



EMPLOYMENT TRIBUNALS

Claimant: Ms Alison Holland

Respondent: Environment Agency

Heard at: Leeds Employment Tribunal via CVP

On: 28-29 June 2023

Before: Tribunal Judge Sills sitting as an Employment Judge

Representation

Claimant: In person

Respondent: Mr Blitz

RESERVED JUDGMENT

The Claimant's claim for unfair dismissal is dismissed.

REASONS

INTRODUCTION

1. The Claimant (C) brings a claim for constructive unfair dismissal against the Respondent (R). R is a Non-Departmental Public Body with around 10,000 employees. C was employed by R from 5 March 2012 until 30 November 2022.

PROCEDURE, DOCUMENTS, AND EVIDENCE HEARD

2. At the outset of the hearing, I confirmed the issues to be determined with the parties. As per the direction of Judge Rogerson dated 11 April 2023, the matters identified in the claim form were the alleged breaches of contract which C claims entitled her to resign and claim constructive dismissal.
3. While Ms Holland had made a previous application for disclosure, she did not pursue this at the hearing and confirmed that the final hearing bundle was an agreed bundle. Both parties confirmed that the bundle of documents was agreed prior to hearing the evidence.

4. To accommodate the availability of R's witness Dr Matthews, who dealt with C's grievance, with C's agreement I heard her evidence first. I then heard C's evidence. I heard evidence from R's remaining witnesses, Mr Lines, Operations Manager in Producer Responsibility Regulatory Services (PRRS) at the relevant time, and Mr Ramsey, C's Team Leader at the relevant time. I heard submissions from the representatives and reserved my decision.

FACTUAL BACKGROUND

5. The following facts have not been disputed. C commenced her employment on 5 March 2012 as a Regulatory Assistant in PRRS. PRRS is part of the Waste Regimes Operations Service (WROS). She was initially a Regulatory Assistant, a Grade 2 employee. Her duties at this time included responsibility for the shared inbox and marking applications for accreditation as 'duly made' to confirm an application has been submitted, relevant information provided, and payment has been received, known as the "duly making process". In September 2019 C's role changed to Regulatory Officer, a Grade 3 role. In her Grade 3 role, C continued to perform some of the same tasks as in her Grade 2 role.
6. Amongst C's duties as a Regulatory Officer continued to be determining whether applications for accreditation had been 'duly made'. This work fell to be carried in the from September each year. In September 2020 when the 'duly made' process needed to be carried out, C was mainly responsible for carrying this out. Responsibility for managing the inbox was placed on a rota. C complained on a number of occasions that some of her colleagues did not deal with the emails quickly enough.
7. C was signed off sick by her GP in September 2021. She received 6 months full pay, followed by 6 months half pay. In November 2021 C told Mr Lines that she did not wish to return to her role with PRRS. R subsequently agreed that C could move to a role at the same level within International Waste Shipment, another part of WROS. Upon finding out more about the role in February 2022, C refused to take up the new role and remained on sick leave.
8. On 29 March 2022, C raised a grievance against the following individuals with whom she had worked in the PRRS team: Mr Lines, Mr Ashcroft, Ms Kilgallon, Mr Sutton and Mr Rehman. Dr Matthews was appointed Decision Manager to hear the grievance. Dr Matthews met with C on 22 April 2022 as part of her investigation. She appointed an investigator to look into C's complaints. Once that investigation was complete, Dr Matthews again met with C on 21 September 2022 to hear the grievance. On 4 October 2022 Dr Matthews informed C of her decision not to uphold any of the complaints against the five individuals.

9. C appealed in relation to the complaints against 2 individuals, Mr Lines and Mr Ashcroft. That appeal hearing took place on 18 November 2022, with Mr Stuart Allen as the Appeal Manager. On 25 November 2022 Mr Allen dismissed the appeal. C resigned on 30 November 2022 without notice.

THE LAW

10. S95 of the Employment Rights Act 1996 (the Act) defines a dismissal for the purposes of a claim for unfair dismissal. S95(1)(c) is relevant to the present case and states:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –

(c) The employee terminates 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.

11. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA, Lord Denning MR stated as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, 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. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

12. The component parts of a constructive dismissal which need to be considered are as follow. First, there must be a repudiatory or fundamental breach of the contract of employment by the employer. Second, the employee must terminate the contract because of that breach. Third, the employee must not have lost the right to resign by affirming the contract after the breach.

13. C relies on the implied term of trust and confidence, formulated in Malik and Mahmud v BCCI [1997] ICR 606 as being an obligation that the employer shall not:

"Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

14. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must:

"impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer"

15. C's case is that a series of events or course of conduct amounted to a breach of trust and confidence and so she relies on the last straw doctrine. I have considered the guidance in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

THE ISSUES

16. The issues to be determined in this claim are as follows:

17. Did R commit a repudiatory breach of C's employment contract?

- a. C argues that R breached the implied term of trust and confidence. She argues that the following matters, cumulatively, amounted to a breach:
 - i. R required C to do all the Grade 2 work as a Grade 3 employee;
 - ii. In relation to the 'duly made' process, R gave C excessive work, refused to help, and took responsibility taken away from C;
 - iii. In relation to the email rota, R refused to support C in dealing with the inbox;
 - iv. R offered C an inappropriate alternative role;
 - v. R carried out an inadequate investigation into C's grievance.

18. If I find that R did commit such a breach, did C resign in response to the breach?

19. If so, did C lose any right to resign by affirming the contract after the breach by delay?

20. If C was constructively dismissed, was the dismissal fair in any event?

FINDINGS

21. I first consider whether R breached C's employment contract as claimed. I consider each individual issue raised by C.

R required C to do all the Grade 2 work as a Grade 3 employee

22. It is not in dispute that when C progressed from her Grade 2 to Grade 3 role, she retained some of her Grade 2 roles along with some additional tasks. C has not suggested she was treated differently from other Grade 3 employees she worked with in this regard. In evidence C accepted that there would be overlap between jobs at certain grades. It is plain that other Grade 3 colleagues carried out tasks that C had carried out as while Grade 2 and continued to carry out when Grade 3. For instance, C was on a rota with other Grade 3 colleagues for managing the email inbox. While C did most of the 'duly made' applications in 2020, when C started in 2019 there were 3 other Grade 3 officers doing this work. In 2021 the work was also

shared out amongst other Grade 3 officers. R was entitled to include some Grade 2 tasks amongst C's duties at Grade 3 as R did with other Grade 3 staff. The fact that R required C to continue to perform from some of her Grade 2 roles after progressing to Grade 3 was not calculated or likely to destroy or seriously damage the relationship of trust and confidence. This cannot form part of a course of conduct capable of breaching the implied term.

In relation to the 'duly made' process, R gave C excessive work, was refused to help, and took responsibility taken away from C;

23. C claims that her workload was excessive during the period of around September 2020 to January 2021 (see e.g., p99 at para 131) due to her role determining whether applications were 'duly made'. The preponderance of the evidence does not support C's claims.
24. While the reliability of the time sheets was in dispute, I am satisfied that they are reliable. There is a clear explanation for how they were obtained at p588. Viewed as a whole they are coherent, with only one or two minor anomalies. I am satisfied on balance that they are reliable. The time sheets support R's argument that C did not work excessive hours, did not regularly work 12 hour days, and that even if she did, R was not aware of this and did not require this. For instance, pp436-8 do show C sometimes working extra hours. However, there are no 12 hour days. C's accrued flexi leave rises from 15:56 on 1 September 2020 to 36:41 on 6 October 2020. But by the end of November 2020 the amount was 16:19. The time sheets show C did work some extra hours, but the extra hours worked in September and early October had been taken as flexi leave by the end of November. The timesheets do not in my view indicate an excessive workload. Further, even if C did work some extra hours, I do not accept that C was required to work any extra hours by R. There is no significant evidence to suggest this.
25. C also claims that she was refused help in relation to this issue. I do not accept this. C did receive some help from a Jo MacDonald. In oral evidence C did not dispute that he helped with around 50 applications over a couple of weeks.
26. C placed great weight on 'Document 18', an email chain from September 2019 set out at pp108-113. This document sets out the plan for C's Grade 3 role. In relation to this issue, the document shows that R's intention was that C would train other people to carry out the 'duly made' process. C's oral evidence was that she did this but that those she trained left the organisation. In my view this demonstrates that R took steps prior to September 2020 to share out the responsibility for the 'duly making' amongst other staff even those steps were unsuccessful due to staff departures.
27. A breakdown of the amount of work required also does not support C's claim. C accepted in evidence that it would take around 20 minutes to determine a single 'duly made' process. The work was concentrated in the

period September to November 2020. C worked 37.5 hours per week. I accept the evidence of Mr Lines that in 2020 there were 406 'duly made' processed completed. Deducting the 50 applications dealt with by Mr MacDonald, this amounts to just over three weeks work that was completed in a period of 2-3 months. I do not consider this to be excessive.

28. In terms of excessive working, given that this took place in late 2020, it is of concern that C did not formally raise this in a grievance until March 2022. This well over a year after the period in question. I note that C was on sick leave from September 2011 but even at that point around 9 months had passed since the period she claims to have had to work excessively. I take this delay into account. It is similarly surprising given her complaints that C did not raise a grievance against either Kayleigh Morley her line manager from 2016 until October 2020 (notwithstanding her claim that she mistakenly thought Ms Morley had asked for help), or David Ramsey, her line manager from October 2020 until September 2021.
29. I note that in 2021 Mr Lines decided to change the system for managing the 'duly made' process. The new system was managed by a more senior employee, Grade 4, and involved the work being carried out by a number of Grade 3 employees rather than concentrated in the hands of C. In evidence Mr Lines described the aim as being to improve the resilience of the system which until then had been overly reliant on a single individual. This reform dealt with the ultimate cause of C's complaint on this issue, namely overreliance on her to deal with the 'duly made' process.
30. It is noteworthy that as well as complaining about being refused help, which I do not accept, C also complains about the help that was provided in the way in which the system was reformed. C complains that responsibility was taken away from her. I do not that C had any legitimate cause for complaint. The new system shared the responsibility amongst Grade 3 colleagues overseen by a higher grade employee. This was an arrangement entirely open to R, was not prejudicial to C and indeed addressed her complaints. In oral evidence C referred to being humiliated by having work taken off her. Whether or not C felt humiliated by the change, I do not consider that that was R's intention, or that there was any reasonable basis for C to feel humiliated. R's reform of the 'duly made' process was not calculated or likely to destroy or seriously damage the relationship of trust and confidence between C and R.
31. I make the following findings on this issue. R did not require C to work excessive hours to deal with the 'duly made' process. C did not in fact work excessive hours during this period. The workload was not excessive. R took steps to remove the overreliance on C in relation to the 'duly made' process, which was the ultimate cause of her complaint. The steps taken prior to September 2020, training other staff, were unsuccessful as the staff members left. Further steps were taken in 2021. Nothing R did in relation to the 'duly making' process as discussed was calculated or likely to destroy or seriously damage the relationship of trust and confidence between R and

C. In relation to this issue, nothing done by R could form part of a course of conduct capable of breaching the implied term.

In relation to the email rota, R refused to support C in dealing with the inbox;

32. C had been responsible for the packaging inbox as a Grade 2 employee. As a Grade 3 employee this responsibility was shared with C and other Grade 3 colleagues on a rota. It is not in dispute that C dealt with inbox queries more quickly than some of her colleagues, was unhappy at the length of time it took colleagues to deal with inbox queries and repeatedly raised this with her managers. However, ultimately, it was not C's role to oversee the overall management of the inbox. C accepted that she had no line management responsibilities. While in her meeting with Dr Matthews at AB81, C stated she was expected to watch over the inbox, she could not recall ever being asked to do this, and stated that if she hadn't it wouldn't have been done. I do not accept that overseeing the overall management of the inbox fell within her responsibilities. I have considered Document 18 at pp108-113 in relation to this issue. It does not assist C. C's duties in that document do not include any line management of any colleagues, overall management of the inbox, or the power to determine appropriate deadlines for responses. I am satisfied that C took it upon herself to watch over the inbox and that this was not something asked of her by her managers or part of her role.

33. Those responsible for the overall management of the inbox, the team leaders and above, were content with how it was being managed by all those on the rota. This was their responsibility and not C's. This is reflected in what Cath Kilgannon stated as part of the investigation, that C's colleagues were not going near the 10 day deadline. Similarly, Mr Ramsey's evidence was that he was content with how all the Grade 3 employees dealt with the inbox. I consider it surprising that C only raised a grievance against Cath Kilgannon, and not David Ramsey, given that Ms Kilgannon was only her team leader from 1 September 2021 and she went on sick leave on 29 September 2021, and this was a matter C raised with Mr Ramsey.

34. The problem, ultimately, was that C was unable to accept that other colleagues on the rota dealt with queries less quickly than she did, and that the time frame in which they dealt with queries was nonetheless acceptable to those responsible for overall management of the inbox. Nothing R did in relation to the email rota and C's complaints about how her colleagues dealt with the inbox was calculated or likely to destroy or seriously damage the relationship of trust and confidence between R and C. In relation to this issue, nothing done by R could form part of a course of conduct capable of breaching the implied term.

R offered her an inappropriate alternative role;

35. I do not accept that the proposal to move C to another role could form part of a course of conduct capable of breaching the implied term. C requested a change in role. I accept R's evidence that this had to be within the WROS

team because otherwise the move would be subject to a recruitment process. It is clear that Mr Lines did explore moving C to a different department but was told that this was not supported by HR (p158-9).

36. At the time of the move, C's complaint was that she was being moved to a role less senior than her current role. I do not consider that complaint was justified. It is clear from the correspondence that the intention was for C to be eased into the role in view of the fact that C has been on sick leave for a number of months (see p162-7).
37. There was a dispute about whether or not C was aware that she would have been under Mr Ashcroft's management. In the two conversations between C and Mr Lines on 4 January 2022, with notes at pp158-160, Mr Lines makes repeated reference to 'Jon'. Mr Lines in evidence confirmed that there was no other relevant Jon and that he thought she understood he was referring to Jon Ashcroft. I am satisfied on balance that this was a reference to Jon Ashcroft and that C knew this. I note how long C worked for the agency and so would have been familiar with the organisational structure. I also note the evidence that Mr Ashcroft chairs an all WROS meeting. I am also satisfied as a result that C knew that her new role would still fall under the responsibility of Mr Ashcroft, by then a WROS manager, at the time the role was offered to her. It is thus noteworthy that C did not raise any issue about the role falling under Mr Ashcroft's remit at the time. C rejected the role in February 2022. It was not until 29 March 2022 that C raised her grievance, including against Mr Ashcroft. In any event, C would not have been under Mr Ashcroft's direct management given his level of seniority. I find that nothing R did in relation to alternative role C was offered was calculated or likely to breach the term of mutual trust and confidence. Nothing R did in relation to this issue could form part of a course of conduct capable of breaching the implied term.

R carried out an inadequate investigation into C's grievance.

38. I do not accept that the investigation was in any way inadequate. In evidence C accepted that Dr Matthews was an appropriate person to deal with the grievance. She accepted Mr Ibrahim was an appropriate person to carry out the investigation into C's complaints. She accepted that Mr Allen was an appropriate person to consider the appeal. Dr Matthews met with C at the outset of the grievance. She also met with all those C had raised grievances against. Dr Matthews commissioned an investigation from Mr Ibrahim who carried out further meetings. Dr Matthews considered and decided C's grievances. C was given a right of appeal which she exercised. While C disagreed with the outcome of the grievance, it was not inadequate. I find that nothing that R did in relation to the grievance investigation was calculated or likely to breach the term of mutual trust and confidence. Nothing R did in relation to this issue could form part of a course of conduct capable of breaching the implied term.

Conclusion on whether R committed a repudiatory breach of C's employment contract

39. In view of the above, I therefore find that R did not breach the implied term of trust and confidence. As R did not commit a repudiatory or fundamental breach of the C's contract of employment I find that she was not constructively dismissed. I therefore dismiss the claim.

Tribunal Judge Sills sitting as an Employment Judge

Date: 4 August 2023