



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms W Richards

**Respondent:** K M Bowen

**HELD AT/BY:** Wrexham by CVP      **on:** 17-18<sup>th</sup> July 2023

**BEFORE:** Employment Judge T. Vincent Ryan

## REPRESENTATION:

**Claimant:** Ms D Bowd, CAB

**Respondent:** Litigant in Person

**JUDGMENT** having been sent to the parties on 24 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

**The Issues:** The issues to be decided were:

1. Holiday pay claim:

1.1. did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when her employment ended?

1.2. If so, how much is due to the claimant?

2. Breach of Contract (Notice)/Wrongful Dismissal claim:

2.1. what was the claimant's notice period?

2.2. Was the claimant paid for that notice period?

2.3. Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

3. Claim of constructive Unfair Dismissal:

3.1. Was the claimant dismissed?

3.1.1. Did the respondent breach the implied term of trust and confidence?

3.1.2. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

3.1.3. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that she chose to keep the contract alive even after the breach.

3.2. If the claimant was dismissed what was the reason for breach of contract?

3.3. Was it a potentially fair reason?

3.4. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

4. Remedy for Unfair Dismissal:

4.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

4.1.1. What financial losses has the dismissal caused the Claimant?

4.1.2. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

4.1.3. If not, for what period of loss should the Claimant be compensated?

4.1.4. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.1.5. If so, should the Claimant's compensation be reduced? By how much?

4.1.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.1.7. Did the Respondent or the Claimant unreasonably fail to comply with it?

4.1.8. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

4.1.9. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

4.1.10. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

4.2. What basic award is payable to the Claimant, if any?

4.3. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

**The Facts:**

5. The respondent (R) is a small employer in that at the material time he employed three people, including the claimant, and he worked in the business. Mr Bowen holds the copyright for the calibration of decelerometers compliant with various road traffic legislation and suited to the needs of MOT testing of vehicles. He works within the business, and correctly described himself as the "brains of the operation". There is no HR function or professional legal or HR advice and assistance available. The documentation is basic and R has a rudimentary understanding of employment law. In fact for some time he misunderstood the legal entitlement to paid annual leave and did not keep up with changes to the law such that for quite some time he inadvertently, and in ignorance, underpaid holiday pay. The upshot of this is that upon termination of her employment the claimant was not paid five days holiday pay to which she was entitled. The respondent conceded liability to pay to the claimant's accrued holiday pay, calculated at £622.50, subject to the usual statutory deductions.
6. Ms Richards (C) was employed by the respondent from 24 April 2018 until 21 November 2022. Initially C was taken on for maternity leave cover, working as a laboratory assistant and general office worker. Her role was made permanent when the person whom she was covering did not return to work at the end of her maternity leave. C increased her hours and was paid additional salary. She also received generous travel expenses, bonuses, Christmas presents and some holiday money from R (all of which she appreciated).
7. C was appreciated by R as being not only a very efficient worker, but the most efficient worker that he had employed. She was valuable to him. He could not envisage working without her and tried hard to retain her employment over the years when there were difficulties, such as with other members of staff. In dealing with staff who were considered to be underperforming, R trusted C's view of the capability or otherwise of her colleagues, to the extent of agreeing to the termination of employment of two employees on her recommendation (albeit terms were agreed and they left by mutual consent). Over time R accredited C with the title of Deputy Manager, in that he considered her to be his deputy. She was referred to by this title by staff and customers. Her job title became Deputy Manager and her role, duties and responsibilities reflected this title.
8. On 11 November 2022 C was critical of the work of Cathy Jones, who was working under her line management. She reported this to R. Ms Jones joined them in R's office. There was a row. During the altercation R pushed C, and as she left the room he pushed or otherwise ejected her from the room using either his hand, knee, or foot to do so. I find from C's explanation that this is what

happened, although she feels that it was a kick because when she turned around she saw R with his arms spread out wide as if for balance and his foot still in the air. Her explanation in evidence is consistent with what she says she told her colleague Mr Guscott on that day, and she wrote several emails that are in the bundle that are consistent in this respect, and which were dated around that time; she has been consistent throughout. R's evidence is less credible and was put less plausibly. If he was trying to keep the claimant away from him as he describes when he said he pushed her it makes no sense that he would be so close behind her when she opened the door inwards and stepped back merely for it to open, that they can have come into contact; on the balance of probabilities I find that the C's description of the events is what occurred; it was more likely the case. In any event she made this allegation clear and it was not denied at the time; in fact R apologised to C for having lost his temper. When he apologised he did not make an accusation of aggression or violent temper against C. His apology is suggestive of an acceptance of fault on his part.

9. On 16<sup>th</sup> November in the light of what had occurred and other matters that irked C, she resigned. Her reasons are set out in an email at pages 82 and 83. In that email she described the incident of 11 November.
10. R was anxious not to lose C. They spoke to each other on 17<sup>th</sup> November. One of C's concerns was that as the business was so dependent upon R, if he were to close the business or it were to close through his illness (or indeed death), she would have no security. She asked that she be paid three months' salary in lieu of notice in those circumstances. She also wanted a pay rise. She wanted to be treated with respect, and for an acknowledgement from R that she was due respect with no insulting name-calling as had been his practice in the past. C had been demeaned by class-based insults from R in the past and she wanted this to stop. R agreed her terms. It was agreed that there would be written documentation to confirm this agreement. In the light of this, and subject only to these conditions, C was prepared to return to work and rescind her resignation.
11. On 21 November 2022 R presented C with a draft contract for her signature. The contract confirmed an increased hourly rate but referred to her as "Laboratory Assistant - General Office Secretary"; C was not afforded her proper title of Deputy Manager, which had been used for some years. The pay in lieu of notice agreement (of three months' notice) was recorded instead as a provision that "notice of dismissal or resignation shall be at least one calendar month, unless there is genuine legal cause for immediate dismissal". The draft also introduced for the first time a restrictive covenant clause preventing C from working in other similar employment for a minimum of three years should she leave her employment with R, and a confidentiality clause (neither of which had previously been in her contract, had been discussed between them or had been the subject of agreement); there was no additional consideration for these unilaterally imposed restrictions in the document R produced.
12. C considered that R had gone back on the agreement that had been reached on 17-18 November. He had reneged, depriving her of the three month pay in lieu of notice provision and the agreed security that she so earnestly wanted; that he had attempted to impose terms upon her without her consent; that he had demoted her. C no longer trusted Mr Bowen. She had been prepared to forgive

him for the events of 11 November but on condition that he made the agreed efforts to repair their broken relationship. The draft contract caused irreparable damage as did R's insistence on its acceptance and C's signature to it within a short timeframe.

13. By email dated 21 November 2022 C confirmed her resignation. I accept that the reasons set out in her email (at page 87 of the hearing bundle) fully and accurately reflects her feelings at the time and explain her rationale for resignation. I reject R's repeated assertion that C resigned because she wanted a bigger pay rise or that she wanted others to be dismissed, or that she wished to be the sole laboratory worker. C resigned for the reasons that she stated in her two emails of resignation, because having seriously damaged the relationship by his conduct towards her, R then reneged on an agreement aimed at repairing the relationship and by so doing he destroyed it. By his continued detrimental conduct towards C, R had destroyed her trust and confidence in him.
14. C complained to R about his treatment of her during the course of employment. R did not investigate her complaints, consider his own behaviour towards her, convene a meeting or in any sense address her many grievances. In his attempt to address what he considered to be a problem R made a promise, René Donna promised, and sought to impose detrimental terms on C. He therefore failed to deal with a grievances. He did not abide by the ACAS code that was applicable.
15. Severely affect C's health; she attended her GP's surgery on 15 November in relation to the incident on 11 November and was so distressed and affected that her medical records show several GP appointments between then and 12 May 2023 for stress and anxiety. She suffered a loss of confidence because of R's conduct.
16. C qualified for payment of ESA, which she still receives. Having had an initial interview she has been officially notified that she does not have to undergo any further assessment unless called for interview and she is not required to provide further certification.
17. By April 2023 the claimant was in a position whereby she was able to look for employment. She made several job applications response to some of which were encouraging albeit the salaries were not commensurate that enjoyed whilst working for R. C found the interview process difficult because of the loss of confidence and she did not perform well at interview. She made multiple job applications from which she had no response and for substantive applications. One unsuccessful interview she was told that she needed "to sort yourself out", in reference to her stress anxiety and loss of confidence.
18. C registered with employment agencies.
19. C sought employment with numerous supermarkets, including Tesco and Morrisons, (but not Aldi in Newport because at the time of that vacancy she was suffering stress).
20. C is provided a schedule of loss which includes the necessary information for a Basic Award calculation which I approve.

**The Law:**

21. The law on the matter has been explained by me on numerous occasions and was set out in detail by Ms Bowd.
22. S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).
23. It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour as the basis of their resignation and a claimed dismissal.
24. The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence, and any such breach must be repudiatory; a breach of the implied term will be repudiatory, meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether there has been a repudiatory breach of contract by the employer is a question of fact for the Tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured and it is a matter for the employee whether to accept the breach as one leading to termination of the contract, or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position for the time being).
25. As to whether a claimant has resigned as a result of a breach of contract, where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.
26. Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.
27. "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions" **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** (Per LJ Underhill):

- 27.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- 27.2. Has he or she affirmed the contract since that act?
- 27.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
- 27.4. If not, was it nevertheless a part (applying the approach explained in *Omilaju* [that “the function of the Employment Tribunal when faced with a series of actions by the employer is to look at all the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer”]) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)-breach of the *Malik* [trust and confidence] term? If it was, there is no need for any separate consideration of a possible previous affirmation, [because: “If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so”).
- 27.5. Did the employee resign in response (or partly in response) to that breach?

## 28. REMEDY:

With regard to the compensation for unfair dismissal I had to decide:

- 28.1 The amount of compensation to be awarded to the claimant.
- 28.2 Whether the claimant had effectively mitigated losses in accordance with the duty that applies to damages recoverable under the common law of England and Wales;
- 28.3 The extent to which, if at all, any awards should be reduced to reflect the risk facing the claimant of being fairly dismissed (**Polkey** deduction).
- 28.4 The exercise requires the application of the following principles:
  - 28.4.1 The award must be such sum as is considered to be just and equitable in all the circumstances in respect of the loss attributable to the action of the employer as set out above.
  - 28.4.2 The loss referred to shall be taken to include any expenses reasonably incurred by the claimants in consequence of the dismissal and any loss of benefit which he might reasonably be expected to have had but for the dismissal.

28.4.3 Polkey – under the Polkey principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

28.4.4 By virtue of section 123(4) the Tribunal shall apply the same rule concerning mitigation as I have set out above; this is not an absolute duty, the claimants being required only to take such steps as are reasonable, and it is for the respondent to show that there has not been mitigation. The question to be resolved is whether the claimant has done enough depending on applicable particular circumstances and where the respondent must take the claimant as it finds him. The principles governing mitigation of loss as follows:

28.4.4.1 the burden of proof is on the wrongdoer - a claimant does not have to prove that he or she has mitigated his or her loss;

28.4.4.2 the burden of proof is not neutral and if no evidence on the point is put before the Tribunal by the wrongdoer then the Tribunal has no obligation to find it;

28.4.4.3 what has to be proved is that the claimant acted unreasonably; there is a difference between acting reasonably and not acting unreasonably;

28.4.4.4 what is reasonable or unreasonable is a matter of fact;

28.4.4.5 it is to be determined taking into account the views and wishes of the claimant as one of the circumstances, although it is the Tribunal's assessment of reasonableness and not the claimant's that counts;

28.4.4.6 the Tribunal is not to apply too demanding a standard to the victim;



28.4.4.7 the test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate; and

28.4.4.8 in a case in which it may be perfectly reasonable for a claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the tribunal to conclude that the claimant has acted unreasonably but it is not in itself sufficient.

**Application of law to facts:**

29. Trust and confidence is the foundation of the contractual relationship between employer and employee. Employer and employee do not need to be best friends, to socialise at any particular level, but there must at the very least be trust and confidence between them such that an employer knows that the employee will attend work and work diligently and conscientiously, and an employee can trust the employer to provide work and pay and respect not just legal obligations but human dignity. Without such trust and confidence in an employment relationship, it is doomed. Neither party should act in such a way that is designed, or likely to, destroy or damage the relationship.

30. R's conduct towards C not only damaged but destroyed their relationship as employer and employee. R appreciated that C abided by their contract in that she attended work on a regular basis and worked conscientiously, efficiently, and to a very high standard. Despite that, he would on occasion use class-related insults that offended her, he lost his temper with her, he assaulted her, he breached an agreement with her that he had entered into to entice her to withdraw her first resignation, he sought to impose additional restrictions upon her and demoted her. Faced with this conduct the claimant cannot have had any trust or confidence that she would be treated with respect in the future. She was not being treated with respect when she was presented with the draft contract for signature and an ultimatum to get it signed and returned.

31. The last breach of trust and confidence (see **Kaur** above) was R reneging on their negotiated deal, and seeking to impose, according to a swift timetable, unilateral terms that differed significantly from their oral agreement; C did not affirm the contract since that repudiatory breach of contract, which was in any event the last in a series of such. C had not affirmed the contract, waiving earlier breaches of trust and confidence; she had been prepared to do so but only subject to conditions; R unilaterally sought to impose a new contract which itself breached the agreed conditions.

32. I do not doubt that C is capable of expressing her views forcefully to the point of raising her voice and being angry herself. If those matters are problematic then that is a matter for an employer to manage. If there were interpersonal relationship issues that were the fault of C, then that would have been a matter for R to manage, either by way of disciplinary or appraisal process. R chose to do

neither. If there was a nettle to be grasped, the responsibility was his to grasp it. R's management failure, if such it was (and I make no finding of fact that C's conduct was problematic), does not justify him breaching C's employment contract as he did.

33. An employer, however, is not expected to manhandle staff. An employer is expected to respect staff, as they ought to respect the manager and employer. Where an agreement is reached the parties are expected to honour it. I am clear that R appreciated C in many ways and wanted her to stay in employment, and therefore I accept that an agreement was reached on 18 November 2022 that was acceptable to C; provided it was borne out in a written contract she would have been prepared to return to work and overlook the treatment she received on 11 November. Instead of that R reneged on the agreement and sought to impose other terms, and a demotion.
34. Whatever one can say about C's conduct, there is not even an allegation that it amounted to a breach of contract. R says C resigned without giving notice. His conduct however destroyed the relationship of trust and confidence and the claim of constructive Unfair Dismissal succeeds. This was not a straightforward resignation; C resigned in circumstances where she was entitled to resign without notice because of the conduct of R; this makes it a dismissal by R i.e. a constructive dismissal.
35. Where the breach of contract complained of is not only fundamental but is a breach of trust and confidence it would be an extremely rare case that such a dismissal could be considered fair. This is not fair; it was not for a potentially fair reason and the manner in which the respondent went about it was outside the range of reasonable responses of a reasonable employer. C's claim of unfair dismissal succeeds.
36. Because the dismissal was without notice the breach of contract claim also succeeds as C was wrongfully dismissed.
37. I award C her Basic Award as calculated in her schedule of loss. There is no basis in my findings for a reduction of the Basic Award.
38. I consider that C was in an adverse position with regard to employability owing to the effect upon her of R's conduct.
39. It was reasonable for C to allow herself some time to regain composure and mental good health following her mistreatment by R, before feeling capable of paid employment elsewhere. She also had financial expectations to meet.
40. Having put herself in a position where she was able to work, and seeking work, I consider that there must come a time when she would have to lower her financial sights. I consider that a reasonable period to allow as a dispensation for C for the above reasons would be some six months post dismissal, that is by April/May 2023.

41. Since that time C has made reasonable attempts to gain commensurate employment and I consider that it would be just and equitable to award her losses to date, but no future loss.
42. R did not attempt to address C's grievances and his failure to follow the ACAS code was abject. That said, he is a small employer on what he himself referred to as a "steep learning curve", with no professional support. I ordered 10% uplift.
43. With regard to the loss of earnings claim, I am awarding 34 weeks (22.11.22 – 18.07.23) at £569 per week as shown in C's claim form. It would not be just and equitable to reduce the Compensatory Award.

Employment Judge T.V. Ryan

Date: 14 September 2023

JUDGMENT SENT TO THE PARTIES ON 18 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche