



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101586/2023

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Held in Glasgow on 13 and 14 June 2023

Employment Judge R Gall

Ms L Kennedy

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**Claimant
Represented by:
Mr P Miller -
Partner**

15 **Key Housing Association Limited**

**Respondent
Represented by:
Mr L G Cunningham
- Advocate
[Instructed by BTO
Solicitors]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of (Constructive) unfair dismissal brought in terms of Section 95 (1) (c) of The Employment Rights Act 1996 is unsuccessful.

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REASONS

1. This claim was heard on 13 and 14 June 2023. The claimant was represented by her partner Mr Miller. She gave evidence on her own behalf. The respondents were represented by Mr Cunningham, Advocate. The following people gave evidence for the respondents -

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- Ms Amanda Robertson. She was the claimant's line manager.
- Mr Brendan Conaghan, manager within the respondents. He spoke with the claimant when she telephoned on 21 November 2022 to intimate absence.

- Ms Ann McGrath, HR Manager with the respondents. She responded to the grievance submitted by the claimant, proposing a hearing for that.

2. A joint file of documents was submitted.

5 **Brief Background**

3. The claim made is that the claimant resigned from employment in circumstances where the respondents were in material breach of contract, her resignation being in response to that. The claimant relied upon breach of the implied term of mutual trust and confidence.

10 4. At the outset of the case, in discussion with Mr Miller, it was stated that the claimant sought to rely on 3 occurrences. She said that the respondents had replied to a request by her for a week of annual leave by proposing that she work her contracted 4 weekly hours over a 3-week period in order to have the 4th week as leave. In addition, when she was absent through ill health on 22
15 November, having been off on her first day of sick leave on 21 November, the respondents had made frequent attempts to contact her by text and phone call, to the extent that she regarded harassment and bullying as having taken place. She alleged that she had, on 21 November, informed the respondents that she would be in contact with them on 23 November. There was no need
20 therefore, she said, for contact on 22 November. Finally, she referred to a letter from the respondents of 21 December inviting her to a grievance hearing. The date set for that was 16 days from the letter intimating it. The date ought to have lain within 14 calendar days of the letter of invitation in terms of the respondents' policy. The respondents denied any fundamental
25 breach of contract.

5. As it transpired, in evidence, the claimant was clear that the reasons for her resignation were the first two elements. She did not mention the timing of the hearing proposed in the letter of invitation to the grievance hearing, despite being given time at the hearing to reflect as to the reasons which were in her
30 mind for resignation at the time when she decided to resign and then intimated that to the respondents.

6. The respondents' position was that they had attempted to accommodate a late request for holiday leave from the claimant and had therefore made the proposal mentioned above. They had also made an alternative suggestion. The claimant had, they said, told them "*just leave it*". They denied that the claimant had said she would phone back on 23 November. They were unaware of her situation and health in relation to working on 22 November. That led them to try to make contact with the claimant that day, trying to establish whether she would be at work that day and asking to her health. The letter setting the grievance hearing had seen the date fall outwith the 14-calendar day period stipulated in the policy. It was only marginally outwith the time mentioned. Christmas and New Year holidays intervened. The claimant did not argue prejudice through, for example lack of time for preparation, by reason of 2 day "*delay*" or "*overshoot*".

Facts

7. The following were found to be the relevant and essential facts. The Tribunal determined these, where there was a conflict in the evidence, on the balance of probabilities.

Background

8. The respondents provide social care to service users across Scotland. They are a social landlord. The users are adults who live in their own homes and are provided with support by the respondents to assist them in circumstances where they have physical and/or mental health disabilities.
9. The claimant was a support worker with the respondents between 29 August 2017 and 3 January 2023, the date of her resignation. She worked 30 hours per week and was paid a gross weekly wage of £330, a net amount weekly of £314.83. The respondents contributed £39 per 4-week period to a pension for the claimant. The claimant was 62 at date of termination of her employment, having been born on 14 April 1960.
10. The respondents require to provide the service to each of their service users on a daily basis. If therefore an employee is absent, perhaps through annual

leave, training or sickness, it is vital to the respondents that they are aware of this as they require to make alternative arrangements to ensure that care is provided to a service user whose carer is not going to be at work that day. The claimant was aware of this requirement on the part of the respondents.

5 11. The claimant worked in a team of 5. That team had responsibility for delivery of care to 9 service users. A rota is drawn up for each 4-week period of work, allocating the employees to the service users and drafting in others from other teams to make up any shortfall in cover involved. A shortfall often arises looking at the hours of care required and then looking at the hours available from employees in the team, taking account of hours worked and also any leave booked, and training being undertaken.

10 12. It is one of the roles of the manager preparing the rota to manage holiday requests from employees to try to ensure that there is as much cover as possible to supply the necessary hours from within each relevant team. Employees, including the claimant, are aware of the need to intimate requests for leave as early as is possible. There is no guarantee that a request for leave for a particular day or days will be granted. The respondents do what they can to accommodate requests for leave from employees.

15 13. The rota for a 4-week period is drawn up and goes to staff one week before its commencement. Having issued one rota, preparation of the subsequent rota then begins. As manager of the team, Ms Robertson had responsibility for preparation of the rota which involved the claimant.

Policies

20 14. The respondents have conditions of employment (“conditions”) in place. Those conditions cover, amongst other things, absence, illness and grievance. They also have a staff handbook which sets out provisions in relation to absence and leave. Copies of those appeared at pages 54 to 66 (conditions covering leave) and 90 (handbook regarding ill-health absence). The conditions covered leave at clause 7 on page 56 of the file of documents, absence at clause 16, page 59 and grievance in clause 18, page 61 of the file. The grievance procedure itself appeared at 122-125 of the file. There was

a Support Through Illness policy, a copy of which appeared at pages 126 – 136 of the file.

Annual Leave

15. Clause 7 (iii) in the conditions, page 56 of the file, states, insofar as relevant:

5 *“Staff must discuss their leave requirements with their Line Manager and obtain prior approval.”*

16. At page 88 of the file, in the part of the handbook dealing with annual leave, the following appears:

10 *“All annual leave requests must be authorised by the local service manager.”*

At times it may not be possible to grant your first choice of dates (if, for example, it means individuals will not receive a support service), but your manager will ensure that leave is allocated fairly between workers and staggered across the leave year.”

15 *Absence*

17. In clause 16 of the conditions, page 59 of the file, under the heading “Sick Pay & Absence”, it states, once more insofar as relevant:-

20 *“(i) Employees are required to (a) notify their line manager immediately of their inability to report for duty, (b) to update their line manager regularly about their progress”*

18. At page 90 of the file a section of the handbook appears headed “What to do if you are unwell and unable to come to work”. In relation to notifying, it says:

“You must make contact at least twice each week for absences of up to 2 weeks (unless otherwise agreed with your line manager)”

25 *Grievance policy re 14 calendar days*

19. In the Support Through Illness policy at pages 126 and 127 of the file, the following provisions are set out:

“Employees must notify the appropriate member of management, as agreed locally, if they are unwell and unable to come to work. Notification of absence should be made as soon as possible. Employees must keep KEY informed of progress, expected length of absence and likely return to work date. The frequency of updates will be agreed with local management but should be provided at least twice a week for the first 2 weeks.”

Local managers may initiate contact with employees if further information is required, for example for deployment purposes.

On occasion it may be appropriate for the line manager and/or a member of the Personnel department to arrange to visit the employee at home.”

Grievance Procedure

20. The procedure for dealing with grievances appears, for relevant purposes in this case, at page 123 of the file. It refers to submission of a grievance by an employee. If informal resolution does not prove possible, it goes on to state:

“At the appropriate time the employee will be invited by letter to attend a hearing with the relevant level of management and will be informed of their right to be accompanied by a work-based colleague, JNC/elected representative or trade union official. The meeting will be held within **14 calendar days.**”

Claimant’s request for leave

21. On 8 November the claimant spoke with Ms Robertson. The claimant requested that she take leave at some point during the period of the next rota. The next rota was for the 4-week period commencing 19 November. Ms Robertson said to the claimant that the request was made late. She said she had completed the rota and that it was due to be circulated on 11 November. She said that she would however do her best to try to accommodate the request made. She confirmed she would let the claimant know what the outcome was. The discussion had been amicable.

22. Ms Robertson was aware that some other employees in the same team as the claimant already had agreed leave or training commitments during the rota period set to commence on 19 November and that those were matters already factored into the rota as prepared. Ms Robertson looked at the rota once more in light of the claimant's request.
23. On previous occasions employees in the team had agreed to take leave on the basis of working their contracted hours over a condensed period, resulting in it being easier for leave to be taken in terms of the work cover required. This arrangement meant in those situations that a leave request could be accommodated.
24. Looking at the work hours required from the team and the already agreed leave and training absences in the rota, Ms Robertson considered the claimant's request for a week's absence by way of leave.
25. The solution which suggested itself to Ms Robertson was that a week of leave for the claimant was possible within the next 4 week rota, however on the basis that in the remaining 3 weeks she worked the hours she would normally work over the 4-week period of the rota. In other words, the solution involved the claimant working 120 hours over 3 weeks rather than 4, with a week of leave then taking place.
26. Having so concluded Ms Robertson prepared the rota on that basis. A copy of the proposed rota appeared at pages 150 – 153 of the file. Ms Robertson then emailed the rota to the claimant on 14 November. A copy of the email is at page 144 of the file. Prior to the sending of that email Ms Robertson had not discussed with the claimant the proposed rota and arrangement as to the claimant working her quota of 120 hours within 3 weeks.
27. The claimant received the email with the proposed rota and was concerned at the work pattern within it. She sent a text to Ms Robertson on 18 November. A copy of that text is at page 149 of the file. It reads:
- "Morning Amanda. Are you in today. Want to speak to you about my new rota x"*

28. Ms Robertson and the claimant spoke on the phone on 18 November. The claimant explained that she was not happy with the rota as sent out. She said that in her view if she worked her normal 4 week commitment of 120 hours in a 3 week period, the week of leave didn't seem to her to be a holiday. Ms Robertson said she understood the claimant's view. However she said that the request for leave had been made late and that the respondents were short staffed in the period involved. The position as reflected in the rota sent to the claimant had appeared to Ms Robertson to be the best way of trying to accommodate the claimant's wish for leave in the rota period involved. She explained that to the claimant.
29. As an alternative, Ms Robertson proposed that the claimant work 120 hours within 3 weeks, but that the remaining week be treated as rest time. This would mean that the claimant did not "eat into" her annual leave entitlement, yet still had time off work during the 4 week rota period.
30. In the claimant's mind, she was working 120 hours in 3 weeks and then being paid for the subsequent week even though not at work. To her that seemed as if she was working for 150 hours in the rota period in question. She had anticipated working 3 weeks on her normal basis (i.e. a total of 90 hours) and having a week in the rota period away from work.
31. The conversation closed with the claimant saying to Ms Robertson "*Just leave it just now*". The discussion had been conducted in a calm manner and atmosphere. Ms Robertson understood from the claimant's comment that she had decided to proceed on the basis set out in the rota. The claimant did not suggest then or at any point that she "defer" her request for later until a subsequent time.
32. The claimant thought about the position. On Sunday 20 November she wrote to Ms Robertson by email. A copy of that email is at page 154 of the file. It reads:
- "Hi Amanda, regarding my conversation on Friday, regarding annual leave. Having checked the rota again it appears I'm working 120 hours before I'm getting holidays.*

That means I've worked my fully contracted 120 hrs, when in actual fact I should only be working 90 hrs, the other 30 hrs, my requested annual leave, is added to the 90 hrs, thus making up my contracted 120 hrs. My current rota, made up by you, shows that I will be payed (sic) 150 hrs –
5 120 hrs plus 30 hrs a/l. This means I will be taxed on those extra 30 hrs. Annual leave should be taken during working hours, which is “holiday” from working rota.

Could you email me to advise, as I am actually looking to take a holiday from work, not work my normal hours then be paid for 30 extra hours.

10 *Kind regards”*

33. Ms Robertson was not working on Sunday 20 November. She saw the claimant’s email of 20 November on the morning of 21 November. She replied at that point. She was unaware, when replying, that the claimant had telephoned the respondents on the morning of 21 November to intimate
15 absence through ill-health. Ms Robertson’s email in reply was sent on 21 November at 9.28. A copy of it appeared at page 155 of the file. It said:

“Hi Linda

*I have read your email and note the contents may I gently remind you that I did point out during our telephone conversation on Friday that I already
20 had you at contracted hours before putting in your annual leave request and that this was as a result of your late annual leave request and other workers also being off on annual leave. I further explained that I could remove the annual leave put down on your rota and that this would still allow you to have seven days off whilst meeting your contracted hours and
25 that you could use your annual leave at a later date however you declined my offer of doing this and advised me just to leave it. I am more than happy to meet up with you to discuss this further.”*

34. There was no further contact or discussion on this point.

Claimant's absence and events of 22 November

35. On the morning of 21 November the claimant telephoned the respondents to intimate that she was unwell and unable to attend work. She adhered to the policy provisions and phoned at 8am. She spoke with a team manager, Brendan Conaghan.
36. The respondents have a standard form which is to be completed by a team manager in the event of an employee phoning to intimate absence. Immediately after the conversation between the claimant and Mr Conaghan, Mr Conaghan completed one of those forms. A copy of the form he completed is at page 158 of the file. The information provided by Mr Conaghan on the form is an accurate reflection of the conversation he had when the claimant telephoned.
37. The claimant said to Mr Conaghan that she would be absent from work on 21 November. She said the reason for her absence was stress and anxiety. Rest was referred to as being the step being taken to facilitate return to work. The claimant said she would call back with an update about her return to work. That is the information which Mr Conaghan entered on the "Absence Contact Record" at page 158 of the file.
38. Mr Conaghan was thereby aware that the claimant would be absent from work on 21 November. Cover therefore required to be arranged for that day. Had the claimant intimated that she would be absent beyond 21 November or that she would contact the respondents on Wednesday 23 November, Mr Conaghan would have set in motion arranging of cover for 22 November as well as 21 November. He would also have been likely to have recorded that absence of more than one day on the Absence Contact Record.
39. In addition to phoning Mr Conaghan, the claimant sent a text to Ms Robertson. A copy of that text is at page 159 of the file. It reads:
- "Hi Amanda being (sic) up all night. Not fit for work. Keep you updated. Will contact office."*

40. Having spoken with the claimant, Mr Conaghan sent 2 emails. He sent those to the group email for team managers for the area and to certain other people. A copy of those emails appears at page 162 of the file. They were sent at 8.13 and 8.58 respectively. They each have the heading "Linda Kennedy sickness" and respectively say:

8.13 *"Linda Kennedy has called off for her shift at Larch Road this morning. I will look at this now."*

8.58 *"[other employee's name] will cover essential support for [redacted] and [redacted]."*

10 41. Mr Conaghan made arrangements for cover for one day alone in light of the information given to him by the claimant.

42. The respondents had not therefore arranged cover for the claimant's work scheduled for Tuesday 22 November. They anticipated either that she would return to work or that she would telephone them to intimate her absence that day. Calls intimating absence can be made in the evening of the preceding day or on the morning of absence.

22 November

43. The claimant did not appear for work on 22 November. She did not telephone the respondents that day or the preceding evening. In her mind the obligation was to telephone the respondents twice each week. She relied in her mind upon the provisions in the handbook and Support Through Illness policy set out above, and appearing at pages 90, 126 and 127 of the file. She had not however provided any information to the respondents that she would absent other than on 21 November.

25 44. During 22 November the respondents sought to contact the claimant. They wished to understand her health position and her ability to attend work. They sent texts, phoned her and, on receiving no reply to the phone calls, left voicemail messages. The claimant believed she had complied with any requirements as to notification. She was aware of the texts, phone calls and

messages. Her view was that she was absent from work and did not require to respond. She viewed the messages as harassing her.

5 45. Having received no communication from the claimant as to her absence, being unaware of her current health situation and being concerned about there being no reply to texts, phone calls and voice messages, the respondents were very concerned about the claimant.

10 46. The level of concern on the part of the respondents at the absence of contact from the claimant was such that they were contemplating attending the claimant's property to check that she was ok. Their concern was heightened as, on the information they had, the claimant lived alone. The absence of contact/response was also not usual for the claimant.

47. Ms Robertson sent a text to the claimant on 22 November at 13.15. That text and subsequent texts exchanged on 22 November appear at page 159 of the file.

15 48. The initial text from Ms Robertson reads:

"Hi Linda I tried calling you as you didn't contact the office to let them know you weren't coming in for your shift can you give me a call back thanks Amanda."

20 49. The claimant did not respond to that text. Ms Robertson therefore sent a further text at 17.33, reflecting the concern of the respondents. It reads:

25 *"Hi Linda I have tried to call you as has the office several times today to confirm that you are okay it's very unusual that you haven't answered your phone, text messages and or called in or made contact to say that you are extending your sick absence today so we are getting extremely concerned about you so if you don't get in touch with myself via text or call or contact the office on [telephone number] then we will make arrangements to carry out a welfare check at your house to make sure your (sic) okay."*

50. The claimant responded by text and the respondents in turn replied to her text. Those texts read:

Claimant “No need for welfare check. Will be contacting the office tomorrow, as per Employment Handbook. I would have contacted you tomorrow as well. This is not helping my work related stress.

5 *Ms Robertson* “Hi Linda thanks for getting back to me. I was concerned for your welfare given that you hadn’t replied or answered my calls or texts however you should have contacted the office this morning to advise that you wouldn’t be in for your shift today as outlined in Keys handbook and policy procedure and would be
10 grateful if you would contact the Keys oncall tonight on [telephone number] to advise them that you will not be in work tomorrow.”

51. The claimant did not reply to that text on 22 November. She did not call the respondents that evening. She sent a text to Ms Robertson the following
15 morning saying that she expected to be off “*till next week*”. She also said that her stress was “*actually worse since yesterday*”.

Grievance and Hearing arrangements

52. The claimant submitted a grievance to the respondents. She did this by email of 7 December. A copy of the grievance is at pages 173 – 176 of the file.
20 Although addressed to a union representative who was assisting the claimant, the terms of the grievance as submitted to the respondents are as set out in pages 173 – 176.

53. In the grievance letter the claimant sets out her issue with the request she made for annual leave. She expresses the view that in circumstances of
25 working 120 hours in 3 weeks subsequent “leave” of 30 hours does not constitute leave, but rather is extra paid hours.

54. The claimant also details her issue with the respondents’ actions on 22 November. She says that when she intimated absence on 21 November she said she would keep the respondents updated, “*contacting them on Wed*”.

The claimant narrates the sequence of events on 22 November. She refers to her stress as being *“through the roof”*. She concludes:

“I feel that I have been bullied, harassed and intimidated by Amanda Robertson and Key office.

5 *I find it wholly unacceptable and unprofessional behaviour by Amanda Robertson and Key office.*

My trust and confidence has been shattered because of this.

I have lost all faith in Key Community Support and Amanda Robertson.

I am currently waiting an appointment with my GP.”

10 55. The respondents acknowledged the grievance by letter of 21 December from Ms McGrath to the claimant. A copy of that letter is at page 162 of the file. In this letter the respondents invite the claimant to a meeting on 5 January, that being the grievance hearing meeting.

15 56. The letter was sent by post to the claimant. It arrived with her on 30 December. There was at this time disruption to postal services through industrial action. The letter could have been sent by email. The proposed meeting was more than 14 calendar days from the date of the letter being sent. The period between sending of the letter and the meeting (16 calendar days) included Christmas and Boxing days, New Year’s Day and the public holiday in
20 Scotland normally on 2 January.

Resignation of the claimant

57. By letter of 3 January 2023 the claimant resigned from her employment with the respondents. She resigned with immediate effect.

25 58. A copy of the claimant’s letter of resignation appears at page 184 of the file. The letter states that there has been a fundamental breach of contract and breach of the implied term of trust and confidence. in her letter of resignation, the claimant states her reasons as being:

“Failure to uphold contract in regards to Annual Leave.

Harassment and bullying whilst on Sick Leave, this had the effect of exacerbating my work related stress

Conduct of Key Community Support, has resulted in myself having lost all trust and confidence in the company.”

5 59. In addition to the letter of resignation, the claimant sent a further letter of 3 January to the respondents. A copy of that letter is at page 183 of the file. In that letter she specifically states that the letter of 21 December inviting her to the grievance hearing fixes the hearing more than 14 calendar days after the invitation, breaching the respondents' policy. She says:

10 *“As such, I shall decline your invite to the meeting, as I have completely lost all trust and confidence in Key Community Support.*

I have also attached a letter of resignation, through Constructive Dismissal, with this email.”

15 60. The respondents thereafter offered to meet the claimant to have a grievance hearing on a different date, notwithstanding her resignation. By email of 6 January, page 187 of the file, they offered 2 dates for that meeting, saying that a different date would be possible if that better suited the claimant.

20 61. The claimant declined to meet the respondents as part of the grievance process. By email of 9 January, at page 189 and 190 of the file, she offered the respondents an informal meeting with her partner and herself at her home on 11 January. The respondents replied stating that they were unable so to proceed,

Claimant's further employment

25 62. After she resigned the claimant was not keen on immediately obtaining employment in the care sector. She applied unsuccessfully for jobs with the retail sector.

63. On 20 February she submitted an application for a job in the care sector. After some delay as the interview and application process was gone through, she was confirmed as being successful in gaining employment with her new

employer. She took up her position there on 20 April. At that point financial loss on her part ceased.

Issues for the Tribunal

64. The issues for the Tribunal were:

- 5 (i) Did the behaviour of the respondents towards the claimant amount to a breach of the implied term of trust and confidence, thereby constituting a fundamental breach of contract entitling the claimant to resign? The behaviour relied upon by the claimant in her evidence was the handling of the claimant's request of 8 November 2022 for annual leave and the actings of the respondents on 22 November in
10 contacting her.
- (ii) Did the claimant resign at least in part in response to the fundamental breach of contract (if found)? Included within that question was the issue of whether the claimant had affirmed the contract
15 notwithstanding any breach relied upon.
- (iii) If successful, what compensation was to be awarded to the claimant? Included within that question was whether any deduction fell to be applied in respect any failure to mitigate or failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015, if
20 either or both such failures were found by the Tribunal to have occurred.

Applicable Law

65. The Employment Rights Act 1996 ("ERA") provides a right to make a claim of unfair dismissal to an Employment Tribunal in circumstances where the
25 employee terminates the contract, with or without notice, in circumstances where the employee is entitled to terminate it without notice by reason of the employer's conduct. That is in terms of Section 95 (1) (c) of ERA.

66. For success in such a claim a claimant must establish that there was a fundamental breach of contract on the part of the employer. Breach of the

implied term of trust and confidence is always a fundamental breach of contract (*Morrow v Safeway Stores plc* 2022 IRLR 9). A claimant must also establish that the breach was, at least in part, what had caused the claimant to resign. A claimant must also not have waited too long after the breach prior to resigning. Delay might lead to the claimant being found to have affirmed the contract.

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67. The case of *Western Excavating (ECC) Ltd v Sharp* 1978 ICR 221 (“*Western Excavating*”) sets out the principles involved in a case of constructive unfair dismissal. The much repeated passage in the Judgment in that case is helpful - “*If the employer is guilty of conduct which is a significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance.*”

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68. The case of *Malik v BCCI SA (in compulsory liquidation)* 1997 ICR 606 (“*Malik*”) confirmed that it a vital element in the employment relationship was that the employer would 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.*”

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69. Conduct of an employer may not always please an employee, just as conduct of an employee may not always please an employer. It is not every instance of such conduct which entitles an employee to resign claiming constructive dismissal, just as not instance of such conduct by an employee entitles an employer to discipline or dismiss and employee.

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70. There can be situations where there is a build-up of incidents and then a last straw which leads to resignation. Such a situation can found a constructive dismissal claim, even in circumstances where the final straw is not of itself a breach of contract (*Lewis v Motorworld Garages Ltd* 1986 ICR157).

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71. The case of *Woods v WM Car Services (Peterborough) Ltd* 1981 ICR 666 (“*Woods*”) confirms that it is not necessary for a claimant to prove that the employer intended to breach the contract. A Tribunal must consider the conduct and if that conduct has the effect of damaging trust and confidence,

a fundamental breach of contract may have occurred. That is however an objective test rather than being a matter relying on the view of the employee.

72. Given the decision made by the Tribunal the principles applying to compensation to be awarded, including alleged failure to mitigate loss and alleged failure to follow the ACAS Code, are not set out.

Submissions

Submissions for the claimant

73. Mr Miller submitted that the claim should be successful. He said there had been a breach by the respondents of the implied term of mutual trust and confidence.

74. He said there were 3 elements in the series of actions upon which the claimant relied. There was the handling of the request for annual leave, the contact at time of sick leave and the failure to adhere to their own policy when the respondents dealt with the claimant's grievance.

75. Mr Miller highlighted the case of *Woods*. He referred to this being an instance of there being a last straw. A claimant could in that situation be successful even when the last straw was not itself a breach of contract.

76. Mr Miller relied upon the schedule of loss as setting out the sum due to the claimant. He argued against there being any reduction in the sum sought.

Submissions for the respondents

77. Mr Cunningham produced written submissions and spoke to them. He also submitted a list of cases. Those were *Aberdeen City Council v McNeill 2014 SC 335*, *Cooper Contracting Ltd v Lyndsey 2016 ICR digest D3*, *Malik, Stuart Peters Ltd v Bell 2009 ICR 221*, *Western Excavating and Wilding v British Telecommunications plc 2002 ICR 1079*.

78. Mr Cunningham submitted that the claim should be dismissed.

79. In relation to witnesses, Mr Cunningham commended the respondents' witnesses, submitting that they should be viewed as credible and reliable.

Documentation supported their evidence on the crucial points. The claimant, on the other hand should, he said, be doubted. She should not be viewed as reliable.

5 80. In relation to the request for leave, the respondents had tried to accommodate the claimant's request. The claimant was not entitled to have leave as she wished. There were reasons why it was not possible simply to give her a week off. A course followed with some other employees had been suggested. When the claimant queried this the respondents had offered an alternative route retaining time off for her. They had offered to discuss the position. The
10 claimant had asked them just to leave it.

81. As far as the events of 22 November were concerned, the respondents made contact with the claimant in circumstances where they had not heard from her. The Tribunal should accept that, when she called on Monday 21 November, she had not said she would phone back on Wednesday 23 November. The
15 claimant had not responded to the call and texts. The respondents were worried. They had concerns as to the claimant's welfare. They had properly followed up on the absence of contact from the claimant. This was not harassing. The policy did not say, as the claimant seemed to think it did, that contact twice a week was sufficient.

20 82. The claimant's evidence was that these 2 incidents were the ones which led her to resign. The second of those was on 22 November. Resignation was on 3 January. The claimant had delayed too long, said Mr Cunningham. She had affirmed the contract. She said in her grievance that she had lost trust and confidence in the respondents. That was on 7 December. Resignation on 3
25 January came too late for the earlier conduct to be relied upon, Mr Cunningham submitted.

83. In relation to the grievance handling, the respondents accepted that the policy referred to the meeting being within 14 calendar days of the letter and that the date set was 16 calendar days after the letter. That was regrettable. It did not
30 provide a proper basis for resignation and was not said by the claimant in the evidence she gave to have been a factor in her resignation.

84. If the claim was successful, Mr Cunningham submitted that the respondents had discharged the onus of showing that the claimant had not taken reasonable steps to mitigate her loss.

Reply by the Claimant

5 85. Mr Miller submitted that the claimant had resigned in time. He said that there had been no discussion between Ms Robertson and the claimant prior to the rota appearing. The rota stipulated that the claimant would work 120 hours in 3 weeks rather than in her normal 4 week period. She would then have a holiday in week 4. That had not really altered as the proposal when there was
10 a conversation on 18 November.

86. Ms Robertson had caused the claimant stress on 22 November in circumstances where the claimant was absent through work due to stress.

87. In relation to the conversation between the claimant and Mr Conaghan, the claimant should be believed. Mr Conaghan's note was vague. He accepted
15 he couldn't now remember the full details of the conversation. His email the day after the call was fuller as to what had been said but was less likely to be accurate than his note after the call.

Discussion and decision

88. The claimant, through Mr Miller, had confirmed at the outset of the case that
20 she relied on a breach of the implied term of mutual trust and confidence evidenced by 3 things. Those were the handling of the claimant's request for leave, the actions of the respondents on 22 November and the failure by the respondents to adhere to their disciplinary policy as to timescale in fixing the hearing within 14 calendar days of the letter of invite.

25 89. When giving evidence, however, the claimant was asked about what had led her to resign on 3 January. She mentioned only the first 2 of those reasons. This area was explored to an extent, avoiding use of leading questions, particularly as this was a critical point. Despite further questioning, for example as to why she had resigned on 3 January rather than before that, or
30 indeed after that date, and as to anything which might have triggered her

decision to reign, she repeated her evidence that the first two reasons were what caused her to reign.

90. At the outset of the case I had explained to parties, the claimant and Mr Miller in particular, that one of my roles was to try to ensure, as far as practicable, that parties were on an even footing. I said however that I could not act as representative for either party. I could however seek to clarify any points and to explore what appeared to be relevant areas of evidence. I did seek to clarify reasons for the claimant's resignation. However faced with her repeated response to the relevant questions asked, in my view the questioning could not be further pursued. The 2 reasons were therefore the reasons for resignation, accepting the claimant's evidence on that.

91. I considered the 2 elements relied upon.

92. Firstly, there was the holiday request point. The claimant accepted that employees of the respondents could not insist upon holidays being taken on particular dates specified by them. She also confirmed that the nature of the work was such that cover had to be provided for the service users. She further confirmed that her request for leave was made late, close to issue of the rota involved. Holidays and training for others were already agreed when the claimant sought a week of leave.

93. The claimant's evidence was that she had asked for a week of leave. She had not requested or required that the week be during the next rota. Ms Robertson, on the other hand, was clear in her evidence that the request was for a week of leave during the period of the next rota.

94. I accepted the evidence of Ms Robertson on this point. There was no evidence to support the claimant. Had she simply been looking for a week at some point, she surely would have said so when the issue with a week of leave during the rota period arose. At no time in the texts, emails or indeed in the grievance submitted does the claimant say that her request was for a week at some point rather than a week during the rota period beginning on 19 November. Ms Robertson focussed on that rota period, trying to come up with a means of accommodating the claimant's request for a week of leave.

95. Although the solution proposed might not have appealed to the claimant, I did not regard it being put forward as being a breach of the implied term of trust and confidence. It was not ideal that the rota was sent out without discussion of the proposal. Such a discussion might have avoided an issue in that the proposal might have been departed from after discussion. The proposal was, however, put forward with a view to assisting the claimant obtain time off during the period, as asked for. It was something which other staff members had agreed to on previous occasions.
96. The initial discussion on 8 November had been amicable. The text on 18 November seeking to discuss the rota appears to reflect a good relationship. Similarly, the discussion on 18 November seems to have been amicable.
97. It appears that it was when reflecting upon the proposal at home over the weekend that the claimant had misgivings. She does not seem in her email of 20 November to have grasped that, although working 120 hours in 3 weeks, this is being done to accommodate leave as requested by her, the amount of leave sought being within her annual entitlement. She appears to have viewed the suggested working pattern with suspicion.
98. The respondents did not however adhere to the proposal in the rota as being the only option. Ms Robertson put forward the idea of the claimant retaining leave and taking rest days for week 4, thereby retaining her annual leave entitlement. I accepted that this had been Ms Robertson's position on 18 November and that her email of 21 November was setting that out once more.
99. There was no suggestion in the evidence that the claimant had looked to withdraw her request for leave. She did not suggest that she had done so during her correspondence, for example she did not say that in her grievance letter. The evidence was that the claimant had said, at the end of the discussion on 18 November "Just leave it". That was, in my view reasonably, taken by the respondents as the claimant saying at that point that she would go ahead with working on the basis of the rota.
100. In their reply to the claimant's email of 20 November, the respondents say that they are willing to meet up to discuss this further.

101. I did not regard the behaviour of the respondents in this area to amount to a fundamental breach of contract through breach of the implied duty of trust and confidence. The respondents had not, in my view, conducted themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. They had considered and had tried to accommodate the claimant's late request. They had proposed an alternative and had offered to discuss the situation further. Sending of the rota without prior discussion was a valid point of criticism. It did not however, as I saw it, constitute a valid basis for the view that trust and confidence between employer and employee had been destroyed or was likely to have been destroyed.
102. The second element relied upon by the claimant in support of her claim was that of the actings of the respondents on 22 November.
103. The starting point in considering the events of that day is in my view the call from the claimant to Mr Conaghan on 21 November, and the text sent by the claimant confirming absence. The claimant said in evidence that she informed the respondents that she would be back in contact with them on Wednesday, that being 23 November. On that basis there was no need for contact with her on 22 November as they knew she would be off.
104. I do not accept that the claimant so stated. Her text to Ms Robertson on the morning of 21 November makes no mention of that. The form completed by Mr Conaghan just after his call with the claimant was concluded makes no mention of there being an update on Wednesday. Cover for someone off sick is essential. Immediately after the call from the claimant the cover which Mr Conaghan sets about organising and does organise is for one day only, 21 November. That is entirely consistent with the information from the claimant being that she was to be absent on the day of the call, 21 November, with there being no information as to any other absence at that point.
105. I regarded the evidence from Mr Conaghan and Ms Robertson to be credible and reliable. Mr Conaghan fairly conceded that the Absence Contact Record could have been clearer in its terms. He was clear, however, that there had

been no reference to the next update from the claimant being on Wednesday. I found his evidence compelling when he said that had that been said to him by the claimant the need would have arisen for cover to be arranged for 21 and 22 November and he would so have proceeded. As mentioned, he did not, arranging cover only for 21 November. The text from the claimant to Ms Robertson, omitting any mention of contact on 23 November, reinforces the position. The claimant was somewhat hesitant in her evidence and did not seem to me to have a clear recollection of events. I appreciate that she was giving evidence and may have been nervous. In my assessment, however, where there was a conflict of evidence, the evidence of the respondents' witnesses was to be preferred, particularly as it was consistent with contemporaneous documentation.

106. In addition, the actings of the respondents on 22 November would be without explanation, other than to upset or harass the claimant, if they in fact knew that the claimant was to be absent on 22 November. The relationship between the claimant and the respondents had been a good one. There is no sign of malice or mischief in the texts from Ms Robertson to the claimant. Quite the reverse, the terms of the texts show concern. Further, it is not just Ms Robertson who is trying to make contact with the claimant. The office is also trying to speak with her.

107. I understand that the claimant was absent through stress and anxiety. She may not have welcomed the attempts to contact her. The respondents were, however, on the facts I have found in relation to the contents of the call from the claimant on 21 November, unaware of what the claimant's health position was on 22 November and had reasonably expected her back at work that day. The absence of contact from the claimant and inability to obtain her on the phone or to hear from her via text or return call, reasonably led to concern on their part. Their concern was increased given their understanding that the claimant lived alone and also the fact that the claimant had on previous occasions phoned in, responded to calls or had been in touch via text.

108. I appreciate that the claimant had a different view of the contact from the respondents. I did not, however, regard their behaviour as being a breach of the implied term of mutual trust and confidence.
109. The respondents did seek to make contact with the claimant on various occasions on 22 November. Those attempts were justified given the absence of information from the claimant and the resultant issues with work cover for the respondents. The contact was also driven by concern for the claimant. I did not see that that the behaviour of the respondents could be properly viewed as being calculated or likely to destroy the confidence and trust between employer and employee. The claimant appears to have been under the impression that a call twice a week from an employee who was absent was the requirement. Where the initial absence is one day, however, there would be an expectation and requirement that the employee provide information the next day, if not to be at work, to enable cover to be organised, if needed. Initial attempts on 22 November to establish the claimant's position on attendance at work having been unsuccessful, taking steps consistent with concern as to her well-being, such as proposing a welfare check is something I do not accept as a breach the implied term as relied upon by the claimant.
110. I did not therefore regard there as being a breach of the implied term of trust and confidence in relation to either of the elements relied upon by the claimant on the facts as I found them. I also did not regard there as being a breach of that term when the 2 aspects were considered together. There was no pattern of behaviour or cumulative effect which warranted such a finding in my view.
111. The respondents did send out a letter which intimated a date for hearing of the claimant's grievance, that date being outwith the time period stated in the policy. The letter could and should, in the circumstances of the Christmas and New Year break compounded by difficulties with mail delivery at the time, have been sent by email. The complaint from the claimant was not however as to lack of notice of the grievance hearing. Her complaint was that the date set was 16 calendar days after the date of the letter rather than the 14 calendar days stipulated in the policy.

112. I did not regard that element as constituting a breach of the implied term of trust and confidence. The claimant did not explain how it fell into that category and it does not obviously do so in my view. In any event the claimant did not rely upon this element in her evidence as being a reason for her resignation.

5 Insofar as it might have been viewed as a last straw, as detailed above, there is, in the view to which I have come, no foundation laid down by the first 2 elements to which this can be added to lead to a successful claim. Further, if consideration is given to all 3 actings in total, I do not regard there as being conduct by the respondents which, given the facts, could properly be viewed

10 as being calculated or as being likely to destroy the confidence and trust between employer and employee. If that were to be so, it seems to me that the respondents had reasonable and proper cause to act as they did. They were looking to accommodate a late holiday request from the claimant whilst maintaining cover for service users. They were looking to establish if the

15 claimant would be at work and she was "safe and sound". They set a date for the grievance hearing early in the working days after the Christmas and New Year holiday period, a date which was only marginally outside the time frame in the policy.

Conclusion

20 113. For the reasons stated, the claim is unsuccessful.

Employment Judge: R Gall
Date of Judgment: 22 June 2023
Entered in register: 27 June 2023
25 **and copied to parties**