



EMPLOYMENT TRIBUNALS

Claimant: Miss K Allatt
Respondent: Smyths Toys UK Limited

Heard at: Leeds by CVP **On:** 9 & 29 June 2023

Before: Employment Judge Tegerdine

Representation

Claimant: In person
Respondent: Miss A Naughton (General Counsel for the respondent)

WRITTEN REASONS

1. After hearing evidence and receiving submissions from the claimant and the respondent's representative, the Tribunal delivered its oral judgment. On 7 July 2023 the claimant contacted the Tribunal by email to request written reasons. The Tribunal now gives its reasons for the judgment that was reached.

Introduction

2. In a claim form presented to the Tribunal on 2 February 2023, the claimant brought a complaint of unfair dismissal. Unfair dismissal is a statutory complaint brought under the Employment Rights Act 1996. The claimant claimed that she had been constructively dismissed.
3. A joint bundle of documents was provided to the Tribunal for the hearing. The Tribunal heard evidence from the claimant. The respondent called evidence from Ashley Nicolson (Operations Manager), Sarah Yates (Head of HR), Neil Stewart (Senior Operations Manager), Alison Bellamy (Duty Manager), Thomas Farmer (Duty Manager), and Bethany Jackson (Duty Manager).
4. At the start of the hearing the claimant indicated that she wanted to submit CCTV footage of her getting up off the floor on the day she said she had an accident at work. However, as any such CCTV footage had no bearing on the claimant's unfair dismissal claim, it was not necessary for the Tribunal to view the footage.

5. The issues were agreed at the beginning of the first day of the hearing. The claimant's constructive unfair dismissal claim was based on an alleged breach by the respondent of the implied duty of mutual trust and confidence. The claimant alleged that the respondent breached this duty when it failed to provide appropriate support to her after her accident in the following ways:
 - 5.1. It refused to allow the claimant to take annual leave to rest her foot; and
 - 5.2. It refused to allow the claimant to work five days a week instead of six days a week.

Findings of fact

Background

6. The respondent is a toy retail business. The claimant worked at the respondent's Meadowhall store in Sheffield. The claimant was employed by the respondent as a Store Manager between 18 May 2015 and 28 November 2022, when she resigned on notice. The claimant gave 5½ weeks' notice, but was not required to work during her notice period and was paid in lieu of notice.
7. It was not disputed that at some point around the end of August 2022, the claimant injured her foot. The claimant alleged that she injured her foot in an accident at work on 27 August 2022. This was not admitted by the respondent. I made no findings as to how and when the claimant injured her foot, as it was not material for the purposes of determining the claimant's unfair dismissal complaint.
8. On 31 August 2022 the claimant went to the accident & emergency department of her local hospital where her foot was examined, and she had an x-ray taken of her foot. The claimant was advised that her foot was not fractured, but that she should rest it and take pain relief.
9. Mr Nicolson was the claimant's line manager. At paragraph 3 of Mr Nicolson's witness statement he said that the claimant had gone to accident & emergency on 31 August 2022 after Mr Nicolson had noticed during a visit to the Meadowhall store that the claimant seemed to be in pain. Mr Nicolson said he asked the claimant if she was OK, and when she told him that she had hurt her foot, he told her to go to accident & emergency and arranged for her to get a taxi, which was paid for by the respondent. Mr Nicolson said that the claimant protested, however he told her she really needed to go, and instructed Ms Bellamy to order a taxi for the claimant.
10. Mr Nicolson's evidence about the events of 31 August 2022 was corroborated by Mr Nicolson's diary entry for that day, which said, "I sent her to A & E" (page 42 of the Bundle). Mr Nicolson's evidence was also consistent with Ms Bellamy's evidence. At paragraph 5 of Ms Bellamy's witness statement Ms Bellamy said that Mr Nicolson told the claimant to go and get her foot checked by a doctor, insisted she went when she was reluctant to go, and told Ms Bellamy to order a taxi for the claimant.
11. The claimant's evidence about how and why she ended up going to hospital on 31 August 2022 contradicts Mr Nicolson's evidence. At paragraph 2 of the claimant's

witness statement the claimant said that she asked if she could go to accident and emergency on 31 August 2022 because she was in pain.

12. The claimant admitted in oral evidence that her visit to A & E on 31 August 2022 was the only time she saw a doctor or any other health professional about her foot during the three month period between her foot being injured around the end of August 2022 and her resignation at the end of November 2022.
13. The claimant said in her oral evidence that she couldn't see her GP because her GP practice only offered "on the day appointments". The claimant also said she did not ask the respondent if she could have some time off to see her GP. On the basis that the claimant did not see or attempt to see her GP or any other health professionals about her foot for three months, and the fact that Mr Nicolson's evidence is consistent with Ms Bellamy's evidence and the contemporaneous documentary evidence, I preferred Mr Nicolson's evidence about this issue to the claimant's evidence, and found that the claimant went to hospital on 31 August 2022 because Mr Nicolson insisted she should go there to get her foot checked.
14. The claimant phoned Mr Nicolson after her hospital visit to tell him what the hospital had said. At paragraph 3 of the claimant's witness statement she said Mr Nicolson told her to take the rest of the day off and the next day to rest her foot. At paragraph 3 of Mr Nicolson's witness statement he said he told the claimant to take whatever time she needed to recover. In Mr Nicolson's diary (page 42 of the Bundle) he says he "told her to take some time off to rest paid", and in an exchange of messages between the claimant and Ms Bellamy (page 44 of the Bundle), the claimant said "ash told me to take rest of day off and tomorrow to rest it".
15. It was hard to establish exactly what Mr Nicolson said to the claimant about taking more time off, however the exchange of messages between the claimant and Ms Bellamy uses quite specific wording which corroborates that claimant's version of events. On that basis I found that Mr Nicolson told the claimant to take the rest of 31 August 2022 and 1 September 2022 off on full pay, rather than telling her to take as much time off as she needed. However, Mr Nicolson did not tell the claimant that she should return to work on 2 September 2022, although that is what she did.
16. The claimant said in her witness statement that her foot was still painful when she returned to work on 2 September 2022. As this was not disputed by the respondent, I found that the claimant's foot was still painful when she returned to work. However, the claimant did not sign herself off sick on 2 September 2022, which she could and should have done if her foot was still painful, and on the day the claimant returned to work she did not inform Mr Nicolson (or anyone else) that she was still in pain, did not ask Mr Nicolson if she could take more paid sick leave, and did not ask Mr Nicolson if she could take annual leave to rest her foot.

Did the respondent refuse to allow the claimant to take annual leave to rest her foot?

17. At paragraph 7 of the claimant's witness statement she said that Mr Nicolson visited the Meadowhall store on 10 October 2022 and that Ms Yates, the respondent's Head of HR, was also at the store on that day. The claimant said she told Mr Nicolson she was struggling with the pain in her foot, and asked him

whether she could take a period of paid leave to rest it, because she couldn't afford to live on statutory sick pay. The claimant said in her witness statement that neither Mr Nicolson nor Ms Yates were supportive of her, and Miss Yates said that the claimant knew the rules, and that no holidays could be taken between September and 1 January.

18. Mr Nicolson accepted at paragraph 3 of his supplementary witness statement that he was at the Meadowhall store on 10 October 2022, however he said that he did not discuss the claimant's foot with her on that day, and the claimant did not ask him if she could take some annual leave to rest her foot.
19. At paragraph 6 of Ms Yates's witness statement she said that she was also at the Meadowhall store on 10 October 2022, however she said that she didn't have any conversations with the claimant about her injured foot, the claimant did not make any requests to take annual leave or sick leave, and she didn't witness any conversations between the claimant and Mr Nicolson about those matters.
20. Ms Yates gave straightforward answers to the questions she was asked, and was a credible witness. Ms Yates's evidence about what the claimant said on 10 October 2022 is consistent with Mr Nicolson's evidence.
21. Ms Yates said in her witness statement that as general rule, the respondent did not allow employees to take annual leave between 1 October and 31 December, as that is the respondent's busiest trading period. However, she said that there were some exceptions to this rule. Ms Yates said that the respondent sometimes paid (discretionary) company sick pay, and pointed out that the claimant had taken some authorised leave between September and November 2022.
22. The claimant accepted that she was permitted to take annual leave on 12 September 2022 when she had a problem with a car tyre (also substantiated by the records at page 76 of the Bundle), and on 2 November 2022 when she needed to attend a hospital appointment with a member of her family (also substantiated by the records at page 81 of the Bundle).
23. There was no contemporaneous documentary evidence to support the claimant's assertions that on 10 October 2022 she asked Mr Nicolson if she could take annual leave to rest her foot, that Mr Nicolson and Ms Yates were unsupportive, and that Ms Yates told the claimant that she knew the rules, and holiday couldn't be taken between September and 1 January.
24. The claimant never submitted any annual leave requests or sent any emails or messages to Mr Nicolson or anyone else asking if she could take paid sick leave, or annual leave to rest her foot.
25. The claimant only went to the accident and emergency department on 31 August 2022 because Mr Nicolson told her to go there. Later that day, Mr Nicolson told the claimant to take a couple of days off to rest her foot, even though there was no evidence of a fracture. Those actions are not consistent with the claimant's assertion that Mr Nicolson was unsupportive.
26. Employers have a duty to take reasonable care for their employees' health and safety. This is an important obligation, and the respondent is a large organisation

which employs thousands of employees. It is very unlikely that the Head of HR for such a large employer would tell an employee who has a physically demanding job and a painful foot which they alleged had been caused by an accident at work, who asked if they could take annual leave to rest it almost six weeks after the alleged accident happened, that they could not have any time off.

27. It is even more unlikely that a Head of HR in those circumstances would not take some or all of the following steps, in order to ensure that the employer was complying with its obligation to take reasonable care for the employee's health and safety:
 - 27.1. Tell the employee that they should not be work and should take sick leave;
 - 27.2. Advise the employee to see their GP; and/or
 - 27.3. Arrange an occupational health assessment to ascertain whether the employee was fit to be at work.

The fact that there is no evidence that Ms Yates said or did any of these things suggests that the claimant did not ask on 10 October 2022 if she could take annual leave to rest her foot.

28. For the reasons set out at paragraphs 17 - 27 I preferred Ms Yates's and Mr Nicolson's evidence about the content of conversations that took place on 10 October 2022 to the claimant's evidence, and found that the claimant did not ask Mr Nicolson if she could take a period of annual leave during any conversations which took place on 10 October 2022.
29. The claimant alleged at paragraph 13 of her witness statement that during a telephone conversation on 23 November 2022 she asked Mr Nicolson if she could take some annual leave to rest her foot, and Mr Nicolson responded that this wouldn't be allowed because the claimant was needed in store at that time of year. Mr Nicolson's evidence was that although he did speak to the claimant on that date (paragraph 6 of his supplementary witness statement) they did not have a conversation about the claimant's foot, and the claimant did not ask if she could take annual leave. Mr Nicolson said that the claimant never made any requests to take annual leave due to pain (paragraph 8 of Mr Nicolson's witness statement).
30. The claimant resigned by email on 23 November 2022. A copy of the claimant's resignation email is at page 57 of the Bundle. The claimant's email, which is very short, says:

"Hi Ashley. Please take this as my resignation as Store Manager of the Meadowhall branch. My last working shift will be on 31st December 2022. Due to been [SIC] unable to rest my foot while at work and the continued pain caused by this, I will only be working 5 days per week over the Christmas period. Yours sincerely K Allatt"
31. The claimant sent her resignation email to the respondent on the same day that she had the telephone conversation with Mr Nicolson referred to at paragraph 29.

There is no reference in the claimant's email to the respondent failing to support her, or refusing to allow her to take annual leave.

32. The claimant never submitted any written requests for annual leave or paid sick leave by email, text message or WhatsApp, and she did not submit a grievance or any other kind of complaint about the respondent's alleged refusal to allow her to take annual leave.
33. The claimant's asserted in her oral evidence that she didn't submit a grievance because she believed the respondent was "against her". However, as the claimant did not explain why she believed this, or provide any evidence to show that the respondent was "against her", I did not accept the claimant's explanation about why she never submitted a grievance about any of the matters complained of.
34. There was no contemporaneous evidence to support the claimant's assertion that she asked the respondent if she could take annual leave to rest her foot at any time. Furthermore, if the claimant was in pain and the respondent was behaving in a way which the claimant felt was so unreasonable that she was left with "no choice but to resign" (paragraph 14 of the claimant's witness statement), I would have expected the claimant to follow up any oral requests for annual leave in writing, and/or submit a formal written complaint. I would also have expected the claimant to refer to this issue in her resignation email.
35. For the reasons set out at paragraphs 29 – 33, I preferred Mr Nicolson's evidence about what the claimant said to him on 23 November 2022 to the claimant's evidence, and found that the claimant did not ask Mr Nicolson on 23 November 2022 if she could take annual leave to rest her foot.

Did the respondent refuse to allow the claimant to work five days a week instead of six days a week?

36. On 1 November 2022 Mr Nicolson sent an email to all managers informing them that they needed to work six days a week on certain weeks, in the run up to Christmas. A copy of that email was at page 52 of the Bundle.
37. The claimant said in her witness statement that on 18 November 2022 she had a conversation with Mr Nicolson in which she said she couldn't work six days a week because her foot was too painful. At paragraph 11 of the claimant's witness statement she said Mr Nicolson wasn't happy, and said he needed managers to work six days, but if she was saying she couldn't do six days there was nothing he could do but she needed to go to the doctors. The claimant said she told Mr Nicolson that she would try to get a doctor's appointment on her next day off.
38. Mr Nicolson said at paragraph 5 of his supplementary witness statement that he did not have a telephone conversation with the claimant on 18 November 2022, and that they did not discuss whether the claimant was able to work six days a week on that date.
39. There was an extract of a text or Whatsapp message at page 56 of the Bundle in which the claimant says that Mr Nicolson told her that if she couldn't work six days a week she needed to go to the doctors. However, this evidence was of limited

value, as it had been heavily redacted and wasn't clear who the message was sent to.

40. Mr Nicolson said at paragraph 11 of his witness statement that the claimant spoke to him on 21 November 2022, and told him that she wasn't willing to work six days a week because her foot and back were hurting. Mr Nicolson said he told the claimant it was fine for her not to work six days, however she should seek further medical advice and they would review it.
41. Both the claimant's and Mr Nicolson's evidence suggested that Mr Nicolson and the claimant had a conversation in November 2022 (either on 18 November or 21 November), during which the claimant said she couldn't work six days a week because of foot pain, Mr Nicolson accepted that the claimant would only be working five days a week, and Mr Nicolson told the claimant she needed to go to the doctors. On this basis I found that this conversation did take place around the middle of November 2022.
42. In the claimant's oral evidence she accepted that the only time she saw a doctor or any other health professional about her foot during the period of three months between the date of the alleged accident on 27 August 2022 and her resignation on 28 November 2022, was when she visited accident and emergency on 31 August 2022.
43. In November 2022 Mr Nicolson accepted that the claimant was only going to be working five days a week, but told her she needed to seek medical attention. It was perfectly reasonable for Mr Nicolson to tell the claimant that she needed to go to the doctor's, as she hadn't sought any further medical attention after her visit to hospital on 31 August 2022, she had told him her foot was still hurting almost three months after the alleged accident, and the claimant had informed Mr Nicolson that she wouldn't be able to work the days Mr Nicolson had asked her to work in the run up to Christmas because she was in pain.
44. In the claimant's resignation email she said she would only be working five days a week until the end of December 2022. There is no evidence that the respondent raised any objections to this, and on 28 November 2022 Mr Nicolson informed the claimant that she would not be required to work her notice at all, and would be paid up to the end of the year.
45. Mr Nicolson accepted that the claimant would only be working five days a week when the claimant told him in November 2022 that she could not work six days. There is no documentary evidence to support the claimant's assertion that the respondent refused to allow the claimant to work five days a week at any time between August and November 2022. The claimant never submitted any written requests to work five days a week instead of six, and she did not submit a grievance about not being allowed to work five days a week. The claimant's resignation email does not say she'd resigned because the respondent had not supported her, and does not say that the respondent had refused to allow her to work five days a week.
46. As Mr Nicolson agreed that the claimant would only be working five days per week when they discussed this in mid-November 2022, and there was no evidence that

the respondent ever refused any request by the claimant to work five days a week, I found that the claimant did not refuse the claimant's request to work five days a week.

The relevant law

47. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. Section 98 of the Employment Rights Act deals with the fairness of dismissals. In order for a dismissal to be fair, the respondent must show that it had a potentially fair reason for dismissal. If the respondent can show that it did have a potentially fair reason for dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.
48. Constructive unfair dismissals are dealt with under section 95(1)(c) of the Employment Rights Act 1996. Under section 95(1)(c) an employee is dismissed by their employer if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.
49. Lord Denning MR explained the concept of a repudiatory breach of contract in Western Excavating (ECC) v Sharp [1978] ICR 221 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.”
50. In order for an employee to have been constructively dismissed:
 - There must have been a fundamental breach of contract by employer;
 - The employee must have terminated the employment contract because of that breach of contract; and
 - The employee has not lost the right to resign by affirming the employment contract.
51. In a constructive unfair dismissal case the claimant must establish exactly which term of the employment contract they allege has been fundamentally breached. In this case the claimant is alleging that the respondent fundamentally breached the implied term of mutual trust and confidence.
52. The implied term of mutual trust and confidence means that the employer must 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. Any breach of this term of the contract will be so serious as to be repudiatory.
53. The test is an objective one, and all the circumstances of the case must be considered when deciding whether this implied term of the contract has been breached. The Tribunal must take an overall view of employer's treatment of the

employee, rather than looking at individual events in isolation, and take the context of events into account.

54. Not every action by an employer which can give rise to a complaint by an employee will amount to a breach of confidence. In order for the implied duty of mutual trust and confidence to be breached, the employer's conduct must be likely to destroy or *seriously* damage the relationship of confidence and trust. Acting in an unreasonable manner is not sufficient, and this implied term will only be breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract.
55. The contract will be affirmed if, after the breach of contract has occurred, the claimant behaves in a way which shows that they intend the contract to continue by their conduct, or by delaying in resigning. Whether or not a delay in resigning amounts to an affirmation of the contract depends on the circumstances.
56. If it is established that there has been a constructive dismissal, the Tribunal must consider the reason for dismissal and if appropriate the question of fairness. In a constructive unfair dismissal claim the reason for the claimant's dismissal will be the reason for the claimant's treatment.

Conclusions

57. The Tribunal reached the following conclusions based on the findings of fact set out above.
58. The Tribunal found that the respondent did not fail to provide appropriate support to her after her accident in the following ways:
 - 58.1. By refusing to allow the claimant to take annual leave to rest her foot; or
 - 58.2. By refusing to allow the claimant to work five days a week instead of six days a week.

The Tribunal found that the respondent did not refuse to allow the claimant to take annual leave to rest her foot, and that it did not refuse to allow the claimant to work five days a week.

59. The Tribunal found that the respondent did not do the things complained of. The Tribunal found that the respondent did not act in a way which amounted to a breach of the duty of mutual trust and confidence, and there was no fundamental breach of contract by the respondent. Accordingly, the claimant resigned of her own accord, and was not constructively dismissed. There was therefore no dismissal.
60. The judgment of the Tribunal was that the respondent did not constructively dismiss the claimant. Accordingly, the claimant's complaint of unfair dismissal failed.

Case Number: 1800838/2023

Employment Judge Tegerdine

Date 17 September 2023

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61.