EMPLOYMENT TRIBUNALS

Claimant: **Karen Bushrod**

Respondent: **Bellway Homes Limited**

Heard at: **Bristol** **On: 10, 11, 12 and 13 July 2023**

Before: Employment Judge Le Grys
Ms S. Maidment
Mr H. Adam

Appearances
For the Claimant: In person
For the Respondent: Mr A. Pincott, legal advisor

JUDGMENT having been sent to the parties on **28 July 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Issues

1. The Claimant was employed by the Respondent as a sales advisor from 1 March 2019 until her resignation on 1 October 2021. By way of a claim form of 4 February 2022 she brought claims for constructive unfair dismissal, wrongful dismissal and breach of contract relating to notice pay, and unfavourable treatment on the grounds that she was a part-time worker. She states that her resignation was in circumstances such as to amount to a dismissal, having been subject to an unfair disciplinary process in respect of an incident involving the re-sale of goods purchased in a company auction. If her resignation is taken as an unfair dismissal then she argues that she was not paid the required notice pay in accordance with her contract. She further argues that the Respondent treated her unfavourably as a part-time worker by stating that she would be required to move into a 'floating' role, something which was not imposed upon full-time staff.

2. By way of a response form dated 26 April 2022 the Respondent resisted the complaints. The Respondent's case is that it conducted a fair investigation process into matters which amounted to misconduct, and potentially gross misconduct, and imposed a reasonable sanction at the end of that process.

The Claimant was therefore not entitled to treat this as a fundamental breach of the contract, and so her resignation did not amount to a dismissal. In relation to part-time workers, it is denied that the Claimant was treated in any way differently as a part-time employee.

3. The parties agreed at the outset that the issues to be determined by the Tribunal were as set out in the Case Management Order (CMO) of EJ Hughes dated 21 July 2022. While wrongful dismissal (notice) and breach of contract are listed in that CMO as separate issues it was agreed that these both related to the same matter of notice pay.

4. For the sake of completeness we note that we have not considered any issues relating to time limits, such issues having been previously addressed in a judgment of EJ Hughes dated 13 July 2022.

Procedure

5. The Tribunal heard evidence from the Claimant, who also called Melanie Lewis and Daniela Morsani. Melanie Lewis had difficulties in attending the Tribunal in person and so we gave permission for her to attend via CVP, following the Respondent's evidence. For the Respondent we heard from Tim Lund, Iwan Roberts and Dan Holland. We considered the evidence in a 203 page bundle provided by the parties, to which the Respondent added a single page relating to Melanie Jones' promotion. Written submissions were provided by both the Claimant and Respondent.

Relevant Legal Framework

Constructive dismissal

6. Section 95(1)(c) Employment Rights Act 1996 states that there has been a dismissal when an employee terminates a contract in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct. This is commonly called 'constructive dismissal'.

7. In order to claim constructive dismissal the employee must show that there has been a fundamental breach of contract on the part of the employer; that this breach caused the employee to resign; and that the employee did not delay too long before resigning, thus affirming the contract.

8. Contractual terms may be either express or implied, and individual actions that do not in themselves constitute fundamental breaches of any term may have a cumulative effect, such as undermining the trust and confidence inherent in every contract of employment. A course of conduct may cumulatively amount to a fundamental breach following a 'last straw' incident, even if that last straw does not itself amount to a breach.

9. A fundamental breach of contract can be an actual or an anticipated breach. If a contractual term exists and is found to have been breached then the Tribunal must consider if this amounts to a fundamental breach; it makes no difference if the employer did not intend to end the contract.

10. Section 95(1)(c) does not introduce a concept of reasonable behaviour by employers into contracts of employment and the question of whether an

employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

11. Once it has been established that the employer has committed a repudiatory breach of contract, the employee must go on to show that he or she accepted the repudiation. This means that the employee must terminate the contract by resigning, either with or without notice. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. This means that if there is an underlying (or ulterior) reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal.

12. A constructive dismissal is not necessarily an unfair one and if a constructive dismissal is found then the Tribunal must move on to consider more generally the issue of fairness.

Less favourable treatment as a part-time worker

13. The right not to be treated less favourably as a part-time worker is contained in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker as regards the terms of his contract or by being subject to any other detriment by any act, or deliberate failure to act by his employer, where that treatment cannot be justified on objective grounds.

14. Regulation 2(4) sets out the criteria for establishing who is a comparable full-time worker in relation to a particular part-time worker. The effect of this provision is that a part-time worker can compare his or her position with that of a full-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place:

    a. Both workers are employed by the same employer under the same type of contract;
    b. Both workers are engaged in the same or broadly similar work, having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and
    c. The full-time worker works or is based at the same establishment as the part-time worker.

15. In order to be comparable for the purpose of a Regulation 5 claim, therefore, the part-time worker and his or her comparator must also be engaged in the 'same or broadly similar work', having regard, where relevant, to whether they have a similar level of qualification, skills and experience (Regulation 2(4)(a)(ii)).

16. The key question under Regulation 2(4)(a)(ii) is not whether the work is exactly the same but whether it is broadly similar. Where full-timers and part-timers spend much of their time on the core activity of the enterprise, the fact that the full-timers perform additional tasks would not prevent the work of the two groups being regarded as 'the same or broadly similar'. It is not the case, however, that whenever a large component of the work of the two groups is the same, and is important to the enterprise, it necessarily

follows that the work is broadly similar. In such a situation, the crucial question becomes whether the remaining differences are of such importance that they prevent the work being regarded as broadly similar.

17. Unlike discrimination claims, there is no provision for a comparison to be made with a hypothetical comparator.

Findings of fact

18. The Claimant's work as a sales advisor involved the sale of residential properties on behalf of the Respondent. Her place of work was the Corsham office, where she worked 21 hours a week over three days. Her basic salary was £13,800, and she was also entitled to commission which, prior to the events in these proceedings, amounted to just over £20,000 per year additional income.

19. The Claimant's contract required her to work from any office within the Respondent's South West region, and included provision for occasional work elsewhere if necessary. A sales advisor would ordinarily be assigned to a particular site until such time that they had sold all of their properties, at which point they would be assigned to a new site. If for any reason a new site was not immediately available they could be required to 'float', which is to say that they would then work flexibly across any site as required until such a time that they could be assigned somewhere on a more permanent basis. While floating they would not receive commission on sales but instead received an allowance which, for the Claimant, would amount to £450 a month; this would be a significant drop on her usual commission.

20. It was agreed by all parties that the requirement to float, at least on a temporary basis, was a standard condition of work in the industry. The Claimant accepted that it was something that she would occasionally need to do, albeit she had not previously had to do so with Bellway.

Part-time issues

21. On 28 June 2021 a meeting was held by the Respondent. It was agreed evidence that both part-time and full-time workers attended this meeting. It was announced that, as the Corsham office was soon to close upon the sale of all plots, staff may need to float. This was because there had been delays in new plots being completed and so there was no site to which they could be immediately deployed.

22. The Claimant did not suggest that the requirement to move to a new site, nor a potential temporary reduction in commission, would in itself amount to a breach of her contract. She argued, however, that this proposal was unreasonable in that it was to be for an indefinite period rather than on a temporary basis. She further alleged that the requirement to float was only to extend to part-time employees, and that this therefore amounted to less favourable treatment. The Respondent did not accept that any distinction had been drawn at the meeting between part and full-time employees.

23. We accept the evidence of the Respondent on this point. It was agreed that both part-time and full-time employees were at the meeting, which in itself supports the suggestion that the announcement was made to everyone

equally. The Claimant was unable to produce any documentary evidence to show that it was said that the changes would be limited to part-time staff. While she believed that minutes had been taken and circulated she had been unable to locate these. Furthermore, no documentary evidence has been provided suggesting that any concerns were raised following the meeting, and the Claimant did not mention it at all in her resignation letter. There is therefore no contemporaneous evidence to corroborate the Claimant's assertions that the announcement was made solely in respect of part-time employees.

24. In contrast, the Tribunal heard clear evidence from three witnesses for the Respondent, including Mr Lund who conducted the meeting, who each stated that it was never suggested that these proposals would be limited to part-time workers. We found their evidence to be clear and consistent and supported by the overall circumstances, including, as noted previously, the fact that both part-time and full-time employees were present. Furthermore, it was agreed that nobody was actually re-deployed at this stage nor was anyone specifically told what would happen in their individual case. In circumstances where no firm decisions about deployment had been taken there are no grounds to conclude that it had already been determined the employees to which this would apply. We further note that Ms Morsani, a part-time worker alongside the Claimant who remained with the Respondent after the Claimant's resignation, was ultimately assigned to a new site alongside a full-time worker and was not, in fact, required to float. This does not, therefore, support the conclusion that there had been any intention to treat part-time workers differently in this respect, or that they were expected to float indefinitely.

25. While we do accept that part-time workers were informed at this meeting that they could consider applying for available positions in Wales as an alternative to floating, both the Claimant and Ms Morsani stated that these vacancies were part-time roles and so it follows that they might not have been a suitable option for full-time staff. As such, the specific reference to part-time workers in this context would amount to no more than an effort to inform staff as to the options that were available to them, rather than supporting the suggestion that there was an unreasonable and unfair pressure on part-time workers to move.

26. Taking this all into consideration we are not satisfied that any distinction was drawn in this meeting between part-time and full-time workers. We instead find as fact that the meeting was to provide an update to all staff as to the current situation so that they were aware of the risk that they may need to float.

27. The Claimant also stated that part-time workers were treated less favourably by virtue of matters such as the unfavourable allocation of leave, particularly at Christmas. These matters were not raised in her claim form, or in the case management orders that followed the preliminary hearing of 13 July 2022, and so the Claimant applied at the conclusion of proceedings for her claim to be amended. The Respondent opposed the application. Having taken into consideration the arguments for both parties we were satisfied that the balance of hardship fell in favour of allowing the amendment, the Respondent having already addressed the issues in submissions and so there being no significant prejudice caused.

28. We do not find, however, that part-time workers were treated less favourably on the additional grounds alleged. The Claimant and her witnesses accepted that the contract, as well as the policies that were followed, were applied equally to both full and part-time staff. Pay and conditions were identical, albeit on a pro-rata basis as appropriate. While the Claimant and Ms Morsani alleged that there was unfairness in relation to the pro-rating of leave, particularly at Christmas, Ms Morsani further stated that when she had drawn such matters to the attention of the Respondent they had always been corrected, thereby suggesting that these were no more than an error in how the leave was being recorded. We are not satisfied in the circumstances that this amounts to less favourable treatment.

The staff auction

29. We therefore turn to the disciplinary process. As part of the ordinary business of the Respondent show homes would be fully furnished for potential customers to view. Once all units had been sold the Respondent would need to dispose of these furnishings, which it did by way of a closed staff auction. Staff members could bid for items, with the winner paying the money to the Respondent's chosen charity. It was agreed that this process was of benefit to staff, who could purchase nearly new items at significantly reduced cost; the Respondent, who would otherwise incur costs in disposing of the items; and charity, who would receive the proceeds.

30. It was further agreed that the staff auction was a relatively informal event, with no reference being made to it in the contract nor any written rules provided. As bids were made without staff necessarily having sight of the actual item the winner would sometimes find that what they had purchased was unsuitable, for example being too big or too small. Once the item had been purchased, however, it belonged to the winner and so it was their property to do with as they wished, as well as their responsibility to arrange for it to be removed from the show home.

31. In June 2021 an auction was held in relation to the Corsham site and on 30 June the Claimant bid for a number of items. In the course of her employment she had previously participated in similar auctions, having won a total of 164 items. She accepted that this was a relatively large amount but did not accept that they had been purchased with the intention of being re-sold. She said that she was instead bidding for herself, or to help her friends and family by bidding on their behalf in order to help them to buy items at greatly reduced cost.

32. On 10 July 2021 the Claimant was informed that she had won 12 lots in the Corsham auction, and was made aware that certain other items had not been sold. She therefore submitted a bid of £85 for a sofa, which she ultimately won.

33. The following day, on 11 July 2021, the Claimant advertised this sofa for sale on Facebook marketplace. A potential buyer, Mrs Clark, contacted her about it. The Claimant and Mrs Clark were unable to reach an agreement as Mrs Clark was not prepared to pay for the sofa until delivery, but the Claimant wanted a deposit before agreeing a sale. The messages between the pair suggest that Mrs Clark was concerned about being scammed. The

two eventually agreed on a form of compromise whereby Mrs Clark would travel to the Corsham site to view the sofa before any money was exchanged. This required her to travel some distance, as she lived around an hours drive away.

34. The Claimant agreed with Mrs Clark that they would meet on the site that Sunday. This was a non-working day for her and the site was otherwise closed. As this was during the COVID pandemic the Respondent also had in place additional health and safety requirements, which included the need for all staff and visitors to be signed in and out. The Claimant accepts that she did not record Mrs Clark as a visitor, nor did she sign herself in and out on this occasion, stating that it was unnecessary as she complied with all other requirements including wearing a mask.

35. The sale of the sofa did not proceed. The messages suggest that the Claimant instead sold the item to somebody else, after Mrs Clark had seen it and believed that they had reached an agreement. Mrs Clark was therefore extremely unhappy with the Claimant and suggested that this was a scam; after a short exchange of further messages the Claimant blocked her.

36. Mrs Clark then contacted Bellway to complain. In an email of 20 July 2021 she described the Claimant as a rude lady, and she was concerned that she was trying to take money upfront and then not deliver items. She stated that she recognised that Bellway would wish to deal with this “in house” rather than by her reporting the matter to the police.

37. As a result of this complaint the Respondent commenced an investigation. In evidence the Claimant accepted that it was reasonable for the Respondent to do so. We are also satisfied that this was a reasonable action. In inviting Mrs Clark to a Bellway site the Claimant, whether intentionally or otherwise, had associated what she was doing with the company. The person she had dealt with was clearly unhappy and considered the Claimant’s behaviour to be potentially fraudulent, and by complaining directly to the Respondent, as well as her reference to matters being dealt with “in house”, appeared to connect events directly with them. The complaint ultimately amounted to an allegation of potential criminal behaviour by a company employee on company property and, while it is impossible to predict whether this would ever have led to actual reputational damage, the risk that it might do so was plain. In the circumstances it was entirely reasonable for the Respondent to make a more detailed enquiry as to what had happened.

38. The initial investigation was conducted by Tim Lund, who spoke with the Claimant’s Sales Manager, Christel Hawkins, and another sales manager, Rachel Way. His intention was to learn about the rules in respect of the staff auction, and the processes about signing on visitors. He subsequently interviewed the Claimant about what he had been told. She confirmed that she had taken Mrs Clark on site and that she had not obtained permission for this to happen. She acknowledged that this was in breach of the COVID procedures in place at the time. She recognised that she should not have done what she did from a Bellway site and that it would have been better if she had done it at her own house. She claimed that she had permission from a manager to re-sell the item but refused to name who this was. She

denied that she had engaged in any corrupt behaviour and didn't think she had done anything wrong in looking to sell the item.

39. Having completed his investigation Mr Roberts concluded that there was a case to answer for four allegations, namely the negligent use of company property; failure to observe health and safety rules; engaging in corrupt practice; and potentially bringing the company into disrepute. He therefore referred the matter to a disciplinary hearing.

40. Iwan Roberts, Divisional Finance Director whose responsibilities also included HR, dealt with this. He also met with the Claimant, during which time she gave contradictory answers as to whether she had intended to sell the sofa. The Claimant accepted that Mrs Clark had been on the site for the purpose of viewing the sofa rather than anything connected to the purchase of a property from Bellway. Mr Roberts was shocked as to how many items the Claimant had previously purchased in staff auctions and he highlighted that this included 8 sofas, 4 beds, and 9 sets of tables and chairs. He did not accept that these were all for personal use and felt that purchasing items for re-sale was against the spirit of a charity auction.

41. Having considered the material gathered during the investigation, as well as his interview with the Claimant, Mr Roberts concluded that her actions had the potential to bring the company into disrepute, given that Mrs Clark had attended a Bellway site and believed that she was dealing with the company. He also found that health and safety procedures had not been followed. He did not consider that the Claimant's actions amounted to gross misconduct but did conclude that they were sufficiently serious to amount to misconduct. He therefore determined that the actions warranted a final written warning. In line with management guidance he decided that this would last for 18 months.

42. Having considered the evidence before us we are satisfied, and find as fact, that the imposition of a final written warning was reasonable. The Claimant gave inconsistent evidence, including to the Tribunal, as to whether she had permission to sell the item, as well as whether this was for her own benefit or in order to donate the additional money to charity. While she claimed that re-selling goods was an accepted practice she refused to name during the investigation who she said had given her permission on the grounds that she didn't want to get them into trouble, which suggests that she was at least concerned that this might not have been permitted. There was no contemporaneous documentary evidence to show that she had been given approval to go to the site when it was closed in order to conduct a private sale, and in her meeting with Mr Lund she agreed that such permission had not been given. While the Claimant alleged that other staff were also selling items there is nothing to suggest that they were doing so by bringing members of the general public on to a closed site, therefore associating their actions directly with the company, and so the circumstances were not directly comparable. In any event Melanie Lewis suggested that any such onward sales that might have happened were in circumstances in which goods were found to be unsuitable, rather than that they had been purchased with the intention of being re-sold. Furthermore, the Respondent was dealing with the Claimant's case alone and the fact that others may also have been unofficially engaging in such practice does not necessarily impact on how it should have treated her behaviour.

43. Whether the Claimant had re-sold the sofa was also not the sole issue in the disciplinary outcome. Mr Roberts clearly identified a number of other relevant factors, including the fact that she had entered a closed company site without signing in or out and without a legitimate reason connected to her work. Given the prevailing situation at the time in respect of COVID the lack of records as to visits was a potentially significant health and safety issue; Mr Roberts also questioned whether they would be insured if there had been an incident. In taking Mrs Clark to a Bellway site there was also a clear and obvious risk that the Claimant would, whether intentionally or otherwise, associate her actions with the company, a concern that appeared to be merited given that Mrs Clark did indeed complain directly to them.

44. In all the circumstances there were clear grounds to conclude that at least misconduct had taken place. Given that some of the allegations found to be proven, such as engaging in misconduct of such a serious nature as to bring the company into disrepute, arguably amounted to gross misconduct (for which the potential sanctions included summary dismissal), the Tribunal is of the view that the imposition of a warning, albeit of a final and written nature, was a proportionate and reasonable outcome.

45. The Claimant appealed this decision, with the appeal being heard by Dan Holland, Regional Director, on 16 September 2021. During the appeal hearing the Claimant again declined to say who had given her permission to re-sell the items and gave contradictory answers as to whether she was doing so for personal gain. Mr Holland felt that she was evasive about the rules on site visits and had tried to suggest that these were not followed by others in any event. He further stated that she appeared not to grasp the seriousness of the issue. The Claimant did not raise any concerns as to the thoroughness of the original investigation or suggest that others should have been spoken to by Mr Lund.

46. Having heard the appeal Mr Holland concluded that the length of the written warning was inconsistent with the company disciplinary policy, which stated that such a warning would be disregarded after 12 months; the management guidance issued to, and followed by, Mr Roberts had incorrectly stated that it should be for 18 months. He therefore allowed the appeal to that limited extent. Mr Holland did find, however, that the central allegations were made out and upheld the imposition of a written warning.

47. The Claimant was notified of this decision on 17 September 2021. On the same date she submitted a fit note stating that she was not fit for work because of anxiety and stress. In a letter dated 30 September 2021 but which the Claimant states she sent on 1 October 2021 she resigned from her position with immediate effect. This was a relatively short letter and the only reason given was “due to the recent proceedings, and appeals thereto, my position has been made untenable”.

Discussion and conclusions

Constructive unfair dismissal

48. Applying our findings to the law, we are satisfied that the Claimant resigned as a result of the Respondent imposing a disciplinary sanction upon her.

Given that we are not satisfied that she raised any concerns as to her part-time worker status before her resignation, however, nor in her resignation letter itself, we are not satisfied that this was an additional relevant cause of her resignation.

49. We therefore turn to the question of whether the act of the Respondent in imposing a disciplinary sanction amounted a fundamental breach of contract. We remind ourselves that we are not substituting our own views of what the Respondent should have done but are considering whether there was in fact a breach of contract of such seriousness that the Claimant was entitled to resign in response.

50. We are not satisfied that the act of the Respondent amounted to a fundament breach of the contract. The imposition of a disciplinary sanction in the circumstances as we have found was a reasonable and proportionate outcome. The Respondent was justified in commencing an investigation in circumstances in which a complaint had been made about the Claimant's actions on company property. The investigation was conducted reasonably, with Mr Lund speaking to relevant staff members in order to understand the process and giving the Claimant a fair opportunity to answer the clearly presented allegations. The Claimant did not suggest during this time or at the subsequent disciplinary meetings that the investigation was incomplete and so it was reasonable for the Respondent to conclude, having spoken to the key players, that it had the relevant information. While an error was made in respect of the original length of the written warning this was rectified as part of the appeals process, demonstrating that the overall process was fair and had taken into account the Claimant's submissions.

51. The Claimant's account, both to the Respondent and the Tribunal, was contradictory and she did not present to the Respondent the information that she says would have supported her case. She accepted that she had not complied with the signing on requirements, and had taken someone to a closed Bellway site for reasons other than officially connected to her work. Even on the agreed evidence, therefore, the Respondent was presented with a situation in which the Claimant's actions were not in line with the relevant health and safety requirements, and which had led to a member of the public directly connecting the company with what they considered to be a potential scam. In such circumstances there were clear grounds to conclude that the Claimant had committed an act of at least misconduct.

52. The sanction imposed amounted to a warning about future behaviour and did not otherwise restrict her ability to work or perform her contractual obligations. She accepted that there was no contractual right to participate in future auctions and gave evidence that this would not in fact impact her as she no longer wished to purchase items in any event. Her exclusion from this did not, therefore, in itself amount to an unfair sanction. She had a fair opportunity to appeal the outcome in accordance with policy and procedures, and as part of that appeal the Respondent accepted that an error had been made with the length of the warning and amended it accordingly. The overall process was, therefore fairly conducted and reached an objectively reasonable conclusion.

53. In circumstances where a proportionate disciplinary sanction was imposed following a fair process conducted in accordance with procedures we do not

find that the implied term of trust and confidence was breached by reason of the fact that the Claimant did not agree with the conclusions. For these reasons we do not find that the Claimant was constructively dismissed and the claim must therefore fail.

Less favourable treatment – part-time workers

54. In order to succeed in a claim of unfavourable treatment by reason of being a part-time worker the Claimant must identify a comparator who is in the same or a broadly similar role. The Claimant relies on Melanie Lewis, who gave evidence to the Tribunal.

55. Mrs Lewis stated that she was no longer working at the same site as the Claimant at the time of the relevant incidents and had been promoted to a senior Sales role before this date.

56. We accept that Melanie Lewis did continue with some of her previous duties following promotion. She also described, however, additional duties such as weekend working and compiling rotas. We also note from her promotion letter that the role carried a higher basic salary than the Claimant.

57. Taking this all into consideration we are not satisfied that Mrs Lewis was in the same or a broadly similar role to the Claimant. She was employed in a different position to the Claimant, undertaking additional duties while working at a different site and for a higher salary. While she did continue with some of her previous duties, and so there was a degree of overlap with the Claimant's work, Mrs Lewis was ultimately in a position of additional responsibility.

58. We are therefore not satisfied that she is a valid comparator and the claim must fail for this reason.

59. In any event, we have found above that the requirement to float was not limited to part-time workers, nor was there any notable difference in respect of the terms and conditions required of part-time and full-time workers. We are therefore not satisfied that the Claimant was treated less favourably and the claim would therefore have failed for these reasons regardless of the comparator.

Wrongful dismissal/breach of contract

60. As we have found that the Claimant was not dismissed and therefore resigned, this claim must logically also fail.

Employment Judge Le Grys
Date: 7 August 2023

Reasons sent to the parties on 24 August 2023

For the Tribunal Office