



EMPLOYMENT TRIBUNALS

Claimant: Ms J Blair-McDonough

Respondent: The Secretary of State for Justice

Heard at: Manchester (in person)

On: 9, 10 and 11 May 2023

Before: Employment Judge L Cowen

REPRESENTATION:

Claimant: In person

Respondent: Ms Cummings (counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for constructive unfair dismissal is ill-founded and is dismissed.

REASONS

Introduction

1. The claimant's claim was heard between on 9 and 11 May 2023. Oral judgment was given on 11 May 2023. A request was made for written reasons at the conclusion of the hearing on 11 May 2023.
2. The claimant, Ms Blair-McDonagh, was employed by the respondent as an Operational Support Grade ("OSG"), working at HMP Garth, between June 2018 and December 2020.
3. The claimant claims that she was constructively dismissed, and that her dismissal was unfair. The respondent denies that the claimant was constructively

dismissed. The respondent did not seek to argue that there was a potentially fair reason for the claimant's dismissal.

4. The claimant gave sworn evidence. The respondent called the following witnesses, who each gave sworn evidence: Mr C Jones (Custodial Manager), Ms C Heginbotham (Operational Governor) and Mr A Lunt (Deputy Governor).

5. I have also had regard to documents contained in an agreed bundle as well as a chronology, cast list and further documents that were added to the bundle on the morning of the hearing.

Preliminary matters

6. The claimant's original claim included claims of sex discrimination and harassment. At a preliminary hearing that took place on 17 January 2022 Employment Judge Batten struck out the claimant's claims of sex discrimination and harassment as they had been brought out of time.

7. I clarified the scope of the claimant's claim at the start of the hearing on 9 May 2023. I confirmed that the only remaining part of the claimant's claim was her claim for unfair constructive dismissal, and it was agreed that the issues to be determined were contained in the List of Issues determined at the Case Management Hearing that took place on 15 July 2021 before Employment Judge Horne.

8. I also confirmed that the claimant could rely upon a witness statement, contained in an email, dated 8th May 2023. I also confirmed that what was allegedly said by a member of staff regarding her job not being a job for a woman could be relied on as part of the claimant's claim for unfair dismissal.

Issues for the Tribunal to decide

9. It is accepted that the claim is brought in time. It is accepted that the claimant was an employee of the respondent and that she had the qualifying length of service. It is accepted that she resigned on 10 December 2021, with her employment ending on 14 December 2021. The following issues were identified for the Tribunal to determine:

The relationship of trust and confidence

1. Did the conduct alleged by the claimant to have occurred happen?
2. In the case of conduct of colleagues who were not managers, was it the conduct of the "employer"?
3. Did the respondent have reasonable and proper cause?
4. Was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?
5. Did the claimant resign in response to the breach?
6. Did the claimant affirm the contract before resigning?

Redress of grievances

1. The claimant says that she made the following complaints, which should have been treated as grievances:
 - a. A complaint about Mr Pidduck which the claimant made orally to Mr Jones;
 - b. A complaint about Ms Banks that was described as “*well-documented*”;
 - c. A complaint about Ms Irwin made to Mr Jones and Ms Heginbotham by e-mail; and
 - d. A complaint to Ms Heginbotham about officers spreading rumours about her.
2. Did the claimant raise these grievances?
3. Did the respondent provide a reasonable opportunity for redress of those grievances?
4. If not, was the breach fundamental?
5. Did the claimant resign in response to the breach?
6. Did the claimant affirm the contract before resigning?

The Findings of Fact Relevant to the Issues

The Claimant's employment

10. The claimant was employed as an OSG at HMP Garth from 25 June 2018 until her resignation on 10 December 2020. Her Line Manager was Ms Heginbotham.
11. It is clear that the claimant was dedicated and committed to her work and wanted to do her job properly and with the knowledge and skills necessary to work in the prison environment.

The conduct of the Claimant's colleagues during her employment

12. The claimant alleges that in January 2019, a colleague, Mr Pidduck, said to the claimant, “*this is a job for a man not a woman*”. The claimant also alleges that he called her “*fucking useless*” or words to that effect on several occasions. Mr Jones accepts that the claimant spoke to him about this, and he spoke to Mr Pidduck, who denied the conduct alleged.
13. The claimant alleges that in February 2019, a colleague, Ms Banks, called the claimant a “*slag*”. The claimant told Mr Jones about this, and a mediation meeting was arranged. There are no minutes of this meeting. In light of this, I have not been able to reach a conclusion regarding what happened at the meeting, though both parties accept that the meeting did not resolve the issues raised. I accept that the meeting did not lead to Mr Jones being able to reach a conclusion regarding what had happened between the claimant and Ms Banks.

14. The claimant also alleges that in June 2020, a colleague, Ms Irwin, was abusive and disparaging when the claimant asked to swap duties with her due to the back pain the claimant was experiencing. In the additional statement included with her claim form, the claimant alleges that Ms Irwin referred to her back problem as “f***** convenient” and “a f***** joke”. The claimant sent an email to Mr Jones that referred to this allegation on 29th June 2020.

15. The claimant alleges that on 5 November 2020 two officers made disparaging comments to two other OSGs regarding the claimant and her use of a car hire vehicle. She emailed Ms Heginbotham about this conduct by email on 5 November 2020. The steps that Ms Heginbotham took in response to this communication are set out below.

16. There was reference made in the evidence to comments made by an employee called Steve. The claimant also made reference during the hearing to the appropriate training not being provided and information about an investigation that took place in relation to the claimant’s use of a car hire vehicle being leaked. These issues were not included on the claimant’s ET1 form and there was no application to amend the claim form to include these allegations. I have therefore not considered whether these matters formed part of the conduct that led to the claimant’s resignation.

17. When considering whether the conduct the claimant alleges happened, I have considered the conclusion of an internal investigation carried out by Mr Thomson, Custodial Manager, after the claimant had resigned. This concluded that there was no evidence that the claimant had been bullied by other members of staff. I found the claimant to be a credible witness regarding the conduct of her colleagues. I had regard to the fact that complaints were made immediately regarding most of the relevant conduct, and the complainant’s recollection was good regarding the relevant matters. I found that the alleged conduct did occur, and caused considerable distress to the claimant.

18. I have also considered who carried out this conduct, and concluded that this conduct was not carried out by individuals in a management position within the prison; the people involved were all working as OSGs.

Grievances raised by the claimant

19. The claimant says that she made the following complaints which should have been treated as grievances:

- a. A complaint about Mr Pidduck that the claimant made orally to Mr Jones;
- b. A complaint about Ms Banks;
- c. A complaint about Ms Irwin made to Mr Jones and Ms Heginbotham by email;
- d. A complaint to Ms Heginbotham about officers spreading rumours about the claimant.

20. I have determined that these complaints were made. It is agreed that the claimant did not raise any formal grievance in relation to these matters. The claimant says that whenever she sought to raise a grievance management advised her that there was little point in such a process, it was long-winded and the outcome would be of little point or use.

21. Ms Heginbotham and Mr Jones, who was not her line manager but who was someone the claimant regularly spoke to, deny this characterisation of their response. They say that they sought to provide support to the claimant and told her that she could pursue a grievance and that they would support her should she choose to do so. The claimant accepted that she did not consult her contract, the staff handbook or the grievance policy to learn more about how she might pursue a grievance.

22. I have found the claimant to be credible in her recollection of what was said to her. I accept that she genuinely feels she was dissuaded from bringing a formal grievance. The claimant also had a very consistent recollection of what she was told in relation to bringing a grievance, using the same or very similar terms throughout her evidence.

23. I also found the respondent's witnesses to be credible. Ms Heginbotham was very clear that she would not dissuade anyone from bringing a grievance. I do accept that she did seek to resolve matters informally, and I understand why she would take that approach. Mr Jones was also very clear that he would never say the process of bringing a grievance is long-winded and he explained in his evidence that he does not actually believe the process is long-winded or that the outcomes are pointless.

24. I have reminded myself that I cannot speculate as to what actually happened and I have to base my conclusions on the evidence I have seen and heard. I have also considered the documents in this case. What is apparent from the documents is that the possibility of bringing a grievance is emphasised to the claimant on several occasions, for example Ms Heginbotham's email of 27 March 2020, Mr Jones' email of 29 June 2020 and at the meeting of 10 November 2020. I therefore do not conclude that the claimant was dissuaded from bringing a grievance in the way claimed.

25. I have also considered whether in the absence of a formal grievance being lodged the respondent failed to provide a reasonable opportunity for redress of the complaints made, and I have considered the response of the respondent to each complaint in turn.

26. In relation to the alleged conduct of Mr Pidduck, Mr Jones explained that he spoke to Mr Pidduck at the time, who denied the allegations. He said that he requested an email from Mr Pidduck (which Mr Pidduck provided) and told the claimant about his enquiries and suggested she speak to her line manager.

27. The conduct of Ms Banks in February 2019 was reported to Mr Jones, who organised a mediation meeting. There are no minutes of that meeting. Mr Jones explained that at the time he sought information from another witness who at the time said that he had not heard any comment. Mr Jones was of the view that he could do no more to progress this investigation given that the argument really came down to one person's word against another. Mr Jones said that he told the claimant

she could put in a grievance and he offered to support her, and I accept that he would have done this.

28. The claimant raised further concerns about bullying at work during a meeting on 16 March 2020 with Ms Heginbotham and Mr Jones. This meeting followed her return to work from a period of sick leave. The notes of this meeting record that *“Jeanette stated she has concerns with some of our colleagues and feeling unhappy about coming into work”*. The notes record that submitting a grievance was discussed but that the claimant did not wish to do this at this time, and that the claimant said that as she had just returned to work she would monitor the situation. In a follow-up email Ms Heginbotham asked the claimant to confirm that this was her understanding of the meeting.

29. The next complaint was made on 29 June 2020 when the claimant contacted Mr Jones by email in relation to the conduct of Ms Irwin. Mr Jones replied to that email swiftly, outlining the grievance procedure and explaining that he could support her in it but that it would be her line manager who would carry out the investigation after the grievance was submitted.

30. I have found the tone of this email to be helpful and supportive, and Mr Jones appropriately signposted next steps that the claimant could have taken. In his evidence Mr Jones absolutely denied saying anything that would dissuade the claimant from bringing a grievance, and he was clear that his view was that without a grievance being submitted there was nothing further he could do.

31. The next complaint was made on 5 November 2020. The claimant emailed Ms Heginbotham about comments allegedly made by two officers in relation to her use of a car hire vehicle. In her complaint the claimant said that she *“definitely wanted a formal complaint putting in regarding these two”*.

32. Ms Heginbotham could not remember precisely what was discussed between her and the claimant after this correspondence, though there was a management meeting on 10 November 2020 the notes of which record that *“Jeanette stated she was happy for me to deal with [this issue] at a lower level”*. The notes do record that a grievance was discussed. Ms Heginbotham confirmed in her evidence that dealing with it *“at a lower level”* meant talking to the people involved. There was some initial ambiguity about identifying the individuals concerned which may have limited the formal response to this complaint. Ms Heginbotham’s approach, like that of Mr Jones, is clear, helpful, and indicates options open to the claimant to take the matter further.

33. The claimant was then on sick leave and annual leave between 15 November and 10 December 2020.

The circumstances of the claimant’s resignation

34. The claimant resigned during a meeting with Mr Lunt that was held on 10 December 2020. Mr Lunt had convened that meeting. During that meeting, he told the claimant that an investigation into her use of a car hire vehicle was to be taken further. The claimant resigned after she had been told of the outcome of that investigation. She had not prepared a resignation letter in advance of the meeting, and she drafted her resignation letter during that meeting.

35. The claimant's employment ended on 14 December 2020.

The law

36. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed if: - *"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."*

37. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, i.e. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach.

38. The claimant submits that the conduct of her colleagues, and/or the failure of her employer to adequately investigate this conduct and respond to her grievances constitutes a fundamental breach of contract. She relies upon two implied terms of contract: i) the implied duty to provide a reasonable opportunity for the redress of grievance and ii) the implied term of trust and confidence.

39. The implied term of trust and confidence was defined by the House of Lords in the case of **Malik and Mahmud v BCCI [1997] ICR 606** as being an obligation that an 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"*.

40. If there was a fundamental breach, the next question is whether the claimant resigned, at least in part, in response to the breach, and not for some other unconnected reason, and did the claimant resign before affirming the contract. If so, there will be a dismissal. If there is a dismissal it is for the respondent to show the reason for dismissal. In this case, the respondent does not seek to argue that any dismissal of the claimant was fair.

The parties' submissions

41. The respondent submitted that there had been no fundamental breach of contract. In relation to the implied term of trust and confidence, the respondent submitted that the conduct alleged by the claimant, even if it did occur, did not amount to bullying or harassment. The respondent also submitted that the conduct of the employees could not be attributed to the employer. In relation to the alleged failure to redress grievances, the respondent submitted that no grievances had been submitted. The respondent also submitted that the alleged breaches of contract were not the reason for the claimant's resignation, and that she affirmed the contract prior to her resignation.

42. The claimant submitted that her resignation was due to her colleague's conduct, and that she had been dissuaded from bringing grievances on several occasions. She described the distress caused by her colleagues' conduct, and she felt there had been no adequate investigation of this or response to it.

The Tribunal's conclusions

The implied term of trust and confidence

Did the conduct alleged by the claimant to have occurred happen?

43. For the reasons set out above, I concluded that the conduct alleged by the claimant did happen.

In the case of conduct of colleagues who were not managers, was it the conduct of the "employer"?

44. The conduct was not carried out by anyone in a managerial position. I have considered the legal test of vicarious liability, or alternatively the doctrine of agency, given that this case involves an alleged breach of contract. I have had regard to the case of **McKellan v The Co-operative Group [2006] 5 WL UK 287**, in which it was found that an employer was not automatically in breach of mutual trust and confidence arising from the mistreatment of one colleague by another.

45. I have also considered the factors set out in **De Clare Johnson v MYA Consulting Ltd [2007] 8 WLUK 280**, and considered the nature of the conduct and the extent to which it was done with the employer's authority, or under their instruction or control. I have found that the conduct cannot be said to have been done with the employer's authority, as it would clearly be contrary to any instructions or guidance given by the employer regarding how work is to be carried out. I do not conclude that the conduct was carried out under the instruction or control of the employer; the comments were not made in the presence of management staff and do not form part of the work the employees were required, or asked, to undertake.

46. For these reasons, I have determined that the conduct of the claimant's colleagues cannot be attributed to the employer.

The failure to redress grievances

47. I have considered the alleged failure of the respondent to address the complaints made by the claimant as a potential breach of the implied term to redress grievances, though there is some overlap with the implied term of trust and confidence.

Did the claimant raise these grievances? Did the respondent provide a reasonable opportunity for redress of those grievances?

48. I have found that the claimant made the complaints set out at paragraph [9] above. I have had regard to the complaints made by the claimant, and the advice she was given by those in managerial positions within the prison.

49. The claimant did not bring any formal grievance, and I accept the evidence of the respondent's witnesses regarding the limits of any investigation that could be carried out without any grievance being lodged. I accept that the claimant was given appropriate advice and support regarding the bringing of a grievance, and I do not conclude that she was discouraged to do so.

50. I accept that those who were notified of the claimant's complaints sought to investigate them appropriately and did explain to her that she could start a grievance procedure as the next stage to investigate matters further. I conclude that the respondent acted reasonably in their response to the complaints made by the claimant. I therefore do not conclude that they were in breach of the implied term to provide a reasonable opportunity to redress grievances, or that this conduct amounted to a breach of the implied term of trust and confidence.

51. I therefore conclude that there was no fundamental breach of contract such as to entitle the claimant to terminate the contract of employment. The claimant's claim is therefore without foundation and is dismissed.

52. Given these conclusions, I am not required to consider whether the conduct of the claimant's colleagues could amount to a breach of the implied term of trust and confidence. However, had I been required to, I would have concluded that the conduct, when taken together, would be such as to involve the humiliation of the employee, and in such circumstances the employer would be behaving in a way that, when viewed objectively, would be likely to destroy or seriously damage trust and confidence.

53. I am also not required to consider whether the breach of trust and confidence was a reason for the claimant's resignation. However, had I been required to, I would have concluded that it was. Although the news of the investigation being taken further would have been a factor in her decision to resign, I am satisfied that her colleagues' conduct was a reason for the claimant's resignation. If required to, I would also have found that the claimant did not affirm the contract before resigning, given that the most recent conduct that gave rise to the repudiatory breach occurred in November 2020. The claimant was then away from work for a period, and resigned when she returned to work on 10 December 2020.

Employment Judge L Cowen

Date: 9th August 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 August 2023

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