EMPLOYMENT TRIBUNALS

Claimant: Ms A Gniadek

Respondent: BaxterStorey Limited

Heard at: Watford
On: 25-26 May 2023

Before: Employment Judge Caiden

Representation
Claimant: Ms D Janusz (Employment Advisor)
Respondent: Mr T Westwell (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of wrongful dismissal is dismissed upon withdrawal.

2. The Claimant's complaint of constructive unfair dismissal is not well-founded and is dismissed.

REASONS

A) Introduction

1. By an ET1 presented on 20 October 2022, the Claimant claimed she had been unfairly constructively dismissed and was owed notice pay (wrongful dismissal).

2. At the hearing the Claimant was represented Ms D Janusz who is an Employment Advisor, and the Respondent was represented by Mr T Westwell who is counsel. The Tribunal is grateful for their assistance in presenting their respective client's cases.

3. In terms of documents, the Tribunal was provided with the following:
   3.1. a Hearing Bundle that contained 285 pages (including the index). However, at the commencement of the hearing the parties wished to add a Schedule of Loss, Counter Schedule of Loss and pages containing

supplemental WhatsApp exchanges to the bundle. As neither party objected, the Hearing Bundle was extended to include these documents and so was a total of 299 pages. The Claimant provided payslips for the year 2023 but these were not included to the bundle as the hearing was not going to consider an issue of remedy that these would have been relevant to, and the documents were returned to the Claimant. As an aside, the page numbers in **bold** in these Reasons relate to the Hearing Bundle;

3.2. a witness statement bundle containing 38 pages;

3.3. upon conclusion of the witness evidence, the Respondent's Closing Submissions (a 17-page document).

4. In terms of witness evidence, the Tribunal heard from a total of four witnesses: the Claimant, Ms Austin, Ms Hunt, and Mr Delaroue. All of these, having taken oaths confirmed their respective statements as being true to their respective knowledge and belief (save for minor corrections). Ms Fernandes also provided a witness statement, which was contained in the witness statement bundle, and the Claimant wished to rely upon it. As Respondent did not have the opportunity to cross-examine Ms Fernandes, the Tribunal made clear to the parties that it would apply any weight to the statement as relevant having regard to the individual not attending to give live evidence.

5. The Tribunal confirms that it considered all the documents that had been provided and took particular care on pages within the hearing bundle which it was referred to during live evidence and were referenced in the witness statements.

B) Issues and withdrawal of claim

6. The Tribunal and the parties agreed the issues on the morning of the 25 May 2023. In fact, upon recommencing on the afternoon on 26 May, the Claimant withdrew her claim of wrongful dismissal, and this claim was dismissed upon withdrawal by the Tribunal. Later during the hearing some of the issues were further removed by the Claimant. The result of all this was that the agreed issues to be determined by the conclusion of the hearing were as follows:

7. In terms of liability, whether contrary to s.94(1) Employment Rights Act 1996 ("ERA") right not to be unfairly dismissed, the Claimant's resignation amounted to a constructive unfair dismissal within the meaning of s.95(1)(c) ERA, having regard to the following:

    (1) Did the Respondent commit a repudiatory breach of contract? ["**Repudiatory Breach issue**"]. The alleged repudiatory breaches were said to be:

        (i) Expecting the Claimant to work unreasonable/excessive hours of work, including more than the 40 hours of week set out in the contract. This is said to be a breach of an express contractual working hours term and/or a breach of the implied term of mutual trust and confidence;

        (ii) Expecting the Claimant to work overtime without time off in lieu. This is said to be an express contractual clause and/or breach of the implied term of mutual trust and confidence;

(iii) Expecting the Claimant to perform tasks which were not within her job description (said to be a breach of either an express clause or the implied term of mutual trust and confidence), namely:
  (a) on 12 July 2022, unloading 3 water pallets and moving 4 fridges;
  (b) in July 2022, being told that when the power went off next time to put it on herself;
  (c) in July 2022, being told to fix the coffee machine herself when the Claimant reported a fault on it.

(iv) Organising work in such a way as to severely restrict the Claimant's ability to take breaks from 4 July – 13 July 2022 (said to be a breach of either an express contractual clause or the implied term of mutual trust and confidence);

(v) Bullying behaviour which it is said amounted to breach the implied term of mutual trust and confidence, namely allegations that:
  (a) on 4 July 2022, Ms Austin, upon the Claimant indicating she was too tired by the overtime, telling the Claimant that working less would slow down the Claimant's progress in the business and she did not care now many hours managers worked in the business;
  (b) on 4 July 2022, Ms Austin, in response to a discussion about time off in lieu, that "*I warn you that I take a maximum of 5 days of holiday per year";*
  (c) on one occasion between 4-12 July 2022, Ms Austin telling the Claimant, in response to being told she had not eaten anything all day, "*when it is busy a manager does not eat*";
  (d) on 6 July 2022, Mr Delaroue telling the Claimant that she would never be in charge of the business, and she would always have to follow someone else's instructions;

(2) If so, did the Claimant's resignation of 13 July 2022 with notice to expire on 14 July 2022 in response to the repudiatory breach? ["**Resignation in Response issue**"].

8. The Respondent confirmed that it was not relying upon any argument that there had been any waiver/affirmation given the short period of time between the alleged breaches and resignation, and furthermore that it would not be arguing that there was any 'fair' constructive dismissal within s.98 ERA in the event that a constructive dismissal was found.

9. In terms of remedy for this hearing it was agreed the following issues only would be dealt with:
   (1) Whether there should be a reduction to any compensatory award for alleged failure of the Claimant to comply with the ACAS Code of Practice on Disciplinary and Grievances ["**ACAS Code Reduction issue**"];

   (2) Whether compensation should stop upon the Claimant commencing a new job at commensurate pay on 1 September 2022, notwithstanding

the Claimant resigning from this role a month later ["**Losses Post New Job issue**"].

C) Findings of fact

10. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities to those areas that were material to the decision it had to make.

11. The Claimant started employment with the Respondent on 3 June 2019 as Customer Services Manager. She signed agreement having received "*Statement of Terms and Conditions of Employment*" on 19 June 2019 (**p.48**). These "*Statement of Terms and Conditions of Employment*" included the following terms:
    11.1. "*Hours of Work*": "*Your normal working hours will be 40 hours per week as required on a shift basis*" (**p.41**);
    11.2. "*Overtime*": "*You may be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration, which will accumulate in lieu of days allowance*" (**p.42**);
    11.3. "*Notice period*": "*Over 3 months* [service] – *4 weeks* [is the period of notice]" (**p.44**);

12. The Claimant equally signed to confirm receipt of a Job Description for this role. Under "*Additional Responsibilities*" it noted that she was required to "*attend to any reasonable request made by the client or BaxterStorey Management*" (**p.72**)

13. On 1 April 2021, the Claimant changed job title to an Assistant Service Manager (**p.78**). In this role she worked from the British Airways Lounge at Heathrow Airport. The Claimant believed she would have better working conditions and more development opportunities if she worked at another site, Waterside. Following an interview with Ms Austin the Claimant was duly moved to Waterside on 9 May 2022.

14. On 8 May 2022, the Claimant completed a declaration that she opted out of the 48 hours a week limit contained in the Working Time Regulations 1998 (**p.95**).

15. From 9 May – 4 July 2022, the Claimant worked a split role namely at Waterside in the week and shifts at British Airways Lounge at the weekends (although in fact she was on holiday from 15 June 2022 until 4 July 2022). The Claimant confirmed in Tribunal that the breaches relevant to her constructive dismissal case *only* concerned events that took place from 4 July 2022 until her resignation on 13 July 2022.

16. An important difference between the British Airways Lounges and Waterside, was the Lounges are open 7 days a week and expect customers throughout the day (05:00-22:00). In contrast, Waterside was only open for weekdays and had core hours of 07:00-17:00. Ms Austin stated that in light of that, in contrast with British Airway Lounges, she did not expect any time of in lieu to be needed for a manager such as the Claimant as she could just finish early on quieter days. The Tribunal accepts that this was Ms Austin's expectation.

Layout of Waterside and role

17. Waterside contained the following food service:
    17.1. a Starbucks outlet was open from 07:00-17:00;
    17.2. a self-service coffee bar called "*Pavement*" that was open from 07:00-17:00. This was entirely cashless;
    17.3. a street food pop-up was open at lunchtime, between 10:30-14:00;
    17.4. a place for breakfast service that was open from 08:00-10:00 (it opened around 4 July 2022).

18. Additionally, there were several meeting rooms which could be used by clients at which various hospitality would be requested for specific times.

19. At the material time there was still the ongoing Covid-19 pandemic and so the footfall at Waterside had significantly reduced contrasted with pre-pandemic; it being estimated to be at about 10-25 % occupancy.

20. As the Assistant Manager (also referred to as Deputy Manager), the Claimant was responsible for managing the 'team' at Waterside. This 'team' included supervisors. The role however was not purely managerial in the sense that there were times when the Claimant, as any manager at the site even those more senior, would assist with serving customers and other 'front line' type work.

21. The Claimant's direct line manager was Ms Austin (Account Director). Ms Austin managed other sites and so was at Waterside about 1-2 a week on average. The Claimant would also have some contact with Mr Delaroue (Head of Travel Division) who was responsible for management of client relationships and so on of the travel division. He, like Ms Austin, was not on site at Waterside every day.

Hours of work and 4 July 2022 conversation

22. The Claimant stated in her witness evidence that she when she started doing the split role on 9 until 16 May 2022 "*wanted to work from opening until closing to learn better the process (from 7am until 5:30pm)*" (Claimant's witness statement at paragraph 8).

23. Thereafter in the split role, that is for the 5 weeks or so until going on leave, the Claimant usual hours were 07:00-15:30 and she and Ms Austin would, as she affirmed during cross-examination, "*agree a Schedule*".

24. The time sheets which the Claimant completed, indicated she in fact was doing greater than those number of hours and the Respondent accepted that the time sheets were an accurate reflection of the Claimant's actual hours of work. At this stage it suffices to record the accepted hours of work as at the date of working exclusively from Waterside as being as follows from the timesheets (having regard to the timesheets including non-working breaks and that the working 'week' for the Respondent in terms of shifts runs from Thursday-Wednesday) – **p.120-122** and **p.127**:
    24.1. Monday 4 July 2022 – 07:00-17:30 (10 hours);
    24.2. Tuesday 5 July 2022 - 07:00-17:30 (10 hours);

24.3. Wednesday 6 July 2022 – 09:00-17:30 (8 hours);
24.4. Thursday 7 July 2022 – 07:00-17:30 (10 hours);
24.5. Friday 8 July 2022 – 09:00-18:15 (9 hours 15 minutes);
24.6. Monday 11 July 2022 – 07:00-19:00 (12 hours);
24.7. Tuesday 12 July 2022 – 07:00-18:45 (11 hours 45 minutes)
24.8. Wednesday 13 July 2022 – 07:00-18:20 (11 hours 12 minutes);
24.9. Thursday 14 July 2022 – 07:00-15:45 (8 hours 45 minutes);
24.10. Friday 15 July 2022 – 07:00-15:30 (8 hours 30 minutes).

25. Returning to the issue of doing more than 40 hours per week, in live evidence, the Claimant answered, "*don't know*" when it was asked that during the overlap period "*Ms Austin trusted you to ensure not working more than 40 hours a week*". In so far as material, the Tribunal accepts the evidence of Ms Austin which was that the Claimant had not formally moved to her payroll, so she did not see the Claimant's hours and just trusted the Claimant to organise her hours appropriately until relevant pay runs that occurred after 4 July 2022.

26. On 4 July 2022, the Claimant had a conversation with Ms Austin about her hours. The Tribunal pauses to note that this is directly relevant to the issue at paragraph 7(1)(ii), 7(1)(iv),(a) and 7(1)(v)(a)-7(1)(v)(b) above. The Claimant alleges that during this conversation she indicated that she wanted to work 40 hours and that the amount of overtime she was working was unacceptable, to which Ms Austin allegedly retorted that: it was in the Claimant's best interest to work a lot of hours as that would assist her progress (working less would mean slower progress), that there were a lot of new staff who required training, that she did not care how many hours managers work for the business, and that "*I warn you, I take I take a maximum of 5 days of holiday per year*". Ms Austin denies all this; her account is that the Claimant did not complain of excessive hours but rather asked if she could work a fixed 07:00-15:00 shift to which she explained that managers don't generally have fixed shifts but manage their own times, and so can go home earlier on quieter days. The Tribunal rejects the Claimant's allegations and finds that something along the lines of Ms Austin's account is what occurred. It makes this factual finding for the following reasons:
    26.1. the near contemporaneous evidence does not on balance sufficiently supports the Claimant's version of events. No grievance or complaint was raised at the time. It was well over a month later that anything is documented, in fact, the 25 July 2022 email stated, "*I was happy with my work until the time when you and Eric threatened to withhold my expected promotion to General Manager if I wouldn't work more than contracted hours*" (**p.128-129**). This does not seem to attribute the issue to a conversation on 4 July as such. Moreover, her account on 28 July 2022 at the investigation stage is slightly different: *I requested that I work my contacted hours, but I'm still flexible to accommodate hospitality request and closing etc. But not to the extent of what I was doing before as it too much for me. AA said she knew that all the staff are new and that I need to train them, then I could do my contracted hours. AA said it's up to me how many hours I do but it will slow down my progress for promotion* (**p.139**). A few days earlier by email on 25 July 2022, she states that the 5-day holiday comment occurred "*on another occasion*" and not the 4 July 2022 (**p.148**);
    26.2. linked to the above point the WhatsApp chat has nothing along these lines or even supporting such conversations as occurring on 4 July 2022 (**p.90**);
    26.3. by contrast **p.133** is a record of Ms Austin on 26 July 2022 giving an account much more similar to that which she has given to the Tribunal

(**p.133**): "*Did she ever speak to you about her hours? There was one occasion, she came into the office and was asking me about her hours. Leon, GM of Cargo was there, which I remember made me feel a bit uncomfortable that she was asking me this in front of him. She said "can I work 07:00-15.00? I told her I don't count the hours of my management team, that's not how I work, my team manage their own time. I said managers are expected to be flexible, my recommendation is that you are on site for opening in case there are any issues. I also said there are times when you can go home early, for example Friday's which are typically quiet – Eric told her on a couple of days to go home early while things were quiet, which she did*";

26.4. in terms of the organising of working time and breaks, the 9 June 2022 WhatsApp message states the Claimant herself scheduling all the "*break*" times for the teams (**p.288**). Indeed, there was nothing that suggested in the documents in the Hearing Bundle that the Claimant raised an issue with rest breaks as such, which is surprising if this was an issue;

26.5. Ms Austin stated in repeatedly in her witness statement and live evidence that she took all her annual leave. There was no evidence to support that she did not, and so seemingly no reason for her to make such a statement;

26.6. as a matter of fact, there were not several new staff needing training. It would therefore not make sense for that to be a reason given for the hours of work and in any event the Claimant was relatively new herself on site so would not be able to greatly assist with what needs to happen on the site;

26.7. the Claimant's role was that of manager, so she had more autonomy to pick her hours and there was no evidence that anyone was telling her to work certain or longer shift patterns as such by way of direct order.

6 July conversation

27. On 6 July 2022, the Claimant and Mr Delaroue had a conversation. The subject matter of the conversation is in dispute. The Claimant's allegation is that Mr Delaroue in this conversation stated that the Claimant would never be in charge of the business, and she would always have to follow someone else's instruction. Mr Delaroue's account was that he was merely telling her that it was anticipated that another coffee shop would 're-open' (prior to Covid-19 there was another coffee shop that had to close) which would also sell sandwiches, salads and drinks and she could make this her own. On Mr Delaroue's account there was no mention of the Claimant not being in charge of the business.

28. The Tribunal rejects the Claimant's version of events of the material aspects of this conversation: it finds that there was no insinuation that she would never be in charge of the business and would always have to follow someone else's instructions. It does so for the following reasons:

28.1. the Claimant's version would make little sense, there would be no reason to make such a statemen in the context. There was going to be an increase in work and Mr Delaroue had been encouraging up to now, the Claimant's own case being a promotion was in the pipeline. Equally it would be surprising to make a statement that one would not be in charge of a large business in this context, there was no application for such and there was no suggestion by the Claimant that she indicated she wanted to be Chief Executive Officer of the Respondent;

28.2. there is nothing to corroborate the Claimant's account that is near contemporaneous. The closest by the Claimant at **p.140** states "*On the 6th July ED asked me to go with him to the espresso café as we were planning to open a salad bar once we recruit the staff for it. ED started to tell me that I needed to treat this unit as if it was my own business. He talked about himself and AA who looked at working for BS as a career not just a job. He said he can employee another GM and I will never be in charge. I will never make my own decisions and I will never manage this place.*" But that account itself does not seem to make sense: Mr Delaroue is in one breath saying she has an opportunity to make it her 'own business' as it were but then state, she will never make her own decision and manage the place.

Power cut

29. There was a factual dispute that Mr Delaroue at some time in July 2022 told the Claimant to switch on the mains power when there was a 'power cut'. Mr Delaroue explained in live evidence that he had no idea where the mains were and would never suggest this; he did not know how do to it himself. His version was that in terms of an issue with the fridges, the device power should be used (reset). The Tribunal accept Mr Delaroue's evidence. It is credible in the context and once again the Claimant for this isolated incident, which supposedly put her and others at considerable risk, had no evidence to corroborate its occurrence.

Fix coffee machine

30. Whilst on the face of it there was a factual issue to determine about being requested to fix a coffee machine herself from the issues, the factual premise is rejected by the Tribunal. It was not pursued in cross-examination by the Claimant and is not in her witness statement. Given her experience it makes no sense for such a statement to be made when contractors were available to be used for such a job. Accordingly, the Tribunal does not find as a fact that the Claimant was told to fix a coffee machine herself on some unknown date.

Does not eat accusation

31. On some day between 4-12 July 2022, the Claimant alleges that Ms Austin told her, after she was told she had not eaten, "*when it is busy a manager does not eat*". Ms Austin denied such an accusation. No document in the bundle corroborates the event (it first seems to appear in the ET1). It is also a contractual right in terms of payment of food and there was evidence that the Claimant did eat. In these circumstance, the Tribunal does not find that Ms Austin made the alleged comment during the alleged time period.

Moving water/fridges

32. On 12 July 2022, fridges arrived at Waterside which the Chef wanted to swap for the older models in the kitchen and a pallet of water also arrived. The Claimant alleged that she was made to move four pallets of water by herself and also requested to move the fridges. The Tribunal concludes that as accepted by the Respondent, she assisted with the moving bottles of water from a pallet and not moving an entire pallet itself. Ms Austin also assisted,

and this was common in hospitality for staff to assist moving food stuff. The Tribunal does not accept it was done by the Claimant herself or that it was four pallets worth; in effect it accepts the Respondent's version. This is because:

32.1. moving entire pallets require specialist equipment and it would seem nonsensical to try and pick up an entire pallet (which would require assistance of another) rather than just removing stuff on top of the pallet;

32.2. it would have taken considerable time to move four pallets worth, so one would have assumed it would have been observed by someone else. Indeed at **p.139** when giving her account of the incident it stated "*We also had to move about 4 fridges. We were all pushing them out of the way*" but there is no witness to corroborate this. Ms Fernandes at paragraph 10 is not a first-hand account of witnessing the incident as she was "*not helping Agnieszka in that task*" but rather being "*told…later that she hurt her back as a result of those tasks*";

32.3. there was no complaint or incident report at the time in relation to the fridges or pallets, the accusation first occurs on 17 July 2022 (**p.144**). This is despite also an allegation by the Claimant during the investigation that the Chef also hurt himself in the task of moving fridges;

32.4. there is a small inconsistency with the number of pallets moved by the Claimant it (in her ET1 it was said to be three pallets and not four as in her witness statement at paragraph 16 contrasted with **p.20** at paragraph 8);

32.5. the WhatsApp messages that have requests about taking small glasses of water to a fridge on the 18 July 2022, do not detail anything about moving pallets in the earlier time period (**p.292**);

32.6. on Wednesday 13 July 2022, the time sheets indicate the Claimant did a shift from 07:00-18:20 (**p.122**). She therefore would have been able to raise an issue timeously and it is also unlikely that she would have been able to attend work for such time if she did sustain injury following moving pallets/fridges in the manner alleged. Indeed, the Claimant was also at work on the 13-14 July 2022 (Thursday-Friday) (**p.127**)

<u>Resignation and post resignation events</u>

33. On 13 July 2022 at 19:10, the Claimant resigned from her employment with notice. The notice stated (**p.125-126**):

> *Please accept this letter as formal notification of my intention to resign from my position as an Assistant Manager with BaxterStorey. In accordance with my notice period, my final day will be 14 August 2022. I would like to thank BaxterStorey for the opportunity to have worked in the position for the past 3 years.*

34. On 14 July 2022, the Claimant attended work as usual and worked from 07:00-15:30 (**p.127**). From 18 July 2022-14 August 2022, the Claimant did not work as she was signed off as unfit to work owing to back pain (**pp.143-145**).

35. Whilst the Claimant was on sick leave, Ms Austin wrote to her on 22 July 2022 to raise her concerns about allegations concerning the Claimant making derogatory statements about the Respondent (**pp.130-131**). By an email of 25 July 2022 (**pp.129-130**) the Claimant responded to deny the allegations and included in the email "*I am sad that I feel forced to resign from my position in*

Baxterstorey". This in turn led to correspondence between Ms Austin and the Claimant that resulted in the Claimant stating on 25 July 2022 (**p.129**).

> *I was happy with my work until the time when you and Eric threatened to withhold my expected promotion to General Manager if I wouldn't work more than contracted hours*.
> *I did not give any reason on my resignation because I just wanted to leave quietly*. *By being falsely accused of slander force me to bring up this topic.*

36. As already noted above, the Respondent investigated this as a grievance – although this took place after the Claimant's employment had ended. Notably on 29 July 2022, following a conversation with Ms Hunt of HR at the Respondent, the Claimant was provided with a vacancy list of other positions at the Respondent (**p.151**). The Claimant on 2 August 2022, so whilst still an employee, indicated her interest in two roles and then later another on 3 August 2022 (**pp.155-156**). A further vacancy list was provided on 8 August 2022 to the Claimant (**p.160**).

37. By 23 August 2022, the Claimant was offered a job at Boots Optician at commensurate pay to the job at the Respondent. She started that job on 1 September 2022 (**p.190**). She resigned from this position on 26 September 2022 (**p.201**). The Claimant explained to the Tribunal that the reason she resigned is because she did not believe at the time of accepting the job that she would be required to conduct certain eye tests which she found uncomfortable to administer. In short, the Claimant did not like this particular aspect of the job, so she left. The Tribunal accepted that evidence.

D) Relevant legal principles

38. The ERA at s.94(1) provides "*An employee has the right not to be unfairly dismissed by his employer*". By virtue of s.95(1)(c) ERA, an "*employee is dismissed by his employer if…(c) he employee terminated 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*". This is commonly referred to as a constructive dismissal, that is the employee resigns because of the employer's actions but the employer is treated as having dismissed the employee.

39. Section 98 ERA sets out whether a dismissal is fair or unfair, however in the present case the Respondent did not seek to advance any fair reason and never sought to advance that any constructive dismissal could be fair as noted above. Therefore, if a constructive dismissal is found in this case it had to be unfair.

40. In terms of relevant case law, the Tribunal had regard to the following:
    40.1. the relevant summary of five questions to consider in constructive unfair dismissal claims in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978; [2018] IRLR 833 at [55], having regard to the points made in *Williams v Alderman Davies Church in Wales Primary School* [2020]

IRLR 589 (EAT) at [31]-[33], which also considers the approach to take to last straw cases;

40.2. the implied term of mutual trust and confidence – namely an employer will not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee – has two distinct parts and conduct which is objectively likely to destroy or seriously damage is not repudiatory if the employer had reasonable and proper cause for its actions (*BG plc v O'Brien* [2001] IRLR 496 at [23] and [35]);

40.3. breach of the implied term is by definition repudiatory but not every act, even things unreasonable, amount to a breach of the term, one must focus on the severity required by the wording "*destroy or seriously damage*", so what is required is the employer making its clear that it no longer intends to be bound by the employment contract (*O'Brien* at [27]*, Eminence Property Developments Ltd v Heany* [2010] EWCA Civ 1168 at [61], *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347 at [17]; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465 (CA) at [26]; *Leach v The Office of Communications* [2012] IRLR 839 at [53]) Mr Westwell cited also *Amnesty International v Ahmed* [2009] ICR at [72], *Frenkel Topping v King* (2015) UKEAT/0106/15 at [12]-[15] which make materially the same points;

40.4. an objective contract approach is taken to determine if there was a breach and once a breach has occurred it cannot be 'cured' by the employer, the employee has the right to elect what to do (*Buckland v Bournemouth University* [2010] EWCA Civ 121; [2010] IRLR 445 at [22]-[23], [29] and [52]). Mr Westwell cited *Tullett Prebon v BGC* [2011] IRLR 420 which approved the earlier decision in *Eminence Property Developments v Heaney* [2010] EWCA Civ 1168 that materially stated the same thing as *O'Brien* in relation to looking at the circumstances objectively from the perspective of a reasonable person in the position of the innocent party. Unlike breach of the implied term of mutual trust and confidence, breach of an express term is not necessarily repudiatory, and the issue is whether objectively the breach is adjudged to go to the root of the contract: *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 at [15] and [21];

40.5. for a constructive dismissal claim to succeed the repudiatory breach found by the tribunal need only be part of the reason for resignation, it does not have to be the sole or principal reason (*Wright v North Ayrshire Council* [2014] IRLR 4 at [17]). It is a question of fact for the Tribunal whether or not the reason for the resignation was a found repudiatory breach and there is no requirement for it to be expressed at the time of resignation, in the resignation letter or otherwise: *Weathersfield Ltd v Sargent* [1999] IRLR 94 at [20]-[21];

40.6. with respect to ACAS Code uplifts, regard is had to the guidance of questions to be posed in *Rentplus UK Ltd v Coulson* [2022] IRLR 664 at [19] and [38],

40.7. in terms of losses that flow from any dismissal, there is no rule of law that obtaining new employment at same or better pay automatically will stop losses from any unfair dismissal as that would not provide for "*just and equitable*" compensation. Whilst often that may well be the case it is a question for the Tribunal to determine. See *Dench v Flynn & Partners* [1998] IRLR 653 at [19]-[22].

E) Submissions

41. The Tribunal read the Respondent's Closing Submissions, and also heard oral submissions from both the Ms Janusz and Mr Westwell. All the parties' submissions were careful considered in full. The Tribunal will not rehearse the submissions in these Reasons but has mentioned some aspects of these below in the "*F) Analysis and conclusions*" section.

F) Analysis and conclusions

42. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at paragraphs 7-9 above.

(1) Repudiatory breach issue

43. In approaching the issue of the repudiatory breach, the Tribunal will consider each act in turn individually to see if a repudiatory breach has occurred, whether express or implied term of mutual trust and confidence, and then considered cumulatively the effect the facts found to see if that would have amounted to a breach of the implied term of mutual trust and confidence.

Excessive hours

44. The first alleged breach is the expectation that the Claimant work unreasonable/excessive hours of work, including more than the 40 hours a week set out in the contract. In terms of the facts, during the material time period, 4 July 2022-13 July 2022 (inclusive), the Claimant did work in excess of 40 hours per week. That would be so even including any breaks or periods of non-working. The relevant hours are set out at paragraphs 24. The crux of the dispute is whether: (a) Ms Austin had knowledge that the Claimant was undertaking such hours, (b) there was a reason for the Claimant to work such hours, (c) there was any requirement to do such hours that stemmed from the Respondent.

45. In terms of the 'knowledge point', Ms Janusz submitted that it was implausible that Ms Austin would not know the Claimant would be doing those hours as there were timesheets and further as a manager, she should have noted this. The Tribunal does not accept these points. As already noted in the findings of fact, Ms Austin was only on site 1-2 times a week on average so would have limited contact (see paragraph 21 above). She was not only responsible for that site so there is no reason to think she physically would have noticed the hours of work being done. Moreover, as a manager the Claimant would have more autonomy and the Tribunal has already accepted that Ms Austin's expectation was that one could finish earlier on quieter days (see paragraph 20-21 above). Equally for payroll purposes Ms Austin was not responsible until 4 July 2022 onwards (see paragraph 25 above). Taking all this into account, the Tribunal accepts that given it was a relatively short period of time, Ms Austin was not aware of the hours.

46. Given the above paragraph, in terms of knowledge (as well as covering the reason to do the hours and a requirement to work longer hours), the 4 July 2022 conversation takes on central importance. However, the Tribunal has already concluded that the material parts of that conversation did not transpire as alleged by the Claimant – see paragraph 26 above. Rather as already set out it was just covering that managers manage their own times and can go home earlier on quieter days, so a request to work specifically 07:00-15:00 guaranteed shift like others is not possible.

47. This leaves the point as to what the Claimant was doing in the hours, that is the reason for her doing the hours and any requirement to do such hours that stemmed from the Respondent. On this Ms Janusz pointed to the Claimant having a lot of duties and wanting to book time in lieu with Ms Hunt on 7 June 2022 (**p.114**). On this former point, Ms Janusz relied upon messages on WhatsApp that occurred after hours before Ms Austin (**p.88**, **p.90** and **p.92**). However, the Tribunal does not draw the inference Ms Janusz sought to make given that the messages were on discrete matters and not a long list of tasks, and Ms Austin explained, which the Tribunal accepts, she sends messages when she can but not expecting a response outside of working hours. On the latter point, wanting to book time off, that was before working exclusively at Waterside, so the Tribunal rejects that as being material to the issue of work during the 4-13 July 2022 inclusive.

48. Mr Westwell in submissions pointed out that factually there was not really new staff requiring training so that argument for having to be there longer fails. The Tribunal as noted above accepted this point on the facts (see paragraph 26.6 above). Further, there were several other staff members on site, whom the Claimant should have been managing and whilst the Claimant was on leave it did not appear that others were doing such hours (**pp.116-119**). These points have considerable force.

49. Ultimately, the Tribunal stood back and had to consider whether the Claimant, who bears the burden, was able to show an 'expectation' or 'requirement'. It finds she has not established this as, in addition to the points already made at paragraphs 44-48:
    49.1. the mere fact that an employee, who with manager status has some autonomy, does certain hours does not amount to an expectation by her employer that she do them or a requirement by her employer that she do them;
    49.2. the above point is especially so where the relevant period is very short. This is not to detract from the Claimant working hard or being diligent, but it was only from 4 July-13 July, so that cannot amount to some expectation/requirement to work those hours throughout employment once the critical 4 July 2022 content of conversation is rejected (as this Tribunal has);
    49.3. there was too little evidence before the Tribunal in terms of what the Claimant actually did in those hours. Once again that is not to detract from the Claimant doing work or those hours being done, but it seems to the Tribunal that to establish a requirement or expectation to do hours one would expect to see (a) a detailed list of jobs that the Claimant needed to

do and (b) explanation of why it was not possible, as a manager, to delegate those tasks (such as people not having knowledge to do them, previous unsuccessful attempts to delegate short staffing and so on). Without this the Tribunal accepts in essence the Respondent's point that the Claimant was doing those hours but that was he 'choice', it did not impose these on her in any sense by virtue of some expectation to them or requirement to do them (or tasks that would certainly fill that time).

50. Having conducted, the above analysis the Tribunal returns to the alleged breaches:
    50.1. in relation to the express breach, the only terms relevant to hours were "*normal working hours will be 40 hours*" but that has to be read with "*You may be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration, which will accumulate in lieu days*" (**pp.41-42**). Accordingly, the Tribunal rejects that there was any express term breached. Doing more than 40 hours of work over a two-week period cannot objectively and reasonably read as amounting to "*normal*". That is too short a snapshot in time. Moreover, it has to be read with the overtime clause that makes clear that someone can work beyond 40 hours, or just beyond what is normal. In those circumstances the potential breach is not being given overtime, and that is dealt with separately as an alleged repudiatory breach below. Accordingly, the hours of work cannot amount to a breach of the express term;
    50.2. with respect to the implied term of mutual trust and confidence, given the above analysis there also does not appear to be any breach. Objectively what happened in this case the Respondent was not conducting itself in a manner likely to destroy or seriously damage the relationship of confidence and trust. It was *not* expecting or requiring the Claimant as such to do the hours, as stated in essence it appears the Claimant chose to work those hours. Equally it has to be viewed in its context, as Mr Westwell pointed out during closing, this is "*not a case of sustained excessive demands*", so the Claimant's working hours over this short period cannot amount to a breach of the implied term. Furthermore, in so far as some of the extra working was caused by the Claimant being new to the job this Tribunal concludes that would meet the separate limb of the Respondent having "*reasonable and proper cause*" even if someone viewed the working as being 'likely to destroy or seriously damage the relationship of mutual trust and confidence' (which as can be seen is not the conclusion of this Tribunal). In short, the Claimant loses on both limbs of the implied term of mutual trust and confidence test (see paragraph 40.2-40.4 in relation to the law).

51. Thus, the hours of work done by the Claimant on 4 July 2022-13 July 2022 did not amount to any repudiatory breach of contract.

<u>No time off in lieu</u>

52. The second alleged breach is that the Claimant was not given time off in lieu despite doing overtime. The Claimant pursued this as both a breach of the implied term of mutual trust and confidence and an express term.

53. The Tribunal concludes that the implied term of mutual trust and confidence cannot add anything in this context in the event that breach of the express term fails. There is a specific express term dealing with 'overtime', namely (**p.42**):

> *You may be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration, which will accumulate in lieu days allowance.*

54. On first principles, an implied term cannot overwrite an express term. But even if the Tribunal is mistaken on the law on this, objectively if there was no 'requirement' to do the overtime (which is critical to the express clause) then:
    54.1. the failure to give overtime cannot be viewed as destroying or seriously damaging the relationship of trust and confidence;
    54.2. there would be in any event reasonable proper cause for the actions of the respondent, not giving days off in lieu, as the employee did not need to do the overtime and now is going to miss core business hours.

55. Having rejected the case on the implied term of mutual trust and confidence, the Tribunal now considers whether it was a breach of the express term. As foreshadowed, this turns on whether or not the Claimant was required to work "*such additional hours*". The Tribunal asked Ms Janusz during her closing submissions what the Claimant's case is on the required aspect, and she answered that

> *Well she was expected to do certain tasks, but maybe there was no direct communication what was to be done or not. There was a lot of stuff about volume of work, she did not have anyone to delegate to as there was no one to do it.*

56. The Tribunal initially approached the word required as, in Ms Janusz words, requiring "*direct communication*". That is an employer saying to the employee, 'you must finish this task today so you will have to stay late'. On that basis on the facts, as the Claimant in effect concedes, there is no breach of the express term. Whilst that seems to the reasonable reading of the clause in question, the Tribunal considered in effect Ms Janusz's interpretation that someone may be required to do something even if not directly communicated. In effect, although the hours were not set or specific timings of tasks, the Claimant case being she had so much to do, such volume, it could never be done in the time. However, this fails on the facts. As already pointed out as a manager, she had an amount of autonomy and the points made at paragraph 49 and its sub-paragraphs apply equally. In short, there was no evidence to show that the volume of work or the Claimant's job, could not be done within the ordinary hours without resorting to overtime.

57. So, the failure to give the Claimant time of in lieu did not amount to any repudiatory breach of contract.

Expecting the Claimant to do jobs outside her job description

58. Turning to the third alleged breach, the expectation to do jobs outside the Claimant's job description, this was said to be both a breach of the implied term of mutual trust and confidence and express. In relation to the latter, the express term, the Tribunal concludes there is no such term. The Tribunal was not directed to any particular term in the employment contract and cannot see one which expressly defines the job. Moreover, the job description, which was not relied upon during the hearing to any material extent by the Claimant, does not seem to have been incorporated or have contractual effect itself. It specifies (the one signed by the Claimant, the same term being found in the unsigned one) "*I…understand that it acts as a guide only to my duties and responsibilities and is not exhaustive; I agree to undertake any other duties deemed reasonably by management*" (**p.72**). This is also included in similar terms as being the final "*Additional responsibility*" as noted at paragraph 12 above.

59. This leaves the issue of whether there was a breach of the implied term of mutual trust and confidence. Dealing with each of the three incidents in turn:
    59.1. the facts found by the Tribunal in relation to the water pallet and fridges incident are set out above at paragraph 32 above. Having regard to those there is no breach of mutual trust and confidence. It was reasonable to move bottles of water that had arrived (the Tribunal rejected that the Claimant was required to move actual pallets of it and rejected that she had to move any fridge). This was the hospitality sector and the Claimant had manual handling training. It was a one-off event and so viewed in its proper context is not something that can be reasonably said to seriously damage or destroy mutual trust and confidence. Even Ms Austin was assisting in this task. In the alternative, there were "reasonable and proper" cause for the request given the water was otherwise in the way, so it would also fail on the basis of that limb of the implied term of mutual trust and confidence;
    59.2. the Claimant was never asked to turn on the power, the mains power, herself by Mr Delaroue (see paragraph 29 above) and so the claim fails on the facts;
    59.3. the Claimant was not asked to fix a coffee machine herself (see paragraph 30 above), so the claim fails on the facts.

60. Therefore, there was no repudiatory breach of contract by virtue of the Claimant having to do tasks outside her job description.

Organising work to deprive Claimant of breaks

61. Turning to the fourth alleged breach, organising work in such a way as to severely restrict the Claimant's ability to take breaks, the factual case has not been made out. The Claimant's witness statement at paragraph 17 refers to her allegedly *"not hav*[ing] *time to have a proper break, because I simply did not have time for breaks due to the high number of tasks and activities which I had to do*". However, there was no documentary material that supported it and the facts found and points made in terms of her working hours apply equally to

this claim (see paragraph 4749 above) . As noted at paragraph 26.4, the Claimant herself noted the proposed break timetable and did not make any complaint at the time of not having break. Therefore, in the circumstances it does not appear the Claimant has shown that she was deprived of taking breaks and so there is no breach of the implied term of mutual trust and confidence on that basis.

Bullying Claimant

62. The final alleged breach is four distinct acts that are said to be bullying by Ms Austin and Mr Delaroue. These all fail in turn as the Tribunal has already found as a fact that the very conduct the Claimant alleges to be bullying did not in fact occur – see paragraphs 26-28 and 31.

63. Furthermore, the Tribunal also considered Mr Westwell's alternative submission which was that even if they are not bullying that would result in a breach of the implied term of mutual trust and confidence. The Tribunal agrees with this. The phrase 'bullying' is not helpful in the analysis as such as the issue is objectively viewed would the statements made to the Claimant breach the implied term. In this context, the Tribunal concludes that the content of the oral statements, which are not personalised (save for Mr Delaroue's) would not cross the relevant threshold to "*destroy or seriously damage*" the relationship of mutual trust and confidence. The Tribunal relies upon the law set out at paragraph 40.3 above. Therefore, there is no repudiatory breach found by the Tribunal even if the Claimant's account were accepted (which as evident above was not).

Cumulative effect

64. The Tribunal considered whether even on the factual basis of elements that were made out, those actions could cumulatively breach the implied term of mutual trust and confidence. In truth there was little that was relied upon that has been found by the Tribunal to have occurred as relied upon by the Claimant. Nevertheless, the Tribunal did step back to consider any cumulative impact, and has considered that there was no breach of the implied term of mutual trust and confidence: the relevant threshold of "*destroy or seriously damage*" has not been made out. Looked at another way, the Respondent's actions do not show that it no longer intended to be bound by the employment contract.

(2) Reason for resignation issue

65. Given the above, it is not strictly necessary for the Tribunal to determine this issue as no repudiatory breaches have been found. However, given the parties argued the matter and in case the Tribunal's judgment is successfully challenged, the Tribunal briefly sets out its reasoning on the reason for resignation issue.

66. In short, the Tribunal concludes that in terms of the alleged breaches it is only the alleged hours of work and/or lack of overtime, so paragraph 7(1)(i)-7(1)(ii) of the issues, that were part of the reasons for the Claimant resigning. Accordingly, had a repudiatory breach been shown in relation to both or either, then the Tribunal would have concluded the Claimant had been unfairly constructively dismissed.

67. The reasons for findings these two alleged breaches were part of the reason for resignation are as follows:
    67.1. Mr Westwell's reliance on the resignation not containing the reasons now relied upon (see paragraph 33 for the material extract of the resignation letter) and these only occurring after being accused of making derogatory comments appears to invite the Tribunal to fall into the very error that occurred in *Sargent* (see paragraph 40.5);
    67.2. taking the proper approach, there being no requirement to give the true reason at the time, in essence the matters canvassed before this Tribunal were raised soon after the dismissal. On 25 July 2022 the Claimant stated she was "*happy with my work until the time when you and Eric threatened to withhold my expected promotion to General Manager if I wouldn't work more than contracted hours*" (**p.129**). This was followed by a separate email on 25 July 2022 which refers to the working more than 40 hours, the alleged conversation on 4 July 2022 and also "*I haven't been paid for overtime worked, then I was not given the opportunity to take time back*". Moreover, on 28 July 2022, the Claimant submitted an overtime excel spreadsheet to Jane Hunt (**p.146**). These points are all consistent with a belief that the Claimant is entitled to something from having worked overtime and also not being happy with the number of hours worked;
    67.3. similar matters to the above were canvassed in the grievance investigation meeting of 28 July 2022 (**pp.139-142**), this too being consistent with it being part of her reason for leaving;
    67.4. the alleged excessive work and needing to work overtime, which she did not want to do, with the conversation on 4 July 2022, were all shortly before the resignation, so it is more likely that they were part of the Claimant's mental process in deciding to resign or simply more likely to have played a part in the decision;
    67.5. the Tribunal asked Mr Westwell during closing submissions if there was any positive case being advanced for the resignation and he stated that in effect "*only that the role was beneath her*". That however is not consistent with the jobs the Claimant got shortly after her dismissal and there was no evidence to support this.

68. In contrast the other alleged repudiatory breaches are not found to have played a part in the resignation as:
    68.1. despite the emails noted above and the internal grievance meeting, there was no mention of difficulty taking work breaks. It is surprising that this was not raised, it is closely linked to the reasons found so if it was not having breaks during the day that were adequate one would have expected the Claimant to raise that issue if that was truly part of the reason to resign;
    68.2. the expectation to perform tasks beyond job description was not mentioned, save that reference was made about moving the pallets/fridges. It is surprising that during the grievance it was not

specifically raised as being something that is outside of the job description. Indeed, that is especially so given the Claimant was stating she had hurt her back, so if being made to do something she should not have been one would have expected that to have been more clearly expressed;

68.3. whilst some comments are raised that reflect what is being pursued as the alleged bullying behaviour, the Claimant never makes an accusation of bullying in terms of the comments. The focus is on the number of hours she has to do. It is surprising for the accusation of bullying to not be squarely made during the grievance investigation if that were a reason to resign. In fact, the Claimant when offered to comment on "*How would you describe the Management team at WTS* [Waterside]" responded as "*Very business orientated. AA* [Ms Austin] *is very good. I don't know how profitable the contract is, but I believe they* [Ms Austin and Mr Delaroue] *both do a good job*" (**p.140**). That is inconsistent with a claim of bullying by these individuals, so it appears that in so far as their comments are addressed at the meeting, they relate to the Claimant believing she is being overwork, and will be required to keep working hard, and this being the reason for resigning as opposed to comments being made amounting to bullying. Equally, the Claimant it appears was considering remaining at the Respondent which on the face of it is inconsistent with viewing a manager as a bully, but consistent with viewing the current job as being one which the hours are too much;

68.4. the Claimant spoke quite freely it appears from the grievance investigation notes and had follow up emails with Ms Hunt, so this is not a case of a Claimant keeping or not wanting to raise matters which caused her issues (and which led to her resigning).

(3) ACAS Code Reduction issue

69. As the Claimant's claim of unfair constructive dismissal fails there is strictly speaking no need to deal with any reduction of compensation for alleged breach of the ACAS Code of Practice. Notwithstanding, the Tribunal sets out its conclusion on this – namely it would have made no reduction had the claim succeeded. This is because:

69.1. the only breach that is relevant is not raising a grievance. There is a slight tension in the doctrine of preventing a 'cure' (see *Buckland* at paragraph 40.4) and any requirement that in a constructive dismissal claim one has to raise a grievance or face a deduction. After all the purpose of the grievance is surely to resolve something as opposed to a mere 'box ticking' exercise. Moreover, the tension is heightened by the potential for an employer to argue that raising a grievance and delays with that could result in affirmations. The Tribunal is not concluding that a deduction can never be made for breach of the ACAS Code of Practice in a constructive dismissal claim but makes these observations as it shows that it is less likely and must be part of the context in determining whether the breach was unreasonable and whether any reduction is just and equitable;

69.2. it can only be unreasonable or rather something that leads to a deduction *if* it relates to breaches that are found to have made up the necessary claim. So, one should not suffer a reduction for a breach that was not found to have occurred or equally was not causally linked to the dismissal. In this case it means that the Tribunal is only considering the alleged excessive hours and/or failure to give payment in lieu of overtime on the

basis those, although not successful, are the only elements that were found to be part of the reason to dismiss;

69.3. in this case, in circumstances where the issue was on the Claimant's case in essence raised already with Ms Austin it is not unreasonable to fail to escalate it further as a grievance, this being the material breach, and equally in any event it is no considered just and equitable to make a reduction.

(4) Losses Post New Job issue

70. Given the claim fails, it is once again not strictly necessary for the Tribunal to determine this issue of whether the new job stopped any loss. However, the Tribunal after hearing argument and reflecting on the matter would not have concluded losses stopped as of the Claimant commencing employment on 1 September 2022.

71. Whilst at first blush it might be thought that the Claimant having got a new job which she *chose* to leave, meant that the Respondent should not be expected to cover losses post this date, the Tribunal considered Ms Janusz argument on this matter carefully and agrees with her. Ms Janusz in response to the Tribunal asking her why the permanent job did not stop loss stated

> *Taking the job could be viewed as mitigating the loss but she couldn't stay in it because she didn't like the eye job.*

72. On reflection, the Tribunal simply taking the approach that the Claimant had a new job of commensurate pay thereby stopping the loss would be falling into the very error identified in *Dench* (see paragraph 40.7 above). Ultimately it is a factual assessment and the new job the Tribunal concludes should be viewed as an act of mitigation rather than breaking the chain of causation of loss. The main reason is that the Claimant was doing a very different role, it was not something she had done at the Respondent or had any particular experience in. It may have been obvious that working for an optician would require doing certain tasks with the eye, the Tribunal pauses to note the Claimant's evidence was that she was in effect misled during the interview stage which made no mention of having to do particular eye tests, but that does not detract from the Claimant in essence 'trying' a new job. The sums she earned from it amount to mitigation and it is not just and equitable to stop her losses. After all, she could have not 'tried' this job and the Respondent in those circumstances would still be having to cover the losses. This demonstrates in part that it is 'just and equitable' for losses after the resignation with her new job to still flow from the initial alleged constructive dismissal.

G) Conclusion

73. Accordingly, the claim of unfair constructive dismissal is not well founded and is dismissed. Fundamentally, no relied upon repudiatory breach of contract was established, so whilst the Claimant is found to have resigned for two of the alleged breaches pursued, the claim of constructive unfair dismissal must fail. Although not relevant given the lack of repudiatory breach, the Tribunal would not have reduced any compensatory award on the basis of her failing to make

a grievance under the ACAS Code of Practice and it would not have concluded that any losses stopped upon her briefly being employed for nearly a month in a job that had commensurate pay.

Employment Judge Caiden
7 June 2023

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 9 June 2023

GDJ

FOR EMPLOYMENT TRIBUNALS

Notes

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