2023

Before: Employment Judge Livesey

Representation

Claimant: In person

Respondent: Miss Ifeka, counsel

JUDGMENT

The Claimant's complaints of constructive unfair dismissal, breach of contract relating to notice and for a redundancy payment are all dismissed.

REASONS

1. Claim

1.1 By a claim dated, 21 October 2022, the Claimant brought complaints of unfair dismissal, breach of contract relating to notice and for a redundancy payment.

2. Evidence

2.1 The Claimant gave evidence in support of her case and the Respondent called;

- Mr Jackson; Transformation Director;
- Mr Brazil; Regional Operations Director;
- Miss Morrell; HR.

2.2 The following documents were produced;

- R1; agreed hearing bundle;
- R2; the Respondent's counsel's closing submissions.

3. Hearing

3.1 The hearing was conducted by video (VHS).

4. Issues

- 4.1 The issues were discussed at the start of the hearing and agreed as follows.
- 4.2 In relation to the complaint of constructive unfair dismissal, the Claimant relied upon the implied term of trust and confidence. She alleged in her Claim Form that there had been breaches in the following four main areas;
- (i) The Respondent's failure to follow its own process and/or the ACAS Code when she was suspended;
 - (ii) Suspension on a 'false premise' (3 reasons were given in the Claim Form);
 - (iii) Unfair redundancy consultation process; suspension prevented her full communication with the wider business and she was not given the same opportunities as her colleagues;
 - (iv) Her grievance was not dealt with appropriately.
- 4.3 The Respondent ran a positive case on causation; it alleged that she decided to resign once the redundancy consultation had been announced. It also sought to argue that, if she was constructively dismissed, it was fair within the meaning of s. 98 (4). It did not run a positive case on affirmation.
- 4.4 The Claimant contended that she was entitled to a redundancy payment since her position had been deleted from the proposed new structure. She also contended that, because of the Respondent's alleged fundamental breach of contract (above) she had effectively been dismissed without notice, when she resigned.

5. Facts

- 5.1 The following facts were found on the balance of probabilities. Page numbers cited in these Reasons are to pages within the hearing bundle, R1, unless otherwise stated. Citations are in square brackets.
- 5.2 The Claimant was employed from September 2014 as a Programme Delivery Manager. The Respondent is a not for profit or dividend housing developer and landlord regulated by the Regulator for Social Housing.
- 5.3 The Claimant's role was to support projects within the Respondent's wider business and she confirmed that, in the summer of 2022, she was supporting several significant projects. The Claimant's line manager was Mr Wilkes and he reported to Mr Jackson, the Transformation Director. The Claimant worked within the Project Management Office ('PMO') in which there were approximately 13 staff.
- 5.4 The Claimant's contract was produced [42], as were the following relevant policies, which have been referred to further below where relevant;
- The Resolution Policy [144-150];
 - The Disciplinary Policy [151-7].

- 5.5 In the summer of 2022, the Respondent was considering restructuring the PMO, the reasons for which were explained in paragraph 2 of Mr Jackson's witness statement but were not directly relevant to the issues which fell to be determined. The proposal was to remove eight roles and create four new ones for nine people. The Claimant's role was one of those to have been deleted in the proposal, as explained in the PowerPoint presentation [43-8]. The consultation process officially started on 27 July. All of the roles in the PMO were put at risk and the usual consultation period was extended to 45 days due to the fact that it spanned the holiday season. It was therefore due to end on 9 September with an intended implementation date of 1 November.
- 5.6 Before the official start of the consultation, a meeting was held with the entire PMO on 26 July. The proposed new structure was shared with the team [49] and employees were asked not to share the proposal outside the group for 48 hours [47].
- 5.7 The Claimant received an email later that day in which she was told that her first one-to-one consultation meeting was expected to take place on 1 August [50-1]. It was stressed that no final decisions had been made and that she could obviously have applied for one of the new vacant roles if the structure was ultimately confirmed. Mr Jackson identified those roles to her [57].
- 5.8 Later that day, the Claimant cancelled an update that she was expected to provide in August for one of the projects that she was supporting [56]. She also told her line manager that she would restrict herself to 'skeleton meetings' and would spend "*the majority*" of her time looking for a way out [59]; "*I don't really want to hang around!!!! :)*".
- 5.9 On 27 July, a number of important email exchanges took place. First, the Claimant asked Mr Jackson if she had to attend the one-to-one consultation on 1 August [62]. Despite his attempt to persuade her to do so, she ultimately declined and stated that she had no questions about the process at that point, nor did she have any intention of applying for any roles within the new structure [67 & 78]. She emailed further and asked to leave the business immediately under a settlement agreement in which she hoped to have been paid one year's salary [63-4]. She cited a number of domestic and personal stressors in addition to the redundancy process, but she also said this;
- "If I don't get this I'm likely signed off sick tbh I won't be able to run my reports so Aster will end up paying that it's pointless - not trying to be difficult & I wish I was more resilient!!!!"*
- 5.10 Yet further, the Claimant emailed three colleagues outside the PMO and told them that the team was under consultation [60]. She said that it was confidential but that a new structure and "*reduced roles*" were to have been implemented from 1 November. She also said that she was "*jumping out*" of projects that the recipients were involved in and she handed over

management of forthcoming meetings to them [61]. She was explaining to others at the time that she needed time to look for other work [54].

- 5.11 Mr Jackson then responded [63]. In relation to the Claimant's request to leave the business immediately, he reasserted that such discussions would take place in one-to-one meetings and he offered to move it forward if that assisted her. In relation to her email to others, he said this;

"it has come to my attention that you have cancelled a whole series of project meetings for August and communicated with colleagues outside the team, which I had specifically asked was not to be done. The information you provided to them is also misleading to colleagues and inaccurate, this has caused Derek and me significant embarrassment as a result. Whilst the consultation is ongoing, we expect colleagues to remain professional.

Please do let me know if you would like to move your meeting up to Thursday and Friday, and would urge you to please not communicate further with any colleagues outside the team on the consultation."

- 5.12 In Mr Jackson's witness statement, he also said this (paragraph 11);

"I did not consider this to be a disciplinary matter at that stage, as I felt it could be resolved if she listened to my instruction not to discuss the consultation going forward. I did not place a time limit on this instruction, as I expected her to keep the consultation confidential until further notice."

- 5.13 He said that he responded in that way because her cancellation of meetings had caused concern to be expressed to him in the wider business. He had wanted to continue to embargo her on further discussions, beyond the 48-hour period, because of his concerns about what she had already done.

- 5.14 On 29 July, the Claimant cancelled multiple meetings in projects that she was supporting and/or catch up conversations that had been prearranged. There appeared to have been over 20 such cancellations [71-4]. When asked why she was doing so, she was open in disclosing the consultation process and concerns were expressed by Directors and others (for example, [67]).

- 5.15 Also on the same day, the Claimant emailed other colleagues in other Directorates and informed them about the consultation period; Mr Scharf, the Director of Housing and Customer Services [76], Ms Ashley, , the Business Development Director, and Ms Jones, the Diversity and Inclusion Lead [77]. That generated further concern about business continuity (for example, [75]) and telephone calls to Mr Jackson. The Claimant also emailed an external course provider to cancel her attendance going forward [78] and indicated that she *"won't be taking a role"*. That was confirmed to others internally too [77]. This In her email to Mr Scharf too [76], she had indicated that she would not have been staying with the Respondent in the long term. She confirmed in cross-examination that she had made the decision to leave the business at that point in any event.

- 5.16 Mr Jackson's concerns about the Claimant's conduct and communications increased and he sought advice from HR [80];

"Hanna has reacted particularly poorly to this news, and amongst other things has emailed me requesting immediate release with a year's salary as payment and is currently refusing to attend her scheduled 1:1.

All teams were informed that the consultation was to remain confidential and they were not to communicate with colleagues from the wider business. Hanna has cleared her diary for the month of August and has contacted project sponsors and directors to inform them that she won't be staying at Aster as the PMO are under consultation and won't be continuing to support the projects.

I emailed Hanna on Wednesday requesting again but she did not communicate with colleagues and provide inaccurate information to them about the outcomes which are of course simply a proposal at this stage.

It's come to my attention she has continued to do this, despite being asked specifically not to and I've had to field a number of calls from colleagues asking what's happened.

In short I think Hanna has flagrantly ignored management instruction (at least twice) and currently poses a significant risk to the reputation of the team and the wider delivery of projects and programmes.

On the basis of the above I'd like to know my options around suspension as I think her conduct has now strayed into disciplinary action."

- 5.17 On 29 July, a decision was taken to suspend the Claimant by Mr Jackson and Ms Potts, within the People Team. A letter to that effect was sent to her by recorded delivery [65-6]. The suspension was for an initial seven day period in accordance with the Disciplinary Policy (paragraph 6.7 [153]). Miss Morrell was named as a point of contact.

- 5.18 The Claimant received the suspension letter on Monday 1 August and she immediately started raising questions about how the consultation could have continued in light of her restricted access to IT [83]. She also started a period of sickness absence with stress and anxiety [143]. Miss Morrell, who was just back from leave, moved quickly to appoint an investigation officer, Mr Brazil, the Regional Operations Director. He was given access to a number of relevant documents [88].

- 5.19 On 2 August, the Claimant asked if the investigation would continue if she handed in her notice [86]. Lots of other questions were raised about the redundancy process; the calculation of her redundancy payment and the effect of having a new job during her notice period [99]. She repeated many of those questions on 3 August, but couched around a number of different scenarios [93]. Miss Morrell addressed the questions [92] and, in relation to the continuation of the investigation process, she indicated that the business would normally "conclude" it if notice was given and worked. She

also indicated that Mr Brazil's investigation was in fact expected to have been concluded the following week [96]. The Claimant then indicated that she would resign 'tomorrow' and would expect to serve 2 months notice [91], which she then corrected to 7 weeks having realised the length of her service [92].

- 5.20 Miss Morrell replied and stated that the Respondent would expect to *receive* 4 weeks' notice from her, but that it would *give* statutory notice [92]. It was clear that the Claimant misunderstood what appeared to have been a plain explanation. She appeared to think that the Respondent would only have given her four weeks' notice.
- 5.21 The Claimant's emails around this time were numerous and appeared to reflect a rather anxious and erratic state of mind. Lots of questions were raised, which Miss Morrell did well to answer. She also signposted the Claimant to Employee Assistance ([51] & [98]) and the Health and Well-being Partner [113].
- 5.22 On 4 August, the Claimant emailed to indicate that she was raising a grievance which concerned her suspension and the Respondent's alleged failure to follow its Restorative Practice Policy [118-9]. The following day, Miss Morrell addressed the Claimant's concerns, hoping that they dealt with the subject of her grievance ([104] & [117-8]).
- 5.23 On 7 August, the Claimant resigned on notice [110]. She claimed that the Respondent had been in repudiatory breach of contract in reaction to her "*honest...one mistake*" on 27 July of emailing people outside the PMO. The second email on 29 July was, she claimed, sent outside the embargoed period of 48 hours. She claimed that there had been no good reason to suspend her and claimed that her grievance had been 'rejected' because no meeting had been set up.
- 5.24 Miss Morrell replied the following day; she accepted the Claimant's resignation with regret [113] and countered the suggestion that the grievance had been rejected. She maintained that the questions that had been raised had been addressed by her but that, if the Claimant wished to pursue the matter, she should complete a Grievance Clarification Sheet, which she attached [121].
- 5.25 Amongst the further exchanges at that time, the Claimant queried why the investigation had not stopped, since she had resigned.
- 5.26 On 10 August, many more emails passed between the parties, the highlights of which were that the Claimant was informed that the investigation had been concluded and that it had been recommended that she should face a disciplinary hearing [130]. She then resigned with immediate effect [135], which was accepted by the Respondent without notice. She further indicated that she could not complete the Grievance Clarification Sheet as she was too stressed [127]. She did not, in fact, ever complete the document. Because the investigation was concluded, the

Claimant's suspension was notionally lifted, save that her access to her IT account remained suspended because she was off sick and had resigned.

5.27 Mr Brazil's report concluded that the Claimant had been in breach of an instruction not to discuss the consultation and that she had failed to follow a further instruction once she had breached the first [137-8]. Although a disciplinary hearing was recommended, no sanction was considered all recommended.

6. Legal principles

First, the question of fundamental breach. The implied term of trust and confidence was not breached merely if an employer behaved unreasonably, although such conduct could point to such a breach evidentially. However, the implied term was breached if an employer participated in conduct which was calculated or likely to cause serious damage to, or destroy, that relationship (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] 1 AC 20). Breaches must have been serious. Parties were expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851). One of the approaches to that test by the Court of Appeal in the case of *Tullett Prebon-v-BGC* [2011] EWCA Civ 131 was to ask whether, looked at in the light of all of the circumstances objectively, the party's intention was to refuse further performance of the contract (paragraph 27, per Kay LJ), although intention was not an essential ingredient; an objective analysis of the likely effect was required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8). The danger of equating a breach of the implied term with the issue of reasonableness or the 'range or reasonable responses' test was highlighted in the case of *Bournemouth University-v-Buckland* [2010] ICR 908, CA.

6.1 It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct for it to have been regarded as a fundamental breach of the implied term.

6.2 The operation of a disciplinary procedure in an oppressive manner could constitute a breach of the implied term (*Alexander Russell plc-v-Holness* UKEAT/677/93).

6.3 I was asked to consider whether these events, looked at together, could have amounted to a breach of that term following a 'last straw', as in the case of *Lewis-v-Motorworld* [1986] ICR 157. In doing so, I had to consider whether the last straw itself contributed to the breach of trust and confidence in at least some material way. It needed to have been something more than merely trivial (*Omilaju-v-Waltham Forrest LBC* [2004] EWCA Civ 1493) but it was important to look at the case as a whole and consider whether any part of the Claimant's reason to resign had been the fundamental breaches relied upon, even if significantly less serious matters had arisen towards the end of the chain which had only partly contributed to the Claimant's decision (*Williams-v-The Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19/LA). In *Kaur-v-*

Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated an approach in relation to the Malik test which required me to ask; (a) what the most recent act (or omission) on the part of the employer had been which the employee said had caused her resignation, (b) whether she had affirmed the contract since that act, (c) if not, was that act (or omission) by itself a repudiatory breach of contract, (d) if not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term, and finally, (e) did she resign in response (or partly in response) to that breach?"

- 6.4 The breach relied upon did not need to have been the only cause of the employee's resignation in order for a claim to succeed; *Wright-v-North Ayrshire Council* [2013] UKEAT/0017/13/2706. It was sufficient for it to have been *an* effective cause of the resignation.

7. Conclusions

Constructive unfair dismissal

- 7.1 The three main areas in which the Claimant alleged that there had been breaches of the implied term were in respect of the suspension, the redundancy process and the grievance.
- 7.2 In relation to the suspension, it could not have been said that the disciplinary process had been operated in an oppressive manner. The Respondent had been concerned about the Claimant's initial failure to adhere to the 48-hour embargo. She had failed to follow Mr Jackson's specific direction thereafter and had caused upset in the wider business by cancelling meetings in the projects which she supported. The Respondent had reasonable and proper cause to suspend her and launch an investigation. Even within her Claim Form, she had accepted that, in stress and panic, she had inadvertently ignored his initial request.
- 7.3 She raised a number of specific complaints about the suspension which had to be dealt with. First, she complained that she had not been notified about it by the investigation manager, as was required under paragraph 6.4 of the Disciplinary Policy [153]. The significance of that was not explained. It was the message, not the messenger, which was important. This could not be said to have been a fundamental breach.
- 7.4 Further, the Claimant alleged that the Respondent had not followed the Resolution Policy. The Policy covered performance and behaviour and its use was discretionary [144-150]. The Respondent was, in my judgment, entitled to argue that Mr Jackson's informal approach on 27 July [62-3] was an attempt to deal with the matter in the spirit of the Policy, but that her failure to comply with that request entitled him to look beyond the Policy to the Disciplinary Policy at that point.

- 7.5 The Claimant also complained that the suspension lasted for more than seven days. The relevant part of the Disciplinary Policy (paragraph 6.7 [153]) referred to it as a 'normal' period. The Policy clearly contemplated the possibility of a longer suspension. In the Claimant's case, it only lasted eight days and she had resigned within it, having indicated her intention to do so on the third day, 3 August.
- 7.6 The Claimant asserted that the suspension was a 'knee jerk reaction'. The evidence as a whole, however, demonstrated that she had not been suspended precipitously. Mr Jackson's initial email to HR demonstrated a degree of thought and consideration [80] and he said in evidence that it was followed by a lengthy conversation between him and Ms Potts before the final decision was taken.
- 7.7 Her main complaint appeared to have been that the suspension had been on a 'false premise' or based upon a 'false narrative' (see paragraph 21 of her witness statement and the Claim Form). In evidence, she identified two key points which she claimed had rendered it 'false'. First, the fact that Mr Jackson had referred to her having "*refused*" to attend her one-to-one consultation meeting. She accepted in evidence, however, that she had declined to attend. It was difficult to see the difference.
- 7.8 More significantly, she asserted that Mr Jackson's failure to mention the 48-hour embargo in his email was fatal. But Mr Jackson made it clear that he had contacted HR for a number of reasons; because the Claimant had breached the initial instruction not to contact non-PMO colleagues within the initial 48-hour period, which resulted in him prohibiting her from contacting anyone else *indefinitely* in his email of 27 July [62-3], because she had decided to 'jump out' of a number of projects and cancel a raft of meetings, which had led to other Directorates expressing concern that the PMO was withdrawing support more widely, and because she had suggested that, following 1 November, the level of support offered by the PMO was going to have been reduced and/or inferior [60]. That was why the Claimant was suspended. Those were the matters which were in Mr Jackson's mind at the time. He acted with reasonable cause and the issues were not 'false' as claimed.
- 7.9 Finally, the Claimant complained that her suspension had not been compliant with the ACAS Code. She suggested that the Respondent had been in breach of paragraph 8 of the Code but, in my judgment, the suspension was brief; it lasted from 1 August (the date of notification) to 10 August [13], eight working days. Mr Brazil had been given access to a number of documents [88] upon his appointment at short notice. He had to consider the evidence and write a report amongst the demands of his day job and other prearranged commitments.
- 7.10 In relation to the Claimant's complaints about the redundancy process, despite her suspension from her IT account, the Claimant had access to Miss Morrell at all times. She received no more or no less than others within

the PMO as far as I could tell from the evidence. As stated above, her suspension had only lasted for eight days and it was important to note that she had, of course, declined the one-to-one consultation meeting and indicated that she was not going to have applied for any roles within the proposed new structure.

7.11 The Claimant did contend that she was denied voluntary redundancy in circumstances where another employee, Miss Bailey, was granted it during the consultation process. Mr Jackson gave clear evidence on that issue; voluntary redundancy was not granted to anybody *during* the consultation period. It was only after the period had closed that the business considered the positions of certain individuals and the possibility of voluntary redundancy. The Claimant did not wait to see if she might have been offered it as Miss Bailey was.

7.12 In relation to her grievance, the Claimant's case was not really developed in her evidence and/or her Claim Form to any great extent. It was undoubtedly the case that she thought that her grievance ought to have been addressed sooner but the relevant timeline was as follows;

- On 3 August, she indicated an intention to resign [91];
- On 4 August, she raised a grievance [118-9];
- On 5 August, Miss Morrell attempted to address the points within it [104 & 117-8];
- 6 and 7 August was the weekend, but the Claimant resigned on the Sunday with notice [110];
- On 8 August, Miss Morrell accepted the resignation and indicated that the grievance would be progressed upon completion of a Grievance Clarification Sheet [121], which was never returned or completed;
- On 10 August, the Claimant resigned immediately.

The grievance was therefore filed on a Thursday, clarification was requested on the Monday, but it was not provided before the effective date of termination on the Wednesday. It was difficult to identify any failings on the Respondent's part within that time span.

7.13 The Claimant alleged that the email of 3 August [92] was a 'final straw' within her Claim Form [24]. She had, however, misunderstood the email, as stated above. It was noteworthy that she did not cite it as a cause of her resignation on 7 August [110].

7.14 As to the issue of causation, it was clear that the Claimant had decided to leave the business on 29 July, if not before. She was telling her colleagues as much in emails at that time and she confirmed the position in her evidence. In my assessment of the evidence, much of the Claimant's case appeared to have been constructed with the benefit of hindsight; she took an early and somewhat precipitous decision to extract herself from the consultation process having decided, rightly or wrongly, that the proposed new structure was going to have been implemented, that there was no suitable role for her and that she should leave. She therefore 'jumped out' of supporting a number of important projects at meetings, she started to look for other work, she declined to engage in the consultation process and

clearly indicated that she had no intention of applying for alternative roles. What she said subsequently about her treatment largely amounted to an *ex post facto* construction of a claim to engineer the best result from a decision which she took very early on. There was no fundamental breach nor, if there was, was it causative of her resignation.

- 7.15 The Respondent did not run a case on affirmation and its arguments under s. 98 (4) were not advanced with any force, but were academic in any event.

Redundancy

- 7.16 The Claimant was not entitled to a redundancy payment because, as at 10 August, she was not redundant, nor was she dismissed by reason of redundancy.

Notice

- 7.17 The Claimant was not entitled to damages for breach of contract relating to notice because the Respondent did not act in breach of contract for the reasons set out above.

Employment Judge Livesey
Date: 22 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
7th June 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE