EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Saeeda Akbar	**v**	**Beaumont & Fletcher Interior Atelier Limited**

Heard at: London Central
On: 25 and 26 May 2023

Before: EJ G Hodgson
Mr S Pearlman
Ms J Holgate

Representation

For the claimant: Miss D Gilbert, counsel
For the respondent: Mr I Wheaton, counsel

JUDGMENT

1. **The respondent shall pay damages for breach of contract in the sum of £2,541.67.**

2. **The respondent shall pay to the claimant a basic award of £816.**

3. **The respondent shall pay to the claimant compensatory award of £140.12.**

4. **The Employment Protection (Recoupment of Benefits) regulations 1996 recoupment do not apply.**

5. **For the removal of doubt the total sum payable is £3,497.79.**

REASONS

Introduction

1. By a judgment dated 3 March 2023 we found the respondent had unfairly dismissed the claimant, but all allegations of discrimination, harassment, and victimisation were rejected. The remedy hearing came before us on 25 May 2023.

2. At the commencement of the hearing, we agreed the issues to be determined.

    a. First, we need to consider the Polkey issue: would the employment have come to an end in any event, either by resignation or dismissal, and if so, when; further, or the alternative, what would have been the percentage chance of the employment ending.

    b. Second did the claimant contribute to her dismissal, and if so what is the just and equitable deduction

    c. Third, what is the appropriate period of loss, it being the respondent's case that there were supervening events.

    d. Fourth, what is the loss.

3. Both the claimant and Ms Durisova gave further oral evidence and relied on their original statements. We received a bundle of documents. The respondent supplied written submissions.

Further finding of fact

4. We rely on the findings previously made, and we will refer to them as necessary in our conclusions.

5. When employed by the respondent, the claimant had a gross annual salary of £30,500.04. Her gross monthly basic pay was £2,541.67 with a net monthly pay £1,951.00. The respondent contributed £727.80 annually to her pension. The contractual notice period was one month. The claimant was age fifty at the effective date of termination on 2 July 2021 and had accumulated four years' continuous service.

6. It is agreed the basic award is, subject to any contributory fault, £3,264.

7. Following her dismissal, the claimant secured employment with BUPA on a starting salary of £28,000, which she commenced on 13 September 2021. On 8 February 2022, the claimant chose to leave her employment with BUPA. The claimant wished to accompany her mother to Pakistan for personal reasons. The respondent did not formally request unpaid

leave from BUPA. The respondent has failed to disclose her letter of resignation, her BUPA contract of employment, and her wage slips.

8. Following her return from Pakistan, the claimant secured employment with International SOS and continues in that employment.

9. We have limited details of the employment with either BUPA or International SOS. We have seen the offer letter from International SOS. This confirms her start date was 16 May 2022 with a base salary of £28,000 per annum. There is provision for a "one month bonus." No further detail is given. The claimant was entitled to private pension, BUPA medical and dental insurance, and life insurance.

The law

10. Section 119 Employment Rights Act 1996 provides for a basic award -

> **119(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—**
>
> > **(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,**
> > **(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and**
> > **(c) allowing the appropriate amount for each of those years of employment.**
>
> **(2) In subsection (1)(c) 'the appropriate amount' means—**
>
> > **(a) one and a half weeks' pay for a year of employment in which the employee was not be-low the age of forty-one,**
> > **(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and**
> > **(c) half a week's pay for a year of employment not within paragraph (a) or (b).**
>
> **(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.**

11. Section 122 Employment Rights Act 1996 provides for basic award reductions

> **…**
> **(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.**
> **…**

12. Section 123 Employment Rights Act 1996 provides:

> **(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard**

to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

13. It has long been established that it is necessary to consider the likelihood of the contract coming to an end when considering compensation (see **Polkey v A E Dayton Services Ltd** [1987] IRLR 503).

14. In considering our approach to both contributory fault and Pplkey, we have regard to **Software 2000 v Andrews and others** [2007] IRLR 568, and in particular paragraph 54

(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) …[1]

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event…

(b) That there was a chance of dismissal … in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

Conclusions

15. We first consider the Polkey question. We do not need to consider the case law in detail, the principles are agreed before the tribunal.

16. The first question is whether claimant's employment would have come to an end in any event, and if so when.

17. Miss Gilbert submitted that the claimant would have remained employed if she had not been dismissed and would have continued in employment to date.

18. It is the respondent's case that it is certain the claimant would have left in any event or would have been dismissed by no later than two months after the effective date of termination, as the working relationship deteriorated to the point where it could not continue.

19. In reaching our conclusions, we find the appropriate starting point is the fact that the claimant resigned. The resignation was a dismissal because at the time of the resignation the respondent was in fundamental breach of contract, and that breach was a material reason for the resignation.

[1] Software was decided when s.98A(2) Employment Rights Act 1996 was current, but that section no longer applies. It is necessary to have this in mind when considering the principles to be extracted, but nevertheless remains helpful guidance.

20. It does not follow that the breach was the sole reason for resignation. In order to make good the claimant's argument that she would have remained, it is necessary to postulate that had the fundamental breach not taken place, the claimant would not have resigned at the point she did. It is necessary to examine the circumstances in some detail.

21. In the conclusions in our liability judgment, we noted that the respondent was justified in seeking to address the claimant's attitude and performance. We summarised the position of 7.11

> **7.11 We do not accept the respondent made false allegations of poor performance. The claimant had formed a negative view of Ms Durisova. The claimant, at times, refused to accept legitimate instructions and her attitude towards Ms Durisova became increasingly hostile. In addition, it is clear that the claimant made mistakes and underperformed. This is illustrated by her attitude towards completion of the Sage entries and her refusal to engage adequately or at all with considering the deficiencies in the packing list. We have no doubt that Ms Durisova believed the claimant's performance was inadequate and needed to be addressed. She had grounds to do so.**

22. The respondent fundamentally breached the contract of employment in its approach to the capability procedure. However, addressing the claimant's attitude and performance was necessary. We considered the need for, and appropriateness, of the capability procedure in our liability judgement, particularly at paragraphs 7.25 – 7.36.

23. We considered the respondent's letter of 30 April 2021. The first five points concerning the claimant's performance were reasonable and appropriate. However, the letter included two matters which were inappropriate. We said this at paragraph 7.28

> **7.28 In this case, the respondent chose to include two matters which were likely to be contentious. It was unwise to refer to the claimant's relationship to other members of staff, without there being specific examples. It was unwise to refer to the claimant's clothing when the allegation was unclear. Ms Durisova should have recognised that there had been a serious deterioration in the relationship. The point of the capability procedure should be to identify areas which needed to be improved and give appropriate time and support to achieve that improvement. Ms Durisova should have known that inclusion of an unparticularised general criticism of her relationship to other members of staff and of the clothes the claimant wore could only serve to alienate and aggravate. Ms Durisova should have realized that such personal criticism would seriously undermine the relationship.**

And at 7.32

> **7.32 Was this a breach of the implied term of mutual trust and confidence? We have concluded that by including two poorly identified superfluous matters Ms Durisova fundamentally undermined any possibility of a successful capability procedure and this was either calculated to destroy the remaining trust and confidence or she should have realised it would be likely to destroy it. In those circumstances, the inclusion of those items was a fundamental breach.**

24. The fact that the breach was a material reason for the resignation meant the resignation amounted to constructive dismissal.

25. In our liability decision, we explored the reasons for the resignation. We considered the claimant's reasons for resignation at paragraphs 7.37 to 7.42 as follows

> **7.37 It is necessary to consider the reason why she resigned. Ultimately, we find that there are several reasons for her resignation.**
>
> **7.38 We first need to consider the events of 27 April 2021.**
>
> **7.39 We have considered the words used, and the subsequent conversation on 28 April. We have found that the claimant resigned, orally, on 27 April, as confirmed by her at the meeting on 28 April. Ms Durisova initially held the claimant to her resignation. She would have been entitled to do so. However, ultimately Ms Durisova elected to allow the claimant to withdraw her resignation.**
>
> **7.40 When the claimant resigned on 27 April, it is clear that the claimant was refusing to engage with Ms Durisova and discuss constructively what led to the customs delay. Her attitude was so belligerent it is likely that the claimant was in breach of contract at that point. However, by allowing the claimant to withdraw her resignation the respondent affirmed the contract.**
>
> **7.41 It follows that resignation was firmly in the claimant's my mind by no later than 27 April 2021, as she resigned on that date. Resignation remained in the claimant's mind and the fact she believed the respondent was in fundamental breach is contained in her May grievance. Resignation remained at the forefront of the claimant's mind when she returned to work on 7 June, and it was raised in her grievance of 11 June 2021. It is arguable that this grievance is clear evidence of the fact claimant had made up her mind to resign, it was only a question of when. The conclusion of the grievance makes it clear that she will continue to work in the interim, but her reference to addressing the "obvious campaign of attrition and victimisation" in a "robust manner" is a clear indication of her intention to resign.**
>
> **7.42 The claimant did resign after she received the response to her grievance. We have considered the resignation letter. The claimant was dissatisfied with the reply. The resignation letter confirms that her reason was multilayered. She referred to her recent treatment. She alleged race discrimination. She complained about her treatment on her return to work. Part of the reason, undoubtedly, related to the accusations about her conduct towards other members of staff and her appearance. The respondent was in fundamental breach of contract, for the reasons we have given. The breach need only be a material reason, it does not have to be the sole reason or the principal reason for the resignation. We are satisfied it was a sufficient reason, in the sense it was material and not trivial, for the resignation and therefore the claimant was constructively dismissed.**

26. In her evidence to us at the remedy hearing, the claimant alleged that she would have continued with her employment with the respondent if it had

not been for the fundamental breach and would have been employed today. We found her evidence unconvincing, and we reject it.

27. We have regard to the totality of our findings at the liability hearing, the further evidence given by the claimant, and the relevant contemporaneous documentation.

28. We have looked again at the resignation letter. It is clear that the resignation came after the receipt of the "outcome letter." It is that letter the claimant focused on. The resignation letter has several themes: she objects to the treatment after she returned; she alleges her grievance had been dealt with in an unsatisfactory manner; she disagreed with the "sanction" applied; and the claimant alleges the real reason for her treatment was her race and ethnicity. The claimant implicitly rejects criticism of her performance, referring to the criticism as "superficial." She accuses Ms Durisova of "bullying." She refers to four days of "constant hectoring and unrelenting pressure."

29. The letter does not specifically refer to the two matters which put the respondent in breach of contract, namely reference to her relationship with colleagues and her appearance. In no sense whatsoever does it suggest that those matters were any form of final straw, or of particular significance in the context of the claimant's complaint as a whole.

30. We find the claimant rejected criticism of her performance, demonstrated an unwillingness to participate in any capability management procedure, formed a view that her treatment was race discrimination, and considered her employer to be a bully. She considered it necessary to resign to protect her mental health.

31. As to Ms Durisova's behaviour during the four days the claimant returned, we found the following:

> **7.29 It was appropriate when the claimant returned to work to have the meeting. However, it would have been better to give the claimant specific notification in writing of the time. We do not accept the actual conduct of the meeting, or the general commencement of the performance improvement plan was a breach of contract. Ms Durisova did discuss specific tasks with the claimant, and they were agreed. Whilst this was unwelcome to the claimant, we do not see it as a breach of contract. However, Ms Durisova did allow herself to be drawn into excessive supervision and this could be seen as what is commonly termed micromanagment.**

32. We did not find this to be a breach of contract, let alone a fundamental breach. Ms Durisoava's approach is explained, in large, part by the claimant's behaviour, which was belligerent and intransigent.

33. We find the reality is the claimant had formed such a negative view of the respondent that there was no possibility of salvaging the relationship, whatever the approach taken by Ms Durisova. The claimant had formed the view that Ms Durisova was a bully who was acting for discriminatory

reasons. There was no prospect of the claimant participating constructively in any capability procedure. The claimant did not accept that there was a need for one. The claimant had no acceptance of or apparent insight into her own inappropriate behaviour, but instead chose to pursue grievances and intimate she would take robust action.

34. The claimant resigned when she did because she did not like the content of the outcome letter. As noted, it is the claimant's case that if the respondent had not included reference to her behaviour and appearance, she would not have resigned when she did. We find that argument fanciful. We find it is certain that the claimant would have resigned in any event, at the point she did, in response to the grievance outcome, even if the respondent had not been in fundamental breach of contract.

35. It follows that the claimant's employment would have come to an end at the same time because the claimant resigned without notice.

36. We next consider the question contributory fault.

37. It used to be considered highly unlikely that there could be a finding of contributory fault in a constructive dismissal case see **Holroyd v Gravure Cylinders Ltd** [1984] IRLR 259. However, there may be occasions when it is appropriate to find contributory fault even in a constructive dismissal case, see for example **Morrison v Amalgamated Transport and General Workers' Union** 1989 IRLR 361.

38. If contribution is to apply, there must be a connection between the employee's conduct and the fundamental breach by the employer.

39. In **Morrison**, the employee was suspended without pay, but the suspension was held to be a fundamental breach of contract. However, it was held that the claimant had, by her conduct, "provoked and precipitated" the employer's reaction. We find that the circumstances of this case are similar.

40. The conduct which constituted the fundamental breach was part of the wider application of the capability procedure. The capability procedure was caused entirely by the claimant's actions, attitude, and responses. There had been difficulties, particularly in relation to the Oro Bianco incident. The claimant's reaction to that was negative and disproportionate. She was unwilling to engage with Ms Durisova. This led to a deterioration of the relationship which was characterized by the claimant becoming increasingly negative and hostile. Ms Durisova was faced with a deteriorating working relationship which was difficult to manage. As part of that deterioration, the claimant lodged grievances and became increasingly hostile. In those circumstances, one possible way forward was a capability procedure. We have previously observed in this case that as well as issues around capability, there were issues of conduct on the claimant's part. Instigating a capability procedure was legitimate and appropriate. It was unfortunate that Ms Durisova included two

elements which were inappropriate; the introduction of those elements led to a breach of contract. Whilst there were difficulties managing the claimant for the four days when she returned, the difficulties were as much the fault of the claimant as they were of Ms Durisova, and it was not itself a breach of contract. Whatever the position, when we stand back and look at this as a whole, it is clear that the claimant precipitated Ms Durisova's response, and part of that response contain the unlawful treatment. However, it was the claimant's conduct and attitude which precipitated the capability procedure. In the circumstances, given that the claimant provoked and precipitated the respondent's reaction, we find that necessary causational link is made out and we must consider whether it is just and equitable to make a deduction. We find that the claimant's behaviour was inappropriate and culpable. We find the claimant's contribution to the dismissal and that the just and equitable deduction is 75%.

41. Having decided those matters, as is now possible to consider the compensation.

42. We have considered whether we should treat the basic award and the compensatory award differently for the purposes of contributory fault. We find there is no reason to do so.

43. At the hearing, it was agreed that damages for breach of contract should be paid gross. The gross pay for one month is £2,541.67 and we award this sum for breach of contract. Whilst the respondent has referred to subsequent conduct, there has been no evidence advanced that subsequent conduct has been identified which would have justified her dismissal. We note that the claimant had previously been in fundamental breach, but the contract had been affirmed. In the circumstances, the claimant is entitled to payment of her notice period.

44. It is agreed that the calculation of the basic award is £3,264. This will be reduced to reflect contribution and there will be an award of £816.

45. We next consider the compensatory award. The claimant would have resigned in any event, even if the respondent had not breached contract. We may only award compensation for losses sustained in consequence of the dismissal. We find it would not be just and equitable to award losses beyond the period of notice that the respondent would have been required to give. It follows we do not have to consider why the claimant left BUPA. We calculate the appropriate losses as follows:

a. We make no award for loss of earnings, as the period is covered by the breach of contract claim.

b. We award £500 for loss of statutory rights.

c. We award loss of pension contributions £60.65

46. The total compensatory award is £560.65 and to this sum, we apply contributory fault of 75% leaving an award of £140.12.

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Employment Judge Hodgson

Dated: 3 August 2023

Sent to the parties on:

.03/08/2023

For the Tribunal Office